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The Ontology of Marriage

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by

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Abstract

This thesis is a response to the lack of philosophical integrity in contemporary same-sex marriage legislation and jurisprudence, both for and against, in North America. Rather than being based on an account of the authentic *ontology* of marriage, these legalities are merely *assimilated* to external terrains of meaning. In the case of the expansion of the institution, the assimilation is to frameworks of rights, while the obstruction of this expansion is founded upon notions of tradition and the divine. As a solution, I undertake an examination of three varieties of political philosophy: liberalism, new natural law, and Hegelian idealism. And as will be shown, each account is an attempt to get at the same ontology: marriage as an instance of self-constitution. However, I will argue that Hegel's formulation best fulfills the goal of marital self-constitution—encompassing *form*, *substance*, and *participation*—and, crucially, implies the possibility of same-sex marriage.

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Introduction

In the ongoing battle for same-sex marriage rights in North America, those seeking to expand the boundaries of the institution are progressively gaining ground. When it comes to the United States, in May of 2012 Barack Obama became the first sitting president to express his support for same-sex marriage.[1] Though his words were merely symbolic, they were indicative a very real legal trend. Indeed, prior to this pronouncement, same-sex marriage had been legalized in Maine, Rhode Island, Delaware, Connecticut, Iowa, Massachusetts, New York, New Hampshire, Vermont, and the District of Columbia.[2] Following Obama's interview, in the election season of 2012, referenda led to the expansion of the institution in Maine, Maryland, and Washington.[3] More importantly, in June of 2013 the Supreme Court struck down one of, if not the biggest, obstacles to the gay rights movement: the Defense of Marriage Act (DOMA). Of course, these developments had already come to pass in Canada, and in a much less staggered fashion, with the passage of Bill C-38 in 2005, which legalized same-sex marriage across the country.

In terms of legislation and jurisprudence, then, it would seem that gay rights advocates, or at least those advocates who have sought the marital status, have made significant head way. On a philosophical level, however, these advancements ironically have been to the detriment of an authentic ontological investigation of marriage. That is, rather than being based on an evaluation of the nature of marriage itself—a hallmark of Aristotelian inquiries[4]—these

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[1] Sam Stein, 'Obama Backs Gay Marriage,' *The Huffington Post*, May 9, 2012, accessed August 7, 2013, http://www.huffingtonpost.com/2012/05/09/obama-gay-marriage_n_1503245.html.

[2] 'Timeline of Gay Marriage in the United States,' *Reuters*, March 26, 2013, accessed August 15, 2013, http://www.reuters.com/article/2013/06/26/us-usa-court-gaymarriage-chronology-idUSBRE95P0YK20130626.

[3] Ibid.

[4] In his critique of Plato's Theory of the Forms, Aristotle argues that the form is not outside the object under investigation, but within the phenomena of sense. Thus, authentic substance, for him, is not abstract form but actually the thing itself. ('Aristotle,' *Internet Encyclopedia of Philosophy*, James Fieser and Bradley Dowden (eds.), URL = <http://www.iep.utm.edu/aristotl/>).

progressive legalities have merely attempted to assimilate the institution to already-existing systems of meaning.[5] Joshua Goldstein elaborates on this point:

> In this way, the new epistemic dynamic shifts the individual's primary activity in relation to the object from *grasping* (if only intuitively) the irreducible quality of the object via a confrontation with the object itself to *assimilating* the object to the universal and priorly existing ground in which the object is now seen to emerge from and from which it gains its foundational meaning.[6]

When it comes to the *expansion* of the institution, this epistemic dynamic frames the value of marriage in terms of *individual right*.[7] This is not at all surprising given, as Goldstein points out, that appeals to frameworks of rights and freedoms have historically been utilized 'by social groups to gain access to social goods and institutions previously denied them because of some particular attribute—preeminently sex, religion, language, disability, and ethnicity.'[8] And in examining the legislation and jurisprudence that have argued for the marital inclusion of same-sex partners, the continuation of this strategy is evident.[9]

Consider, first, the landmark Supreme Court ruling that overturned section 3 of DOMA. In the detailed decision of the court, there is reference to how the act 'is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.'[10] The justices note how 'DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage.'[11] Thus, they claim that '[t]his is strong evidence of a law having the purpose and effect of disapproval of that class'

[5] Joshua D. Goldstein, 'Neither a Rights Bearer nor a Reproducer Be: Same-sex Marriage and the Task of Political Philosophy,' (unpublished paper prepared for the Canadian Political Science Association General Meeting, June 2006, York University): p. 8.
[6] Ibid.
[7] Ibid.
[8] Ibid, p. 9.
[9] Ibid, pp. 8-9.
[10] *United States v. Windsor* 570 U.S. 2 (2013).
[11] 570 U.S. 20 (2013).

and '[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter same-sex marriages made lawful by the unquestioned authority of the States.'[12] The New York bill referenced in the decision, which the justices claimed 'sought to eliminate inequality,'[13] argued that '[m]arriage is a fundamental human right' and that '[i]t is the intent of the legislature that the marriages of same-sex partners be treated equally in all respects under the law.'[14] Similarly, a Massachusetts court decision argued in reference to DOMA that:

> To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, 'there is no reason to believe that the disadvantaged class is different, *in relevant* respects' from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification. As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.[15]

'Equal protection' was also at play in Vermont, where a 2009 bill stated that its purpose was to 'recognize equality in the civil marriage laws.'[16] In Canada, a 2005 federal bill declared that 'section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination.'[17] Furthermore, the bill states that 'the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination

[12] 570 U.S. 20-21 (2013).
[13] 570 U.S. 22 (2013).
[14] *Marriage Equality Act*. N.Y. Stat. § 2 (2011).
[15] *Gill v. Office of Personnel Management*, 699 F.Supp.2d 38 (D. Mass. 2010).
[16] *An Act to Protect Religious Freedom and Promote Equality in Civil Marriage*. Ver. Stat. § 2 (2009).
[17] *Civil Marriage Act*. S.C. c. 33 Preamble (2005).

requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes.'[18]

In each of these pieces of legislation and jurisprudence, the legal advancement of the gay community is undeniable. However, the bases for these advancements are not evaluations of whether marriage itself might be a good and one worth securing in the political community, but only an external terrain of meaning and the assimilation of the institution to its grounds. Thus, this legal turn makes it impossible to determine whether marriage actually is capable of including partners of the same sex, regardless of whether such inclusion is required by commonly held notions of rights or equality.

At this point, it may be tempting to look to those legalities that have prohibited and obstructed the progression of same-sex marriage rights for an answer to the question of marriage's nature. After all, those laws are typically founded upon some sort of moral evaluation of the boundaries of marriage. However, I suggest, rather than representing an advancement for a philosophical investigation of marriage, these rationales are merely a *second* assimilationist dynamic. In this case, the institution is framed 'in terms of tradition, nature, or the divine.'[19] More concretely:

> These arguments represent a justification of the given attribute—be they of individuals, social institutions, or evaluative frameworks—that once formed the dominant and unreflective background conditions, the presuppositions or prejudices in the Burkeian and Gadamerian sense, against which rights-based arguments now work.[20]

In the assimilation to this second dynamic, moral argumentation may be used and advanced, but those arguments do not emerge from an authentic ontological evaluation of marriage. Rather,

[18] S.C. c. 33 Preamble (2005).
[19] Goldstein, 'Neither a Rights Bearer nor a Reproducer Be,' p. 9
[20] Ibid.

they emerge from external goods or values to which the good of marriage is simply assimilated. That is, we equally lose sight of what might be at stake in marriage itself. Now, while evidence of this is not present in DOMA because the act merely defines marriage as 'only a legal union between one man and one woman as husband and wife,'[21] the reasoning behind the act is informative:

> The House Report announced its conclusion that 'it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage….H.R. 3396 is appropriately entitled the "Defense of Marriage Act." The effort to redefine "marriage" to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage' […] The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality' […] The stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'[22]

From this, we see that the decision to proceed with DOMA was motivated by morality. However, that morality was an already-existing system of meaning (in this case, the traditional and enduring understanding of marriage's boundaries and the directives of Judeo-Christian theology). And though the justification of traditional marriage through convention and religious understandings is slightly different than the rights-based defenses of the same-sex variety—in the sense that *some* moral framework is used—the alienation of the institution's authentic ontology is no different.

At times running parallel to this assimilation to traditional and theological grounds is the claim that same-sex marriage is some how harmful to children. For example, a 2006 amendment to the State Constitution of Alabama that prohibited same-sex marriage stated that: 'As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting

[21] *Defense of Marriage Act*. H.R. 3396 (104th) § 3 (1996).
[22] 570 U.S. 21 (2013).

[traditional marriage] in order to promote, among other goals, the stability of society and its children.'[23] Similarly, a 2014 brief filed by the State of Utah in defense of its same-sex marriage ban suggested that such marriages could pose a risk for children and that 'the man-woman model is simply the one the State and its people believe is the best for children.'[24] In February 2014, a federal court in Detroit was the site of a public debate on the validity of the 'harm to children' argument.[25] Those testifying in support of Michigan's constitutional ban on same-sex unions claim 'that children of same-sex marriage couples do not fare as well as those raised by married heterosexuals.'[26] Not surprisingly, opponents of the ban take issue with the studies that supposedly provide support for this claim, calling them 'fatally flawed,' and 'describe a near consensus that, other factors like income and stability being equal, children of same-sex couples do just as well as those of heterosexual couples.'[27] But whether those supporting the ban are correct or not, by making the 'harm to children' issue the focus of the question of same-sex marriage, the element of assimilation is still present and, thus, the ontology of marriage is still obscured. In this case, the institution is seen as gaining its meaning from a possible consequence of its existence—the creation and raising of children—which it has traditionally been associated with. In this way, we are pulled even further away from the possible authentic ontology of marriage than we would be by conforming its boundaries to theological requirements. At least in that case our focus is still the moral possibilities of the union itself and not what could result from that relationship. Granted, one could argue that children are a fundamental element of the

[23] AL Const. amend. 774, § (b).
[24] Amanda Holpuch, 'Utah defends same-sex marriage ban in appealing opening arguments,' *The Guardian*, February 4, 2014, accessed February 24, 2014, http://www.theguardian.com/world/2014/feb/04/utah-same-sex-marriage-ban-appeal.
[25] Erik Eckholm, 'Opponents of Same-Sex Marriage Take Bad-for-Children Argument to Court,' *The New York Times*, February 22, 2014, accessed February 24, 2014, http://www.nytimes.com/2014/02/23/us/opponents-of-same-sex-marriage-take-bad-for-children-argument-to-court.html?_r=0.
[26] Ibid.
[27] Ibid.

nature of marriage, but to make such a claim one must furnish a normative account of why this is indeed the case.

In the legal arena, then, both the advancement and obstruction of the cause of same-sex marriage are philosophically inadequate. Indeed, in the assimilation to rights and tradition, the objective nature of marriage is ignored—and so important philosophical questions remain unanswered—in favor of basing the institution on these *external* terrains of meaning. As was shown, this has significant political and pragmatic implications in that important public policy decisions (including, but not limited to, those pertaining to marriage law) emerge from justificatory frameworks that may have little to do with what the object under investigation actually *is*. As a result, any possible authentic defenses, or prohibitions, of same-sex marriage are obscured.

Remedying these difficulties forms the foundation of this thesis. Simply stated, the goal with the following was to construct an authentic account of marriage's ontology—its moral foundation, importance, and potential boundaries—that is divorced from assimilationist dynamics in order to decipher whether same-sex marriage really is possible. Now, while ultimately it will be argued that it is, in fact, possible, this investigation did not begin under such a presupposition. On the contrary, one had to be open to the prospect that same-sex marriage is not morally permissible. Otherwise, this thesis could not claim that it was *really* after marriage's ontology. Nor could it, in good conscience, critique the assimilationist dynamics present in contemporary same-sex marriage legislation. As Goldstein points out, when it comes to a sound philosophical approach to same-sex marriage '[w]e are not question begging.'[28]

[28] Goldstein, 'Neither a Rights Bearer nor a Reproducer Be,' p. 7.

In attempting to overcome the problem of assimilation, three strands of political philosophy—liberalism, new natural law theory, and Hegelian idealism—will be examined in order to extract their particular contributions to understanding the ontology of marriage. And I argue that each account is a different attempt to get at the *same* ontology: marriage as an instance of self-constitution. That is, marriage represents a motivating end that can be freely taken up in the making of one's self. However, despite the general volition towards this understanding, the degree to which each account is able to authentically manifest it varies. Thus, in addition to showing how the three strands contribute to the overcoming of assimilation, it will be possible to discern which best fulfills the goal of marital self-constitution.

In chapter one, the liberal canon of political philosophy will be explored, specifically the works of John Rawls, Tamara Metz, and Elizabeth Brake. And in looking, first, at Rawls's political liberalism, it will be shown how his account both contributes to and inhibits the problem of assimilation. In terms of the former, the development of public reason and the application of political values undermine the moral conceptualization of marriage. At the same time, the mandate Rawls attaches to the family—the reproduction of society and its values—opens up the possibility of a normative understanding and marital self-constitution. However, the inherently public and practical shape of this possibility limits its authenticity and reveals an assimilationist tendency within political liberalism.

The perfectionist liberal accounts of Metz and Brake provide an opportunity for direct normative engagement with marriage that is absent in contemporary legalities. Indeed, Metz's 'disestablishment' narrative aims at uncovering the 'extra value' of the institution, while Brake applies a strict interpretation of political liberalism to marriage law in uncovering its moral center. At the same time, however, Metz argues that this extra value should be subject to the

subjective whim of individuals (for the sake of 'freedom of marital expression') and, consequently, ontologically downgrades marriage as a motivating end that can be taken up for self-constitution. Conversely, Brake's conditional assessment of what constitutes a marital relationship leaves open the possibility of the latter, though her account ultimately prioritizes the satisfaction of an externality over uncovering the nature of marriage.

In examining new natural theory, chapter two builds upon the advances of liberalism by morally conceptualizing marriage and illustrating how it, as a basic human good, can contribute to human flourishing. In this way, the new natural law theorists provide both the *form* and *substance* of marriage as self-constitution. However, as will be seen, their account is marred by a discrepancy between the idea of marriage as self-constitution and their more explicit arguments about the boundaries of the institution. Consequently, it will be argued that the new natural law conception of marriage is inimical to its own foundational principles, creating a problem of *participation*.

From Hegelian idealism, the focus of chapter three, the analytical framework of *form*, *substance*, and *participation* is substantiated and thus, we are provided with one *possible* account of marriage as self-constitution. Like the new natural lawyers, Hegel frames marriage as a concrete potentiality through which one can engage in self-making; namely, through the actualization of a distinct type of freedom. Upon initial inspection, however, the marital boundaries he establishes also suggest the problem of participation. Fortunately, a reinterpretation of the logic of his account implies a foundational deference to the subjectivity of participants and a more open institution. Crucially, this second reading seems to indicate the possibility of same-sex marriage.

Chapter 1 – Liberalism and Marriage: Three Contributions

This chapter examines the contribution of liberal political philosophy, in three varieties, to an ontological investigation of marriage. Beginning with John Rawls's political liberalism and transitioning to the perfectionist liberalism of Tamara Metz and Elizabeth Brake, it will be shown how each account provides the possibility for overcoming the problem of assimilation. In fact, the shape of this possibility is the same in all three instances: marriage is a potentiality for the actualization of self-constitution. Substantively, however, the authenticity of that potentiality is questionable. In particular, the initial normative engagement with the institution is offset, respectively, by a further assimilationist dynamic, the attribution of malleability to its moral center, and an attempt to satisfy an externality. Consequently, the utility of liberalism as it relates to the question of marriage's boundaries is limited primarily to *form*.

1.1 Political Liberalism

The popular generalization of the political philosophy of John Rawls as neutralist and metaphysically hollow raises doubts about its utility for an ontological investigation of marriage. And to some extent, this overview is accurate. After all, Rawls explicitly states that, given the fact of pluralism in constitutional democracies, his political conception seeks common or 'neutral ground.'[29] This conception, what he terms 'justice as fairness,' acts as the foundation of an 'overlapping consensus' amongst a constellation of 'religious, philosophical, and moral doctrines' within society.[30] Rawls also characterizes his system as neutral in terms of *aim*; implying that institutions and policies 'are neutral in the sense that they can be endorsed by citizens generally as within the scope of a public political conception.'[31] This is given, in

[29] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 192.
[30] Ibid.
[31] Ibid.

particular, by the development of what he calls 'public reason.' The latter is defined as 'the reason of the public' and 'its subject is the good concerning questions of fundamental political justice.'[32] More distinctly, it specifies the terms of the political relation: how lawmakers and judges interact with citizens and how citizens interact with each other.[33] Citizens engage in public reason when they deliberate 'within a framework of what [they] sincerely [regard] as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens, might also reasonably be expected to endorse.'[34] In justice as fairness, political values include toleration, mutual respect, and 'a sense of fairness and civility.'[35] Consequently, the legitimacy of decisions on public policy can only be affirmed through reliance on political values and not on comprehensive doctrines that, as Rawls argues, 'seek to embody the whole truth in politics.'[36] The application of these values to constitutional essentials or basic matters of justice is illustrated by Rawls's more recent account of the boundaries of the family, which is part of the 'basic structure' of society.

In political liberalism, the basic structure of society encompasses its major social institutions: the political constitution and the economic and social arrangements.[37] These would include 'the legal protection of freedom of thought and liberty of conscience, competitive markets, private property, and the monogamous family.'[38] Since these varying structural components define individuals' rights and duties and have a profound influence on their 'life

[32] John Rawls, 'The Idea of Public Reason Revisited,' *The University of Chicago Law Review* 64 (1997): pp. 765-807, p. 767.
[33] Ibid, p. 766.
[34] Ibid, p. 773.
[35] Rawls, *Political Liberalism*, p. 123.
[36] Rawls, 'The Idea of Public Reason Revisited,' p. 767.
[37] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), p. 6.
[38] Ibid.

prospects,' they are a 'primary subject of justice.'[39] In the case of the family, and since political society is regarded as existing permanently, its primary function 'is to establish the orderly production and reproduction of society and its culture from one generation to the next.'[40] This not only implies the (necessary) physical production of children in order to ensure the indefinite existence of society, but also the raising and care of those children for 'moral development and education into the wider culture.'[41] In regards to the latter, Rawls argues that those individuals who make up society 'must have a sense of justice and the political virtues that support just political and social institutions.'[42]

Though he acknowledges in a footnote that 'I don't here attempt to decide the question,'[43] Rawls's theoretical application of public reason to the proper boundaries of the family is informative. Indeed, he argues that the state would appear to have no requirements concerning the specific form of the family 'except insofar as that form or those relations in some way affect the orderly reproduction of society over time.'[44] Consequently, appeals to monogamy or opposition to the expansion of marriage rights to partners of the same sex, at least within the state's 'legitimate interest in the family,' would seemingly 'reflect religious or comprehensive doctrines [and] that interest would appear improperly specified.'[45] Recall that, as specified by the idea of public reason, the validity of decisions on constitutional essentials or basic matters of justice depends on their reliance on political values and not on conceptions of the good. Thus, the greater weight assigned to a political value, in this case toleration, would result in the defeat of

[39] Ibid, pp. 6-7.
[40] John Rawls, *Justice as Fairness*: *A Restatement*, Erin Kelly (ed.) (Cambridge, MA: The Belknap Press of Harvard University Press, 2003), p. 162.
[41] Ibid, pp. 162-163.
[42] Ibid, p. 163.
[43] Rawls, 'The Idea of Public Reason Revisited,' p. 779, note 38.
[44] Ibid, p. 779.
[45] Ibid.

any moral or naturalistic argument against same-sex marriage as long as the preeminence of that value does not conflict with 'orderly family life and education of children.'[46] And, at least in this brief application of public reason, Rawls does not believe that it would and so, seemingly, would not object to the expansion of the institution.

Political philosophers of varying ideological backgrounds have criticized this method of reasoning through difficult public policy issues. For instance, Carlos Ball, who writes about the 'morality of gay rights,' argues that the impasse between progressives and conservatives on the question of same-sex marriage 'opens up a myriad of normative and moral issues.'[47] Accordingly, he claims that by requiring those on both sides of the debate to limit their arguments to political values and the 'reproduction' of society '[Rawls] asks that they confine themselves to issues that seem at best tangential to the controversy at hand.'[48] Similarly, new natural law theorist Robert George points out that Rawls's repudiation of moral argumentation in the public realm is impossible without first assessing the merits of those claims.[49] And if they are accurate, he claims that 'there is no reason to exclude the principles and propositions they vindicate as "illegitimate" reasons for political action.'[50] Echoing this sentiment, communitarian Michael Sandel argues that when it comes to important moral questions, the reasonableness of bracketing 'moral and religious controversies for the sake of political agreement partly depends on which of the contending moral or religious doctrines is true.'[51]

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[46] Ibid.

[47] Carlos A. Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge, 2003), p. 25.

[48] Ibid.

[49] Robert P. George, *In Defense of Natural Law* (New York: Oxford University Press, 1999), p. 203.

[50] Robert P. George, 'Public Reason and Political Conflict: Abortion and Homosexuality,' *The Yale Law Journal* 106 (1997): pp. 2475-2504, p. 2484.

[51] Michael J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (New York: Cambridge University Press, 1998), p. 196.

More specifically, Ball claims that if, as the new natural lawyers and other traditionalists contend, sexual acts by persons of the same gender are 'immoral or debasing […] then it is not clear why society should condone that immorality […] by recognizing gay marriages even if there is an overlapping consensus that tolerance and equality are values to be encouraged.'[52] It is only by addressing the pertinent moral considerations, he argues, that one can decide if 'committed same-gender relationships merit social approval and support.'[53] Of course, critics claim that political liberalism hampers this endeavor. Indeed, Sandel argues that Rawls's framework 'leaves little room for the kind of public deliberation necessary to test the plausibility of contending comprehensive moralities.'[54] And while he acknowledges that this works to the advantage of gay rights advocates, he also points out that, conversely, it can limit the types of arguments that *support* their interests.[55] For instance, dissenters to anti-sodomy legislation 'cannot argue that the moral judgments embodied in these laws are wrong, only that the law is wrong to embody any moral judgments at all.'[56] Ball concedes that a coherent defense of same-sex marriage can be developed within the limits of political liberalism, but he questions whether lesbians and gay men would even desire to express their interests in such a way.[57] For him, these relationships are 'expressions of their humanity' and 'their basic needs and capabilities for physical and emotional intimacy.'[58] Thus, requiring same-sex couples to rely strictly on neutral political values and not on more fundamental moral concerns is tantamount to asking 'them to

[52] Ball, *Morality of Gay Rights*, p. 26.
[53] Ibid, pp. 26-27.
[54] Sandel, *Liberalism and the Limits of Justice*, p. 211.
[55] Ibid, pp. 212-213.
[56] Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), p. 242.
[57] Ball, *Morality of Gay Rights*, p. 27.
[58] Ibid.

set aside their most important convictions about the value and meaning of their lives and relationships.'[59]

To be sure, this small sample of criticisms reveal important truths about political liberalism; namely, that the bracketing of moral argumentation, like assimilation, inhibits the formulation and utilization of coherent solutions to difficult moral questions. At the same time, however, this normative disengagement is not indicative of Rawls's framework as a whole. In the first place, Rawls himself discusses the importance of facilitating moral doctrines within society:

> just institutions and the political virtues would serve no purpose—would have no point—unless those institutions and virtues not only permitted but also sustained conceptions of the good (associated with comprehensive doctrines) that citizens can affirm as worthy of their full allegiance. A conception of political justice must contain within itself sufficient space, as it were, for ways of life that can gain devoted support. If it cannot do this, that conception will lack support and be unstable. In a phrase, the just draws the limit, the good shows the point.[60]

The allocation of social space for citizens' comprehensive doctrines certainly serves a practical purpose in facilitating an allegiance to the political conception. But this mere allocation of space is supplemented by a more substantial *incorporation* of normative understandings. Indeed, in *Justice as Fairness,* Rawls specifies which ideas of the good actually appear in his framework: 'the good of rationality,' 'the idea of primary goods,' 'the idea of permissible conceptions of the good,' 'the idea of the political good of a society well ordered by the two principles of justice,' and the 'idea of the good of such a society as the social unions of social unions.'[61] Contained within these elements are explicit normative evaluations. For instance, the good of rationality 'supposes that citizens have at least an intuitive plan of life in the light of which they schedule

[59] Ibid.
[60] Rawls, *Justice as Fairness,* pp. 141-142.
[61] Ibid.

their more important endeavors and allocate their various resources so as rationally to pursue their conceptions of the good over a complete life.'[62] And, according to Rawls, this assumes three things: that human existence is good; that the satisfaction of basic human needs and purposes is good; and that rationality underpins, and is a basic principle of, political and social organization.'[63]

Critics may respond to this theoretical resistance to neutrality by pointing out that when it comes to specific public policy issues, Rawls still limits the moral arguments that are necessary in formulating coherent solutions. And while this does seem to be generally the case, particularly in the above discussion of marriage within the basic structure of society, it could be argued that his discussion of the mandate of the family contains within it a normative evaluation. Recall that the stated primary function of the family 'is to establish the orderly production and reproduction of society and its culture from one generation to the next.' Rawls also remarks that 'no particular form of the family (monogamous, heterosexual, or otherwise) is so far required […] so as long as it is arranged to fulfill these tasks effectively.'[64] The problem, as Carlos Ball points out, is that by framing the issue around 'reproduction,' Rawls 'joins hands with the new natural law thinkers who argue that reproductive sexual acts are a fundamental part of marriage.'[65] At the same time, in moving towards this more traditional understanding of the institution, Rawls provides the foundation for the moral conceptualization that is needed to overcome the problem of assimilation. That is, engagement with the institution in order to uncover its significance and boundaries. And the result of that engagement is the framing of marriage in terms of self-

[62] Ibid, p. 141.
[63] Ibid.
[64] Ibid, p. 163.
[65] Ball, *Morality of Gay Rights*, p. 27. Ball rightly adds that in discussing the 'reproductive' role of the family within political liberalism, Rawls has in mind the 'reproduction of society and not of individuals.' At the same time, he points out that 'society obviously cannot reproduce unless its members procreate' (Ibid).

constitution. That is, the institution represents a potentiality that can be taken up in the making of one's self or nature. More specifically, marriage, at least within political liberalism, allows for the development of one's *public* self: by participating in the union and reproducing, individuals are ensuring the indefinite existence of society.

Thus, the degree to which Rawls's framework avoids normative understandings seems to be overstated. At the same time, two fundamental problems with his moral conceptualization of marriage prevent its complete utilization. In the first place, the substance of Rawls's understanding is not really marriage's ontology, as Aristotle would have prescribed, but only its potential utility for an externality: the perpetuation of society. In this way, political liberalism is subject to the 'harm to children' assimilationist thread presented in the introduction. In fact, subsequent to his theoretical justification of same-sex marriage, Rawls acknowledges that 'there may be other political values in the light of which such a specification would pass muster: for example, if […] same-sex marriages [were] destructive to the raising and education of children.'[66] Furthermore, this externally oriented conception limits the possibility of authentic self-constitution. Indeed, by participating in marriage, individuals are merely facilitating the indefinite continuation of society and so only actualize a sort of public existence and identity. This corresponds to Rawls's observation that '[r]eproductive labor is socially necessary labor.'[67] That is, the mandate that he attaches to marriage is not intended for any sort of individual moral development or self-making, but only the broader goals of society.

Rather than the neutrality generalization so often associated with Rawls's political framework, it is the absence of *direct* normative engagement with the ontology of marriage and the subsequent inauthentic potentiality of self-constitution that limits the utility of political

[66] Ibid, p. 779.
[67] Rawls, *Justice as Fairness*, p. 162.

liberalism. To be sure, Rawls does provide the *form* of what is required to overcome the problem of assimilation and decipher marriage's ethical substance and boundaries. But more than the simple outline of a proper ontological account, what is required is the *substance* of authentic philosophical inquiry. And in the next section, it will be shown how another strand of liberalism may supplement the blueprint provided by political liberalism.

1.2 The Possibilities of Perfectionism

As a general theoretical viewpoint, perfectionism would understandably make the liberal political philosopher wary. This is because, as a strand in moral and political philosophy, perfectionism aims to construct a paradigm of ethics or politics, or both, based on 'an objective account of the good.'[68] Indeed, though perfectionist scholars may differ on what the good actually entails, they all defend some conception of it; one that is objective in 'that it identifies states of affairs, activities, and/or relationships that are good in themselves and not good in virtue of the fact that they are desired or enjoyed by human beings.'[69] While this approach no doubt conflicts with the more familiar characterizations of Rawls and political liberalism, there is a variant of perfectionism that attempts to wed the foundational aspects of both. This variant, referred to as moral or perfectionist liberalism, can be characterized as one 'that is liberal in Rawls's sense, but which endorses a foundational perfectionism in that it justifies liberal principles of liberty by reference to a comprehensive philosophical theory of how people should live.'[70] In this regard, the frameworks of influential liberal theorists Ronald Dworkin and Joseph Raz can be considered versions of perfectionist liberalism because 'they argue for principles of

[68] Steven Wall, 'Perfectionism in Moral and Political Philosophy,' *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/win2012/entries/perfectionism-moral/>.
[69] Ibid.
[70] Peter de Marneffe, 'Liberalism and Perfectionism,' *The American Journal of Jurisprudence: An International Forum for Legal Philosophy* 43 (1998): pp. 99-116, p. 110.

liberty as necessary social conditions for people to lead the best kind of lives.'[71] At the same time, perfectionist liberals argue that engaging conceptions of the good is possible without jeopardizing liberal principles or participating in forms of state-supported coercion.[72] They claim that these principles—autonomy in particular—exemplify 'the *best* conception of the good' and 'best protect and advance *human well-being properly conceived.*"[73]

Implicit in these characterizations of perfectionism and perfectionist liberalism is a general willingness to make normative evaluations and to use those evaluations as the basis for a political framework. And it is this willingness that provides a significant point of divergence between political liberalism and the following two perfectionist accounts. Indeed, though they align themselves with liberal principles, the latter provide the possibility of an explicit normative evaluation of the ethical substance or core of marriage (as opposed to the indirect subjective evaluation of Rawls). On the surface, this perfectionist possibility constitutes a much-needed shift in method in order to determine the fundamental nature of the institution and whether that nature encompasses partners of the same sex. However, these perfectionist frameworks must themselves be evaluated to uncover whether they do, in fact, provide the philosophical clarity that is needed for an ontological investigation of the institution. If the integrity of either is questionable, then it will be clear that the liberal canon of political philosophy cannot assist in this endeavor and a further shift will be required.

In the first of these accounts, Tamara Metz attempts to formulate a coherent model of marriage and the liberal state. And similar to this thesis, her normative evaluation of the institution was prompted by ineffective same-sex marriage jurisprudence: Baker *vs* State of

[71] Ibid.
[72] Carlos A. Ball, 'Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism,' *The Georgetown Law Journal* 85 (1997): pp. 1871-1943, p. 1920.
[73] Ibid.

Vermont, which led to the creation of a civil union status, and Goodridge *vs* Department of Public Health (Massachusetts), which resulted in same-sex marriage.[74] She argues that in each case the justices either failed to identify the 'extra value' of marriage or failed to adequately explain that extra value and why state control of it was necessary.[75] In response, Metz undertakes her own ontological inquiry using the resources of G.W.F. Hegel; namely because he 'placed the social psychological influence of social institutions at the center of his political philosophy.'[76] That is, Hegel, unlike liberal thinkers past and present, placed the 'meaning side of marriage' at the center of his account of the institution and its role in political society.[77]

Based on her understanding of Hegelian political philosophy, Metz identifies what she believes to be the special value attached to the marital status: 'the community's constitutive recognition, the weighty moral approval and the complex normative account of the relationship it names and is intended to reconstitute the most intimate aspects of self-understanding.'[78] On the surface, this attempted identification of the moral significance of marriage is an improvement over legislative assimilation and the indirect normative evaluation provided by political liberalism. Rawls, of course, was not interested in uncovering the extra value of marriage, but only in its potential utility for the perpetuation of society. Conversely, Metz provides a direct engagement with the moral side of the institution. And though her account is, like Rawls's, founded upon the possibility of self-constitution, it is not limited to a public form. Indeed, Metz argues that the conferral by the community and the acceptance of the status by the individuals

[74] Tamara Metz, 'The Liberal Case for the Disestablishment of Marriage,' *Contemporary Political Theory* 6 (2007): pp. 196-217, p. 200.
[75] Ibid, pp. 200-201.
[76] Ibid, p. 202.
[77] Ibid.
[78] Ibid, p. 205.

involved in the union are recognized 'as intentionally, mutually constitutive acts.'[79] That is, by choosing to engage with the potentiality of marriage, the participants are not simply fulfilling a societal role that, while necessary, contributes nothing to individual moral development. Rather, the act of becoming married transforms one's self-understanding, seemingly by instilling a sense of acceptance and community by one's valued peers.

Thus, in this initial assessment of Metz's framework, Rawls's primarily structural contribution is complemented nicely. However, in further integrating liberal principles into her proposal, Metz destabilizes marriage as a potentiality for self-constitution. This stems from her rejection of state control of the marital status on the grounds that it amounts to the inculcation of a preferred conception of intimate life into the citizenry.[80] She compares this to the 'establishment of religion,' whereby the state is involved in 'defining, inculcating and reproducing a particular religious worldview and institution.'[81] As a result, she argues that '[m]arriage—like the church in America—should be disestablished.'[82] The first nuance to this proposed solution involves making marriage much more compatible with freedom. More specifically, Metz asserts that the disestablishment of marriage aims to eliminate the threat of prosecution for 'unsanctioned use of the marital title,' thus protecting 'freedom of marital expression.'[83] Under the proposed model, individuals would have the liberty 'to call themselves married' without any fear of punishment from the state.[84] Metz claims that the 'special value' of marriage does not require state control and so 'is not essential for its realization.'[85] In fact, she

[79] Ibid.
[80] Ibid, p. 199.
[81] Ibid, p. 205.
[82] Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for their Divorce* (Princeton: Princeton University Press, 2010), p. 134.
[83] Metz, 'Disestablishment of Marriage,' p. 205.
[84] Ibid.
[85] Ibid.

argues that 'the unique expressive value of marriage would increase were the state to relinquish control over the institution.'[86] This conjecture relies on a particular understanding of ethical authority:

> Like its religious kin, ethical authority in marriage depends on being chosen in one sense but also *not* chosen, in the sense that it just *is* experienced as ethical authority by its adherents. The constitutive potential of marital status is thus more likely to be realized or felt when the conferring authority is chosen/not chosen in this sense. Such an authority might, for some people, be a religious leader. For others an ethical authority might be the head of a cultural group, or the esteemed representative of one's family.[87]

For Metz, the transfer of the authority to grant the marital status to private entities would 'increase the likelihood that the marital status would be assumed in the context of a community of shared understandings about marriage.'[88] Furthermore, she argues that this supposed 'improved fit' between the couple's particular conception of marriage and the conception of the conferring community 'could bolster the force of the special value of the marital status.'[89]

In attempting to square her ontological inquiry with the commitments of liberalism, Metz nullifies the philosophical advancement of her account. More specifically, by prioritizing 'freedom of marital expression' and the subjectivity of the participants over her initial identification of 'constitutive recognition,' she attributes an inherent malleability to the institution. This undercuts marriage as a concrete potentiality that can be taken up for the purposes of self-constitution.[90] Indeed, if any form of interpersonal relationship and chosen ethical authority can be considered a marriage, the institution no longer represents a definitive

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[86] Metz, *Untying the Knot*, p. 143.
[87] Ibid.
[88] Metz, 'Disestablishment of Marriage,' p. 207.
[89] Ibid.
[90] Though she ultimately rejects the hypothetical objection, it is interesting that Metz acknowledges that 'freedom of marital expression' may seem like a 'trivial freedom' and that 'one might argue' that '[l]eaving the conjugal appellation to the whims of individual choice […] would effectively undercut its constitutive potential and transformative power for all by undermining its necessarily communal foundation' (Ibid, p. 206).

self-making goal. Marriage is then simply the product of one's own subjectivity being manifested in the world rather than an objective reality being brought within one's self. This is not to suggest that choice plays no role; marriage as a potentiality needs to be open to participation, but it also needs to be fully conceptualized in order to be considered an authentic nature-making endeavor. So while Metz's disestablishment narrative is helpful in initially overcoming the problem of assimilation—by engaging with the moral side of the institution—it fails to build upon the identification of the extra value in facilitating true self-constitution.

In the second perfectionist account, Elizabeth Brake suggests a radical restructuring of marriage by way of an orthodox application of political liberalism. For her, the framing of marriage law based on the 'monogamous central relationship ideal' violates public reason and fails to respect the fact of reasonable pluralism in society.[91] Without a 'publicly justifiable' rationale for the state defining marital relationships as 'heterosexual, monogamous, exclusive, durable, romantic, or passionate,' she argues that it must take the next step and endorse all relationships 'if it supports any.'[92] In particular, she is concerned with the exclusion of 'networks of multiple, significant, nonexclusive relationships' from the marital framework.[93] These relationships, she claims, 'provide emotional support, caretaking, and intimacy, and are not (all) romantic.'[94] Thus, under her proposed 'minimal marriage' model individuals would be permitted to 'have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each.'[95] The only restriction identified, and

[91] Elizabeth Brake, 'Minimal Marriage: What Political Liberalism Implies for Marriage Law,' *Ethics* 120 (2010): pp. 302-337, p. 323.
[92] Ibid.
[93] Ibid, p. 320.
[94] Ibid.
[95] Ibid, p. 303.

the only one that she argues can be instituted by the liberal state, is that these relationships be caring relationships.[96]

Care, then, seems to be at the heart of Brake's normative engagement with marriage. Conceptually, it encompasses, for her, both material caretaking—'feeding and dressing or activities to cheer or stimulate the cared for, such as grooming or chatting'[97]—and attitudinal care in that 'caring relationships are emotionally significant personal relationships between parties who know one another in their particularity, take an interest in each other as persons, interact regularly, and share a history.'[98] She also provides a rationale for maintaining marriage law in general in arguing that '[t]he social bases of caring relationships are primary goods.'[99] By 'social bases,' Brake means the framework of rights that would 'recognize (e.g., status designation, burial rights, bereavement leave) and support (e.g., immigration rights, caretaking leave) caring relationships.'[100] And in arguing that these social bases are 'primary goods,' she is harkening back to political liberalism. Indeed, in *A Theory of Justice*, Rawls introduces the concept of primary goods 'as a basis for interpersonal comparison of resources, specifying persons' wants whatever plans of life they may have.'[101] More concretely, primary goods are 'all purpose goods which people are assumed to want whatever their plans.'[102] Rawls points out that with more of these goods in-hand, individuals 'can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be.'[103] Not

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[96] Ibid, p. 305.
[97] Ibid, p. 327.
[98] Ibid.
[99] Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012), p. 173.
[100] Brake, 'Minimal Marriage,' p. 307.
[101] Brake, *Minimizing Marriage*, p. 173.
[102] Ibid.
[103] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 92, cited in Brake, 'Minimal Marriage,' pp. 326-327. Rawls identifies five kinds of primary goods: 'The basic rights and liberties:

surprisingly, primary goods are centered on a political conception of persons that defines them 'in terms of their moral powers' (capacities for a sense of justice and a conception of the good).[104] Thus, the primary goods are instrumentally important for 'the development and exercise of the moral powers and to the pursuit of varied conceptions of the good.'[105]

While Brake seems to be advocating a stricter application of political liberalism to intimate relationships—and would thus seem to be moving closer to neutrality—she bases her marital framework around the inclusion of care in the list of primary goods. As mentioned earlier in this chapter, Rawls explicitly states in *Justice as Fairness* that the list of primary goods is an example of the 'ideas of the good' that appear in his work. Thus, Brake seems to be making a normative evaluation of marriage, not by way of ideas associated with neutrality, but through an idea formulated through a conception of the good. Minimal marriage is therefore useful in overcoming assimilation. Nevertheless, it may seem that by opening marriage to a variety of relationship types Brake's account would experience the same difficulties as Metz's disestablishment narrative when it comes to self-constitution. There can be no doubt that minimal marriage is geared towards self-making: in participating in the institution, individuals are facilitating, through legal channels, the advancement of care and so are facilitating the development of their moral powers. In particular, they are enabling the pursuit of their particular conceptions of the good and, thus, moral self-development. And while the widening of the marital boundaries may give the impression that Brake offers an inherently malleable version of

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freedom of thought and liberty of conscience, and the rest'; 'Freedom of movement and free choice of occupation against a background of diverse opportunities'; 'Powers and prerogatives of offices and positions of authority and responsibility'; 'Income and wealth, understood as all-purpose means […] generally needed to achieve a wide range of ends whatever they may be'; 'The social bases of self-respect, understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence' (Rawls, *Justice as Fairness*, pp. 58-59).

[104] Brake, *Minimizing Marriage*, p. 173.

[105] Ibid, pp. 173-174.

marriage, there is evidence that she also maintains moral boundaries and thus maintains its potential for authentic self-constitution. Indeed, the minimal marriage framework identifies certain requirements for caring relationships, including 'that [the] parties are known personally to one another, share history, and interact regularly, and have detailed knowledge of one another.'[106] Brake acknowledges that these various requirements 'impose practical limits, for there are psychological and material limits on the number of such relationships one can sustain.'[107] Even in the case of large care networks, she points out that the sheer number of individuals involved may result in, for example, the watering down of visitation rights through the forced alternation of visitors or the limiting of visit duration.[108] Furthermore, though she raises the possibility of self-designation of a caring relationship to receive marital rights, she also suggests the use of interviews in the case of immigration rights 'to determine that parties do actually know each other well and […] care for one another […]'[109]

On the surface, then, Brake's minimal marriage seems to provide the substance of the ontology of marriage as self-constitution. At the same time, however, in looking at the shape the institution takes after it has been altered by her framework, we can see that it no longer resembles marriage. After all, in addition to romantic partners, minimal marriage would allow friends and family to 'marry' (and at the same time).[110] What elevates these associations to the level of marriages? Brake claims that it is the aspect of care, but provides no explanation as to why caring relationships should be equated with marriages. It seems likely, however, that she is more interested in the satisfaction of care than providing a moral account of marriage. For

[106] Brake, 'Minimal Marriage,' p. 310.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] For a hypothetical working of minimal marriage, see Brake, 'Minimal Marriage,' pp. 311-312.

instance, her rationale for even retaining the term 'marriage' comes down to nomenclature.[111] Indeed, she argues that political resistance to labeling same-sex unions 'marriages' is frequently an attempt to refuse them 'full legitimacy.'[112] Thus, by loosening the criteria by which individuals can be considered 'married,' she claims that minimal marriage can '[rectify] past discrimination against homosexuals, bisexuals, polygamists, and care networks.'[113] She points out that the current use of the term does not need to be determined by its past and that 'rectification might also take the form of an apology, reparations, or a monument to the victims of discrimination on the basis of sexual orientation.'[114] Should such measures be taken, she argues that retaining the term 'marriage' would 'be less important' and might be replaced by '"personal relationships" or "adult care networks."'[115] It seems, then, that the utilization of the term is about correcting, to a degree, perceived injustices rather than a sincere attempt at equating caring relationships with marriages.

But the prioritization of care over marriage goes deeper, specifically when it comes to the entitlements Brake assumes are fundamental for the former. As discussed earlier, she claims that minimal marriage rights 'recognize (e.g., status designation, burial rights, bereavement leave) and support (e.g., immigration rights, caretaking leave) caring relationships.' To the extent that these relationships 'depend on social arrangements for their existence and continuation,' Brake argues that their social bases ('socially distributable conditions' or 'legal frameworks designating and supporting them') fall under claims of justice.[116] More explicitly, she remarks how '[m]any threats to relationships are in fact created by the state—immigration restrictions, relocation of

[111] Brake, *Minimizing Marriage*, p. 186.
[112] Ibid.
[113] Brake, 'Minimal Marriage,' p. 323.
[114] Brake, *Minimizing Marriage*, p. 186.
[115] Ibid.
[116] Brake, 'Minimal Marriage,' p. 330.

civil services and military personnel, and prisons,' while others result 'from circumstances of the modern world, in which vast institutions (hospitals and workplaces) affect individuals lives with little regard for particularity.'[117] Thus, minimal marriage rights allow individuals to 'signal which relationships such institutions are required to recognize as relevant in visitation, caretaking leave, or spousal hiring and relocation.'[118] Crucially, Brake argues that these rights 'are the social bases of caring relationships' and 'are not available within private contract; they exist to support relationships and can only be used in that capacity.'[119] As Christie Hartley and Lori Watson point out, Brake is essentially claiming 'that certain practical supports for caring relationships can only be provided through the state's recognition of minimal marriage.'[120]

Despite Brake's claims, however, it is not clear that the state needs to play such a role in facilitating caring relationships. Indeed, in regards to the three sets of rights she argues are not available through private contract—immigration or legal residency entitlements, employee entitlements for taking care taking and bereavement leave, and hospital and prison visitation entitlements—Hartley and Watson offer three effective refutations. First, when it comes to employee rights for care taking and bereavement they argue:

> political liberals should recognize that nearly all human beings are members of society entitled to justice and have a claim to care in times of dependency. Furthermore, political liberals should regard the work of caring for persons who are temporarily or permanently dependent on others as socially obligatory work for which members of society are collectively responsible. Although it may not be necessary that all members of society perform this work, those that do should not be disadvantaged relative to others members of society because they perform socially obligatory work, and those who perform this work should be properly respected and compensated. As a matter of justice for dependent members of society and their

[117] Ibid, p. 331.
[118] Ibid.
[119] Ibid.
[120] Christie Hartley and Lori Watson, 'Political Liberalism, Marriage and the Family,' *Law and Philosophy* 31 (2012): pp. 185-212, p. 192.

> caregivers, temporary, paid leave from the labor market must be available to those who care for others.[121]

This insight—that minimal marriage is not necessary for an individual's entitlement to 'leave from employment in order to provide caregiving in adult caring relationships'[122]—not only detracts from Brake's argument about the significance of her framework, but also speaks to her treatment of marriage in general. That is, in her failure to realize that an authentic application of political liberalism actually includes at least one of the benefits of minimal marriage, we see a fundamental neglect of the ontology of marriage in favor of unnecessarily supporting care. And in regards to the other named benefits, the results are the same. Indeed, when it comes to prison and visitation rights, Hartley and Watson point out that this could be handled by the simple right to freedom of association which 'could provide the necessary basis for hospitals to recognize visitation rights for patients and for prisons to recognize visitation rights for inmates.'[123] Finally, they offer the following when it comes to immigration and legal residency entitlements:

> First, note that if open borders are required by justice, then minimal marriage is not necessary for the state to support the social bases of adult caring relationships through immigration and legal residency policy. Arguably, the core commitments of political liberalism as such are not challenged by the prospect of open borders […] Second, suppose it is justifiable for the state to enact some restrictive—but not closed—immigration and legal residency policy. It does not seem necessary for the state to recognize minimal marriage in order to provide for the social bases of adult caring relationships. The state could recognize a variety of factors as strong grounds for entry. Among these grounds could be a citizen's claim that her/his personal or professional relationship to a foreigner could best or only be facilitated by living in close physical proximity to the person.[124]

These refutations of the actual utility of minimal marriage further substantiate the idea that Brake's framework neglects the pursuit of the ontology of marriage in favor of sheltering care. In

[121] Ibid, pp. 194-195.
[122] Ibid, p. 195.
[123] Ibid.
[124] Ibid, p. 196.

her pursuit of providing a legal framework supporting caring relationships, she fails to realize that idea of political liberalism, on its own, is an effective means to achieve her goal. This introduces a significant degree of doubt as to the legitimacy of her claims about the relationship between marriage and care. And when combined with her failure to rationalize the elevation of those relationships to the status of marriages, we are compelled to move on from her account as a source for deciding the foundational questions of the institution. Taken a step further, one could argue that the reality of minimal marriage is simply an attempt to satisfy an externality. And while this does not divert our attention to the extent of the problem of assimilation, it nevertheless prevents us from reaching our goal.

1.3 Conclusion

That liberal political philosophy provides the general form of the ontology of marriage as self-constitution—and so marks an improvement over contemporary legislation—cannot be denied. However, as was shown, this shape of a moral conception of the institution is not sufficiently substantiated to warrant the utilization of liberal resources for deciding the question of marriage. As a result, a philosophical shift is required. And in the next chapter, the decidedly conservative new natural law theory will be examined in the hopes of carrying to fruition the useful blueprint of Rawls, Metz, and Brake.

Chapter 2 – A New Natural Law Sexual Ethic: New Horizons, Limited Possibilities

This chapter explores the Thomist-inspired new natural law theory (NNLT) and its mature marital formulation. And as will be seen, the latter furnishes both the *form* and *substance* of the idea of marriage as self-constitution. However, the utility of the account is inhibited by the institutional boundaries provided by that very substance, which ultimately prove to be inimical to foundational principles of the theory. As a result, new natural law can be said to be suffering from a problem of *participation* that negates the possibility of authentic self-making. This necessitates the utilization of further philosophical resources.

2.1 An Overview of the Theory

In his comprehensive critique of the system, Russell Hittinger identifies new natural law theory—comprising the work of Germaine Grisez, John Finnis, Robert George, and others—as another attempt to recover premodern ethics in order to overcome the weariness of 'conducting ethical analysis within the context of the utilitarian-deontological debate.'[125] Indeed, in seemingly falling on the ancient side of Alasdair MacIntyre's Aristotelian-Nietzschean ethical ultimatum, Hittinger argues that the new natural lawyers, among others, hope to 'furnish grounds for some forward moves, whether they comprise diagnostic reflections on the state of contemporary ethics or systematic and constructive proposals.'[126] These grounds, it seems, are provided by an improved formulation of Thomas Aquinas's natural law theory 'that avoids the standard objections which have beset such a theory since the Enlightenment' and rescues it 'from the problems inherent in the rest of Aquinas's work.'[127] Furthermore, Grisez and Finnis attach a 'systematic and comprehensive' label to their framework, indicating that 'they are not about the

[125] Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame: University of Notre Dame Press, 1987), p. 1.
[126] Ibid.
[127] Ibid, p. 5.

business of recovering an isolated strand of premodern ethics' or simple forays into the history of premodern ethical analysis.[128] Rather, as Hittinger points out, they claim to have recovered 'the systematic core of natural law theory in a way that is congruent with the older tradition *and* in a way that is persuasive to contemporary ethicians.'[129]

In a more recent critique, Nicholas Bamforth and David Richards describe the new natural lawyers as a 'tight-knit and highly influential group of Catholic thinkers' who have 'sought to develop an integrated theory applicable to the fields of religion, ethics, philosophy, and law.'[130] They portray their work as deeply trusting of reason, by a readiness to apply theory to an array of practical problems, by a dedication to a conservative interpretation of Roman Catholic moral teachings, and, mirroring Hittinger's description, by a complex systematization.[131] New natural law, they claim, encompasses 'a distinctive approach to Catholic theology, alongside a comprehensive account of ethics and the nature and proper purposes of law and legal systems.'[132] On the practical side, adherents to the 'Grisez School' have advocated for 'unilateral nuclear disarmament, and against contraception, abortion, and any sexual activity outside of the heterosexual marriage (and many common sexual practices within it)—including all lesbian and gay sexual activity.'[133] Aside from their prominent role within Church debates, the new natural lawyers have also attempted to influence constitutional cases in the United

[128] Ibid.
[129] Ibid.
[130] Nicholas C. Bamforth and David A.J. Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (New York: Cambridge University Press, 2008), p. 1.
[131] E.M. Atkins, review of *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School*, by Nigel Biggar and Rufus Black, *The Heythrop Journal* 43 (2002): pp 533-534, p. 533, cited in Ibid.
[132] Ibid.
[133] Ibid.

States, including supporting an anti-sodomy state statute and a constitutional ban on same-sex marriage.[134]

The genesis of these various positions rests with the basic elements of NNLT. As Robert George points out, the most basic principles of the theory 'direct people to choose and act for *intelligible* ends and purposes.'[135] In the Thomist tradition, these precepts are referred to as 'the first principles of practical reason' and 'refer to the range of "basic" (i.e. non-instrumental or not-merely-instrumental) human goods for the sake of which people can intelligently act.'[136] In one of the foundational texts of NNLT, *Natural Law and Natural Rights,* John Finnis identifies these goods as life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.[137] The principles that correspond to these goods, for example, the good of knowledge corresponds to the principle that knowledge is a good to be pursued, are described by the new natural lawyers as being self-evident. Indeed, in their discussion of the functionality of the basic goods, Grisez, Finnis, and Joseph Boyle argue that being '*first* principles, they cannot be derived from any theoretical knowledge.'[138] Consequently, they cannot be confirmed 'by experience or deduced from any more basic truths through a middle term. They are self-evident.'[139] They describe self-evident principles as '*per se nota*,' meaning that they are 'known just by knowing the meaning of their terms.'[140] This does not imply, they claim, that the principles are simply 'linguistic clarifications' or 'intuitions—insights unrelated to data.'[141] But

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[134] Ibid, pp. 1-2.
[135] Robert P. George, 'Natural Law Ethics,' in Philip L. Quinn and Charles Taliaferro (eds.), *A Companion to Philosophy of Religion* (Oxford: Blackwell Publishers Ltd., 1997), p. 460.
[136] Ibid.
[137] John Finnis, *Natural Law and Natural Rights,* 2nd ed. (New York: Oxford University Press, 2011), pp. 86-90.
[138] Germain Grisez, Joseph Boyle, and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends,' *The American Journal of Jurisprudence* 32 (1987): pp. 99-152, p. 106.
[139] Ibid.
[140] Ibid.
[141] Ibid.

it does mean 'that these truths are known (*nota*) without any middle term (*per se*), by understanding what is signified by their terms.'[142]

In *Natural Law and Natural Rights*, John Finnis provides a three-fold description of the basic goods in an attempt to illustrate 'the sense in which each is basic.'[143] In the first place, he claims that 'each is equally self-evidently a form of good'; secondly, he points out that none of the values 'can be analytically reduced to being merely instrumental in the pursuit of any of the others'; thirdly, each good, when focused upon, can soundly be considered the most important.[144] In order to justify this characterization, Finnis provides a hypothetical scenario involving the goods of knowledge, life, and play:

> If one focuses on the value of speculative truth, it can reasonably be regarded as more important than anything; knowledge can be regarded as the most important thing to acquire; life can be regarded as merely a precondition, of lesser or no intrinsic value; play can be regarded as frivolous; one's concern about 'religious' questions can seem just an aspect of the struggle against error, superstition, and ignorance; friendship can seem worth forgoing, or be found exclusively in sharing and enhancing knowledge; and so on.[145]

Alternatively, as Finnis points out, if one were in a situation in which one's life was at risk, such as a drowning, then 'life will not be regarded as a mere precondition of anything else; rather, play and knowledge and religion will seem secondary, even rather optional extras.'[146] Again, however, one may 'shift one's focus, in this way, one-by-one right round the circle of basic values that constitute the horizon of our opportunities.'[147] Play, then, may seem to be the most important good around which to organize one's life:

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[142] Ibid.
[143] Finnis, *Natural Law and Natural Rights*, p. 92.
[144] Ibid.
[145] Ibid.
[146] Ibid, pp. 92-93.
[147] Ibid, p. 93.

> We can […] reflect that we spend most of our time working simply in order afford leisure; play is performances enjoyed for their own sake as performances and thus can seem to be the point of everything; knowledge and religion and friendship can seem pointless unless they issue in the playful mastery of wisdom, or participation in the play of the divine puppet master (as Plato said), or in the playful intercourse of mind or body that friends can most enjoy.[148]

For Finnis, this hypothetical prioritization illustrates both that each of the basic goods is fundamental and that '[n]one is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value.'[149] And while conceding that individuals can reasonably label one or more of the values as more important in one's own life, he argues that this self-constructed hierarchy can shift and that '[t]he change is not in relation between the basic goods' but in one's own life plan.[150] This new choice reflects a change in the rank of a value for oneself as 'the change is in oneself.'[151] As Finnis points out, while an individual subjective ranking of the values is 'essential if we are to act at all to some purpose,' the reasoning behind one's ranking 'relate[s] to one's temperament, upbringing, capacities, and opportunities, not to differences of rank of intrinsic value between the basic values.'[152]

The chapter one discussion of John Rawls and political liberalism indicated that the idea of public reason specified the terms of the political relation. That is, how legislators and judges interact with citizens and how citizens interact with each other. For Rawls, citizens engage in public reason when they deliberate within a framework that they regard as the most reasonable political conception of justice. This conception must reflect political values, such as toleration and mutual respect, which could be reasonably endorsed by other free and equal citizens. As a

[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid, pp. 93-94.

result, the legitimacy of public policy decisions can only be affirmed by reliance on political values and not on any comprehensive doctrine. Alternatively, in the case of NNLT, a comprehensive doctrine in the form of the basic goods constitutes the condition for public reason for the new natural lawyers. This, as will be seen, is an important point to bear in mind before examining the NNLT account of marriage.

In his preliminary discussion of the basic good of knowledge, Finnis points out that '[t]o think of knowledge as a value is not, as such, to think of it as a "moral" value […]'[153] Indeed, he argues that the assertion that '"truth is a good" is not, here, to be understood as a moral proposition and "knowledge is to be pursued" is not to be understood, here, as stating a moral obligation […]'[154] And prior to his overview of the rest of the basic goods, he provides a reminder that 'by "good", "basic good", "value", "well-being", etc. I do *not* yet mean "moral good", etc.'[155] This is because before the transition can be made from basic good to action or before the pursuit of these values becomes moral, a further set of principles is required. These intermediary moral principles are known the 'modes of responsibility.' As the new natural lawyers point out, these principles 'do not refer to any specific kind of acts, but they are more specific than the first principle of morality, because they specify, in several ways, how any action must be willed if it is to comply with the first principle of morality.'[156] The first principle of morality in NNLT is as follows: 'In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment.'[157] This formulation,

[153] Ibid, p. 62.
[154] Ibid.
[155] Ibid, p. 86.
[156] Grisez, Boyle, and Finnis, 'Practical Principles,' pp. 127-128.
[157] Ibid, p. 128.

for them, has two aspects: the first relates to how the 'formulation focuses on the principle of morality insofar as it is the principle of moral goodness which actualizes moral truth,' while the second relates to their emphasis on the principle 'insofar as it is the integral directiveness of practical reason.'[158] The relationship between the two aspects is explained by equating moral truth with 'the integrity of the directiveness of practical knowledge.'[159] And the reasoning behind this phrase itself relates to a distinction made by the new natural lawyers between moral truth and moral falsity. Indeed, they argue that former is differentiated from the latter 'by the integrity with which it directs to possible human fulfillment insofar as that can be realized by carrying out choices.'[160] On the other hand, moral falsities—such as those rooted in revenge and selfishness—are characterized by an 'incompleteness due to which they lack adequacy to possible human fulfillment insofar as that can be realized by carrying out choices.'[161] More concretely, the difference between moral truths and moral falsities is based on their opposed relationships to the entire set of practical principles.[162] In their discussion of immoral choices, the new natural lawyers point out how such choices impede 'reason by adopting a proposal to act without adequate regard for some of the principles of practical reason, and so without a fully rational determination of action.'[163] Consequently, an immoral choice embodies the principles of practical knowledge (relating to the basic goods) 'less perfectly' than if a morally suitable proposal was taken up.[164]

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[158] Ibid.
[159] Ibid.
[160] Ibid, p. 126.
[161] Ibid.
[162] Ibid.
[163] Ibid, p. 125.
[164] Ibid. Grisez, Boyle, and Finnis provide an example of an immoral choice in which an individual, despite the directiveness of the practical principles '*to benefit persons*, both oneself and others' and to live peacefully with others and 'avoid hurting oneself' and despite the fact that 'everyone knows from experience that harming others is likely to have consequences contrary to these interests,' exacts revenge on another after being, or feeling that they

Returning to the first principle of morality and the idea of moral truth as the integrity of the directiveness of practical knowledge, the new natural lawyers argue that, in an ideal situation, the free choices of individuals 'would consistently respond to this full directiveness.'[165] And since moral truth directs to human fulfillment, they point out that 'ideally the freely chosen actions shaped by moral truth' would result in the fulfillment of all individuals in the full set of basic goods.[166] This fulfillment of all persons or '*ideal community*' is what the new natural lawyers are referring to in the first moral principle when they say 'integral human fulfillment.'[167] Furthermore, they refer to the 'good will' as one that is 'fully responsive to thoroughgoing practical reason' and, consequently, such a 'morally good will is a will toward integral human fulfillment.'[168] More importantly, the ideal of a good will entails 'intermediate moral principles—the modes of responsibility' which can be used to work out specific moral norms.[169] This ideal, then, allows 'one to bring the integral directiveness of practical reason to bear upon choices.'[170]

In essence, the modes of responsibility allow for the moralization of the basic goods. Their specific content is varied, but they involve, for example, forbidding 'unnecessary individualism,' partiality that is not required by the basic goods, and the hostile acceptance or chosen 'destruction, damage, or impeding of any intelligible good.'[171] Interestingly, John Finnis

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have been, wronged. In this case, the act of revenge could 'mollify hurt feelings and bring harmony between them and one's choice—since that *choice will be in accord with one's feelings!*' Thus, as they point out, by choosing to carry out the act, the individual fetters reason via two of its practical principles. The first prescribes 'harmony of feelings with one another,' while the second prescribes the same between judgments and choices (Ibid, pp. 122-124).

[165] Ibid, p. 128.

[166] Ibid.

[167] Ibid.

[168] Ibid.

[169] Ibid, p. 129.

[170] Ibid.

[171] Hittinger, *Critique of the New Natural Law Theory*, pp. 57-58.

provides a similar list of principles that are not referred to as the modes of responsibility but 'the basic requirements of practical reasonableness' emerging from the basic good of practical reasonableness. The latter is described as 'being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and lifestyles and shaping one's own character.'[172] For Finnis, this has both a negative and a positive element; negatively, it involves one having a degree of effective freedom, while positively it entails 'that one seeks to bring an intelligent and reasonable order into one's own actions and habits and practical attitudes.'[173] The requirements of this basic good, like the modes of responsibility, are diverse, but they similarly involve, for example, directives against unnecessary individualism ('no arbitrary preference amongst persons') and the destruction of any intelligible good ('respect for every basic value in every act').[174] In fact, within NNLT, the modes of responsibility actually flow from following the requirements of practical reasonableness. Thus, to follow the basic good of practical reasonableness means, concretely, to abide by the modes of responsibility. And since the modes of responsibility allow for the moralization of the basic goods, their relationship with the requirements of practical reasonableness makes sense of Finnis's statement that those requirements 'express the "natural law method" of working out the (moral) "natural law" from the first (pre-moral) principles of natural law.'[175] In more straightforward terms, he points out that the list of requirements 'concern

[172] Finnis, *Natural Law and Natural Rights*, p. 88.

[173] Ibid. The order described in the positive element is further broken down into an internal component—'as when one strives to bring one's emotions and dispositions into the harmony of an inner peace of mind that is not merely the product of drugs or indoctrination nor merely passive in its orientation'—and an external component—'as when one strives to make one's actions (which are external in that they change states of affairs in the world and often enough affect the relations between persons) authentic, that is to say, genuine realizations of one's own freely ordered evaluations, preferences, hopes, and self-determination.' Thus, Finnis characterizes the good of practical reasonableness as 'complex, involving freedom and reason, integrity and authenticity' (Ibid).

[174] Ibid, pp. 106-109, 118-125.

[175] Ibid, p. 103.

the sorts of reasons why (and thus the ways in which) there are things that morally ought (not) to be done.'[176]

The progression from basic good to moral obligation within NNLT results in substantive and philosophically astute normative positions on a whole host of practical issues. The beginning of this section provided a sampling of such positions, including a vehement opposition to same-sex marriage. But to understand this position requires a two-fold endeavor: one part that examines the earlier and, as will be argued, more accommodating, NNLT account of marriage and another part that examines the new natural lawyers' current, and more in-depth and restrictive, understanding of the moral boundaries of the institution. The following section will address both the former and the latter, beginning with a closer look at John Finnis's list of the basic goods and the way it frames the possibilities of human flourishing.

2.2 The New Natural Law Conception of Marriage

Given the new natural lawyers' general position on the subject of marriage identified in the previous section, its absence from one of the foundational elements of NNLT is surprising. Indeed, as the above showed, John Finnis does not include the institution in his original list of the basic goods in *Natural Law and Natural Rights*. Instead, marriage seems to be simply the result of the moral choices of individuals. This can be inferred from Finnis's account of the basic good of life (corresponding to the urge for self-preservation).[177] He begins by pointing out how '[t]he term "life" here signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination.'[178] Thus, life in this context encompasses 'bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or

[176] Ibid.
[177] Ibid, p. 86.
[178] Ibid.

injury.'[179] He then goes on to list some of the many different instantiations of that value, including 'the teamwork of surgeons and the whole network of support staff, ancillary services, medical schools, etc.' and 'the crafty struggle and prayer of someone fallen overboard seeking to stay afloat until the ship turns around.'[180]

In the same vein, Finnis considers the inclusion of the transmission of life by procreation of children in the category of 'recognition, pursuit, and realization' of that basic value.[181] First, however, he acknowledges that 'it is tempting to treat procreation as a distinct, irreducibly basic value, corresponding to the inclination to mate/reproduce/rear.'[182] But while conceding that 'there are good reasons for distinguishing the urge to copulate from both the urge to self-preservation and the maternal and paternal instincts,' he argues that the situation is different in moving beyond 'the level of urges/instincts/drives to the level of intelligently grasped forms of good.'[183] That is, while there may be a single drive (for example, to copulate) and a single release for that drive, when considered in terms of 'human action, pursuit, and realization of value, sexual intercourse may be play, and/or an expression of love or friendship, and/or an effort to procreate.'[184] From these moral choices and instantiations of the basic goods marriage may be a possibility, but it is not a necessary result. This much is clear when Finnis says that 'we need not be analytically content with an anthropological convention which treats sexuality, mating, and family life as a single category or unit of investigation.'[185] Certainly marriage, as a basic good, would be the lynch pin for these various aspects and facilitate its becoming a concrete

[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.

starting point of human action (in Rawlsian terms, a condition of public reason). In this early account, however, marriage is more directly tied with choice, and freedom, than the contemporary NNLT formulation. And in fact, this is much more consistent with what Finnis has to say about the role of the basic goods in human flourishing. Indeed, in his initial discussion of knowledge, he remarks that '[a] basic practical principle serves to orient one's practical reasoning, and can be instantiated (rather than "applied") in indefinitely many, more specific, practical principles and premises. Rather than restrict, it suggests new horizons for human activity.'[186] As one possibility of human action, marriage better corresponds to this characterization of the basic goods than if it were a starting point with a defined structure. And in this way, the early conception is similar to Tamara Metz's disestablishment narrative presented in chapter one. As was shown, her model called for the transfer of the special value of the institution—the community's constitutive recognition—to private entities in order to make it more compatible with freedom. Despite making importance progress in terms of overcoming the problem of assimilation, it was argued that this widening of the marital boundaries inhibited authentic self-constitution. In the same way, while keeping marriage as a possibility of moral choice emerging from the basic goods is more compatible with freedom, a lack of a defined structure prevents its utilization for self-making. And in fact, the NNLT view does not even contain the initial and important normative evaluation of the institution present in Metz's work. At this early stage, then, both the *form* and *substance* of an ontological account is absent. Fortunately, however, the move from liberalism to NNLT is not completely a regressive one. Indeed, while this initial account does little to help the philosophical investigation at hand, the

[186] Ibid, p. 63.

new natural lawyers' contemporary—and intricate—views on marriage provide the grounds for a move forward.

Since the publication of *Natural Law and Natural Rights*, the complexity and comprehensiveness of the NNLT account of marriage has grown steadily. In fact, in a postscript of the second edition of the text Finnis reverses his earlier contention that 'we need not be analytically content with an anthropological convention which treats sexuality, mating, and family life as a single category or unit of investigation.' Now, he argues that the discussion had missed 'the basic good which had long ago been identified not only by social anthropologists but also by Aquinas […]—marriage, the committed union of man and woman […]'[187] The point of this good, according to Finnis, is both friendship and procreation.[188] More substantively, he points out that:

> Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person *into existence* as conceptus, embryo, child, and eventually adult, fully able to participate in human flourishing on his or her own responsibility.[189]

For the new natural lawyers, this togetherness relates to the 'real organic union' that is established when a man and a woman (married or not) have sexual intercourse.[190] Indeed, they argue that though a male and female are complete units with regards to other functions of the body (for instance, sensation, nutrition, and locomotion), they are incomplete when it comes to reproduction.[191] During heterosexual intercourse, however, the bodily parts of man and woman

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[187] Ibid, p. 447.
[188] John Finnis, 'Marriage: A Basic and Exigent Good,' *The Monist* 91 (2008): pp. 388-406, p. 389.
[189] Ibid.
[190] Patrick Lee and Robert P. George, 'What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union,' *The American Journal of Jurisprudence* 42 (1997): pp. 135-157, p. 143.
[191] Robert P. George and Gerard V. Bradley, 'Marriage and the Liberal Imagination,' *The Georgetown Law Journal* 84 (1995): pp. 301-320, pp. 311-312.

'participate in a single action, coitus, which is oriented to reproduction (though not every act of coitus is reproductive), so that the subject of the action is the male and the female as a unit.'[192] While the transition to a literal single organism is characteristic of all heterosexual intercourse, when this intercourse is performed within the confines of marriage 'it is an aspect—indeed, the biological matrix—of the couple's comprehensive marital communion.'[193] This bodily aspect, in concert with spiritual and emotional elements, defines the different levels of a unified and multi-tiered personal communion.[194] Crucially, the new natural lawyers reject the instrumentalization of marriage for the purposes of simple procreation and the raising of children (despite their status as real goods).[195] Instead, they index the significance of marital intercourse to the actualization of the personal communion.[196] Thus, as Patrick Lee and Robert George point out, the chaste intercourse of man and woman within marriage 'instantiates a basic human good: the good of marital union.'[197]

To be sure, the organic unity of man and wife is also a unity of a potential father and mother and so in that act 'they share their procreative power.'[198] Now, the full exercising of this potential would involve 'conception, gestation, bearing and raising the child, that is, bringing the child, the concrete prolongation and fruit of their love, to maturity physically, emotionally, intellectually, and morally.'[199] Within the shared procreative potential, then, there exists 'a dynamism toward fatherhood and motherhood, and so, a dynamism which extends the present

[192] Lee and George, 'What Sex Can Be,' p. 144.
[193] Ibid.
[194] Ibid.
[195] George and Bradley, 'Marriage and the Liberal Imagination,' p. 304.
[196] Lee and George, 'What Sex Can Be,' p. 144.
[197] Ibid.
[198] Ibid.
[199] Ibid, p. 145.

unity of the spouses indefinitely into the future.'[200] Nevertheless, the absence of procreation does not erase the moral significance of marriage. In fact, the new natural lawyers claim that the children who result from marital sex 'participate in the good of their parents' marriage and are themselves instrumental aspects of its perfection; thus, spouses rightly hope for and welcome children, not as "products" they "make," but, rather, as gifts which […] supervene on their acts of marital union.'[201] And even spouses who, for one reason of another, do not believe that their procreative acts will be fruitful can choose a life of marriage 'as one that makes good sense.'[202] Indeed, Finnis argues that these couples can participate in the good of marriage 'because they can make *every* commitment and can form and carry out *every* intention that any other married couple *need* make, form, and carry out in order to be validly married and to fulfill all their marital responsibilities.'[203] In terms of a bodily union, the new natural lawyers claim that the carrying out of intercourse for sterile and fertile couples is, foundationally, for the purpose of actualizing and consummating the good of marriage.[204] This point makes logical sense when considering the NNLT example of the fertile couple that is frequently sexually active, yet cannot recall the specific act that resulted in procreation: no matter when the sperm of the man met the egg of the woman, all of the acts they carried out were of 'the kind which could result in procreation.'[205] Thus, they were still creating that organic unity which, given marital consent, provides a renewal or initialization of their communion.[206]

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[200] Ibid.
[201] George and Bradley, 'Marriage and the Liberal Imagination,' p. 304.
[202] John Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations,' *The American Journal of Jurisprudence* 42 (1997): pp. 97-134, p. 132.
[203] Ibid.
[204] George and Bradley, 'Marriage and the Liberal Imagination,' p. 304.
[205] Lee and George, 'What Sex Can Be,' p. 150.
[206] Ibid.

The implications of marriage as a basic good for the possibility of same-sex marriage can be brought to light by an examination of the logic of the good of self-integrity within NNLT. Robert George and Gerard Bradley describe the latter:

> The body, as part of the personal reality of the human being, may not be treated as a mere instrument without damaging the integrity of the acting person as a dynamic of body, mind, and spirit. To treat one's own body, or the body of another, as a pleasure-inducing machine, for example, or as a mere instrument of procreation, is to alienate one part of the self, namely one's consciously experiencing (and desiring) self, from another, namely, one's bodily self. But these parts are, in truth, metaphysically inseparable parts of the person as a whole. Their *existential* separation in acts that instrumentalize the body for the sake of extrinsic goals, such as producing experiences desired purely for the satisfaction of the conscious self, disintegrates the person as such.[207]

While this integrity can be maintained in heterosexual marriage—because of the actualization of the marital good in organic unity—the common good of friends who cannot participate in marriage (for example, same-sex partners) 'has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unity.'[208] And due to their 'want of a *common good* that could be actualized *by and in this bodily union*,' their sexual activity consists of 'the partners […] treating their bodies as instruments to be used in the service of their consciously experiencing selves.'[209] Thus, the decision to participate in such behavior 'dis-integrates each of them precisely as acting persons.'[210] In addition, any pleasure derived from the above type of actions (for example, sodomy), is only

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[207] George and Bradley, 'Marriage and the Liberal Imagination,' p. 314.

[208] John Finnis, 'Law, Morality, and "Sexual Orientation,"' *Notre Dame Law Review* 69 (1994): pp. 1049-1076, p. 1066. For George and Bradley, this is not to suggest that conscious feeling has no role in moral action. Indeed, while they deny that pleasure is an intrinsic good, they argue that 'its value depends on the moral quality of the acts in which pleasure is sought and taken.' In the case of morally upright acts, the pleasure is justly sought after 'as an experiential aspect of the perfection of persons' participation in the basic goods that provide *reasons* for their acts.' Thus, when integrated with the basic good of marriage, George and Bradley claim that 'pleasure is rightly sought and welcomed as part of the perfection of marital intercourse.' By contrast, they claim that to merely instrumentalize sexual intercourse to pleasurable experience 'is to vitiate its marital quality and damage the integrity of the genital acts even of spouses' (George and Bradley, 'Marriage and the Liberal Imagination,' p. 316).

[209] Finnis, 'Law, Morality, and "Sexual Orientation,"' pp. 1066-1067.

[210] Ibid, p. 1067.

experienced individually and not in unison.[211] For the new natural lawyers, this characterization holds true even if the partners engage in the act 'for the sake of an experience of unity' or with the intention that it is 'an expression of love for each other.'[212] Thus, while intention may be significant in the case of married heterosexual sterile couples, it has little consequence when partners of the same sex attempt to enact their sexuality. Lee and George point out that in order for a truly common good to be manifested 'there must be more than experience; the experiences must be subordinated to a truly common act that is genuinely fulfilling (and as such provides a more than merely instrumental reason for action).'[213]

While this obviously has negative consequences for the possibility of same-sex marriage within NNLT (namely, that it is impossible!), the violation of the good of self-integrity also extends to certain acts between opposite-sex partners. For example, in the case of fornication, if the organic unity that is achieved is not complemented by a unity 'in other aspects,' then the individuals involved are still 'treating their bodies as extrinsic instruments.'[214] That is, without the cohesiveness of a total marital communion, the couple is only enacting one part of the multi-leveled togetherness of the institution. Consequently, the metaphysical mind and body disunity prevents participation in the good of marriage. And similar to the above, this applies regardless of the intentions of the individuals involved; whether they intend to get married in the future or 'intend their act not just as an experience of pleasure, but (perhaps confusedly) as an embodiment of their personal, but not-yet-marital, communion.'[215] It is only if the couple has

[211] Lee and George, 'What Sex Can Be,' p. 146. Though opposite sex partners can unite organically, the new natural lawyers argue that their participation in anal or oral intercourse has the same implications as same-sex partners (Ibid).
[212] Ibid.
[213] Ibid.
[214] Ibid, pp. 147-148.
[215] Ibid, p. 148.

consented to become part of the institution 'does their becoming one organism actualize (initiate or renew) a basic human good—the good of marriage.'[216]

Not surprisingly, the disunity that is characteristic of sodomy, oral sex, and fornication is also inherent in acts of masturbation. As Lee and George point out, however, in the case of the latter that 'disharmony involves different aspects of the same person […]'[217] Nevertheless, the individual engaged in the act 'treats his body as a mere means in relation to a feeling, a feeling regarded not in its reality (as a bodily act), but simply in its aspect as feeling.'[218] Thus, the body is viewed 'as a mere extrinsic means in relation to the goal of a certain type of feeling' and as something outside the agent (and, accordingly, as a sheer object).[219]

2.3 Assessing the Approach

The evolution of the NNLT conception of marriage can best be described as a transition from participation to definition. As was shown, the earlier formulation portrayed the institution as a possible consequence of moral choice. That is, in the actualization of human values—namely, friendship, love, and procreation—marriage may be one possible result, but it is not a defined starting point or concrete plan of life. And this made sense in light of Finnis's contention that 'we need not be analytically content with an anthropological convention which treats sexuality, mating, and family life as a single category or unit of investigation.' In the absence of an ethical lynch pin for these various aspects—a delineated structure of 'marriage'—the institution constitutes a malleable entity that is compatible with freedom. However, as was shown, this version of marriage suffers from the same limitations as Tamara Metz's disestablishment narrative. That is, by allowing marriage to be infinitely shaped by human action, the institution

[216] Ibid.
[217] Ibid, p. 140.
[218] Ibid.
[219] Ibid.

no longer represents a concrete potentiality for self-constitution. Furthermore, the NNLT conception does not even contain Metz's initial normative evaluation of marriage's extra value (the 'community's constitutive recognition') that assisted in overcoming the problem of assimilation. As a result, the transition to the resources of NNLT seemed, at best, a regressive step in the investigation at hand.

However, the subsequent establishment of marriage as a basic good within NNLT is ontologically supportive, both in terms of overcoming assimilation and providing an initial avenue towards self-making (both *form* and *substance*). In regards to the former, the portrayal of the institution as a human value implicating friendship and procreation and involving a multi-leveled personal communion represents a genuine attempt to uncover its normative significance (the 'extra value' of marriage on it own terms). And in its capacity as a basic good, marriage constitutes one potentiality, amongst others, that can lead to authentic self-constitution (in this case, 'integral human fulfillment'). At the same time, this ethical elevation of marriage is not without its difficulties; namely, that its content is both hostile to the element of *participation* that was prominent in the early NNLT marital formulation, consequently limiting the possibility of self-constitution, and inimical to foundational aspects of the theory itself.

With respect to the latter, Joshua Goldstein argues that by associating marriage with procreation, the new natural lawyers do away with 'the conceptual distinction between the good and the moral by reintroducing the interpenetration of the fact (of human reproduction) and norm (of marriage).'[220] This point requires further clarification. Goldstein argues that the association of marriage with procreation 'stand[s] in tension with the founding spirit and logic of the NNLT, which is profoundly oriented to the disarticulation of fact from norm or what-something-is from

[220] Joshua D. Goldstein, 'New Natural Law Theory and the Grounds of Marriage: Friendship and Self-Constitution,' *Social Theory and Practice* 37 (2011): pp. 461-482, p. 466.

what-is-choiceworthy.'[221] As evidence, he points to the assertion of Finnis that the foundations of ethics should not be deduced from the function of human beings, nor from teleological conceptions of nature or other conceptions of nature.[222] And he suggests that to have truly separated fact from norm 'is to understand the new natural lawyers' introduction of the basic goods as a reorientation of human nature away from the past (what is given as "accident of history" or "contingent fact about human psychology"[223]) and towards its open-endedness or futurity (what might be chosen).'[224] This, he points out, corresponds to statements Finnis made in his various works, including the notion that the basic goods merely outline the possibilities of human flourishing[225] and, as was noted in the first section of this chapter, that 'a basic practical principle serves to orient one's practical reasoning, and can be instantiated (rather than 'applied') in indefinitely many, more specific, practical principles and premises. Rather than restrict, it suggests new horizons for human activity.' Thus, the basic goods, rather than determining the content of a single human nature, actually set out 'the rational range of possible human *natures* that might come through decision and action.'[226]

For Goldstein, the distinction made by the new natural lawyers between the reflexivity of the basic goods and the 'actualizing participation in the basic values through decision and action' underpins their confusing distinction between the 'good' and the 'moral.'[227] He expands on this assertion:

> The good and the moral *are* connected, since 'moral purposes acts are specified and judged by reference, not to the behavior's natural facticity, but to the object shaped

[221] Finnis, *Natural Law and Natural Rights*, p. 12, cited in Ibid, p. 463.
[222] Finnis, *Natural Law and Natural Rights*, pp. 33-34, cited in Ibid, pp. 463-464.
[223] Grisez, Boyle, and Finnis, 'Practical Principles,' p. 107, cited in Ibid, p. 464.
[224] Ibid.
[225] John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, D.C.: Catholic University of America Press, 1991), p. 100, cited in Ibid.
[226] Ibid, p. 465.
[227] Ibid.

> by the acting person's intelligence and will,' that is, the participation in the basic goods. Yet, the hinge between them is the will as a moment of practical reasoning: the creative (not calculating) discerning and doing of the good.[228] Thus for the new natural lawyers, in knowing the basic goods we cannot yet know our moral nature, only what ends we (or 'anyone')[229] might choose in order to *become* a moral being.[230]

Based strictly on this logic, the possibility of participation-accommodating NNLT seems promising and its conservative Catholic patina is certainly less visible. And, as was shown, there can be no doubt that this account of the basic goods corresponds to the earlier formulation of marriage as a consequence of moral *choice*. Yet, the addition of the latter to the list of basic values and the accompanying ideas of an organic unity and multi-leveled marital communion seem to drastically undercut this initial assessment. Indeed, it is difficult to imagine that the requirement of couples to literally become one organism—and only through penile-vaginal intercourse—in order to truly actualize their personal communion could be squared with the idea of the basic goods as only outlining the possibilities of human flourishing. While the new natural lawyers argue that the basic goods merely 'correspond to the inherent complexities of human nature,'[231] their explicit emphasis on the body over the choosing self—the element of the individual regarded with suspicion in the discussion of immoral sex acts—when it comes to marriage suggests that the foundation of that good *is* the natural facticity of human beings (rather than an incidental part). Thus, it is the conscious and acting self, the part emphasized in the distinction between the good and the moral and in the creating of human *natures*, which is inhibited in favor of a basic good's rigid definitional starting point.

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[228] Finnis, *Moral Absolutes*, p. 94, cited in Ibid.
[229] John Finnis, 'Reason, Revelation, Universality and Particularity in Ethics,' *The American Journal of Jurisprudence* 53 (2008): pp. 23-48, p 32, note 42, cited in Ibid.
[230] Ibid.
[231] Grisez, Boyle, and Finnis, 'Practical Principles,' p. 107.

This limited understanding of marriage is compounded by one of Finnis's requirements of practical reasonableness that commands 'respect for every basic value in every act.'[232] One formulation of this requirement directs against acts that do '*nothing but* damage or impede the realization or participation of any one or more of the basic forms of human good.'[233] The understanding of the basic good of marriage as a definitional starting point tied to natural facticity makes this requirement much more stringent than it would be if marriage remained a consequence of moral choice. It also makes following the requirements of practical reasonableness more a matter of natural teleology than a collective of the conscious will and an authentic understanding of the basic goods. Interestingly, in his introduction to the list of requirements, Finnis points out that the basic values 'are opportunities of *being*; the more fully one participates in them the more one is what one can be.'[234] He describes how 'Aristotle appropriated the word *physis,* which was translated into Latina as *natura*,' to describe that state of being where one is fully what one can be and '[s]o Aquinas will say that these requirements are requirements not only of reason, and of goodness, but also (by entailment) of (human) nature.'[235] But to understand human nature in terms of facticity, at least when it comes to marriage, would run up against the authentic account of the basic goods. The institution could not be considered one of the many categories of human values that contains diverse and multiple paths towards fulfillment. Rather, it would be a definitional starting point that is limited in its flexibility and hostile to the self-directing choices of individuals. And while the new natural lawyers are extremely concerned with the instrumentalization of the body and harming the good of self-integrity, their views on marriage seem to be merely a reversal of this harm. Indeed, with

[232] Finnis, *Natural Law and Natural Rights*, p. 118.
[233] Ibid.
[234] Ibid, p. 103.
[235] Ibid.

an emphasis on the brute facts of human biology when it comes to actualizing the good of marriage, they seem to be uninterested in the conscious self beyond its accommodating to the institution's strict moral boundaries. Implicit in this, it seems, is an emphasis on the body as if it were the most fundamental part of the self or the part that humans most 'are.' But the sheer givenness of natural facticity makes this claim difficult to substantiate. The new natural lawyers attempt to deny this assertion by arguing that 'moral truths direct free choices toward actions which tend to satisfy natural desires'[236] and that the basic goods merely 'correspond to the inherent complexities of human nature.' But if moral truths and the basic goods (marriage) are so intertwined with natural teleology it is difficult to claim that free choice has any role to play. Instead, it seems that free choice can only direct the lives of individuals if it conforms to certain strict boundaries that purport to support self-integrity. But if the conscious self is, in reality, not really directing any thing and simply constitutes a silent and obedient partner, is self-integrity really maintained?[237] It does not appear to be. Rather, in order for the basic goods to truly constitute the outlines of human flourishing or the range of possible human natures, the conscious self needs to be given a precedence that is unencumbered by human biology and narrowly defined starting points. Only then can the new natural lawyer's *own* logic about the

[236] Grisez, Boyle, and Finnis, 'Practical Principles,' p. 101.

[237] In discussing the immorality of same-sex relations, Finnis argues the following:

> '[…] *in reality*, whatever the generous hopes and dreams and thoughts of *giving* with which same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships […] Sexual acts cannot *in reality* be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective and volitional union in mutual commitment, both open-ended and exclusive […]' (Finnis, 'Law, Morality, and 'Sexual Orientation,' p. 1067).

This passage further substantiates the claim that, for the new natural lawyers, the ideal of self-integrity is bound up with biological fact or 'what is.' Though Finnis claims that the true self-giving of the marriage consists of three elements—biological, affective, and volitional—it seems to be entirely dependent on the complementarity of the sexual organs of man and woman. The conscious self, the part that *authentically* determines the moral life of the individual, has no role to play unless it is subservient to brute fact and a restrictive basic good.

connection between the good and the moral be manifested and, consequently, can their system avoid a fundamental hypocrisy.

In comparing the early and mature NNLT conceptions of marriage, then, we are seemingly confronted with polar opposites, with each containing an element(s) that is required to properly theorize the institution. Indeed, while the choice-driven account facilitates participation, that participation is indexed to an unstructured and non-basic good, thus limiting the possibility of self-constitution. Conversely, the more developed marital formulation represents a concrete potentiality that can contribute to human fulfillment, yet its biology-based boundaries and hostility to the conscious self inhibits participation and conflicts with the very logic of the basic goods. Thus, although the evolution of the NNLT position contains within it the various elements that, when combined, could facilitate the ontology of marriage, the difficulties inherent in each 'pole' undermines the utility of the theory moving forward. Nevertheless, in critically analyzing the metamorphosis of the new natural lawyers' position, we are in a better position to identify the proper philosophical formula for answering the foundational questions of this thesis.

2.4 Conclusion

The exegesis of the new natural law theory conception of marriage, as a basic human good, substantiated the liberal *form* of the ontology of marriage as self-constitution. More than this, however, it also highlighted the importance of *participation* in properly conceptualizing the institution. To be sure, the idea of open participation in marriage was encountered earlier and one could argue that is was at the heart of the liberal formulations. As this chapter showed, however, the new natural lawyers were able to illustrate, albeit incompletely and in a staggered fashion, how participation might be combined with marriage as an authentic potentiality of self-making.

And in the concluding chapter, it will be shown how Hegelian idealism actually provides the philosophical resources necessary for a more complete marital theorization.

Chapter 3 – A Hegelian Answer to the Question of Marriage

The following chapter will analyze the idealism of G.W.F. Hegel and its potential as the foundation of an ontological account of marriage as self-constitution. As has been established, the latter encompasses the elements of *form*, *substance*, and *participation.* Initially, however, Hegel's account seems to exude, as in the case of the mature formulation of the new natural lawyers, hostility to participation in the institution. Fortunately, a more authentic understanding of the logic of his account suggests a deference for the subjectivity of participants and, consequently, a more receptive marital potentiality for self-making. In particular, this reinterpretation implies the possibility of same-sex marriage.

3.1 The Hegelian Conception of Freedom and its Manifestation in Marriage

Despite the varied ideas of freedom in the history of political philosophy, its conception in both modern thought and liberalism is fairly well established. As Paul Franco points out, this version of freedom has typically meant 'the ability to pursue one's wants and desires without obstruction or interference' and it is manifested in the works of foundational liberal theorists, including Hobbes, Bentham, Locke, Mill, and Berlin.[238] Similarly, Allen Wood argues that the spirit of liberalism opts 'to protect individual rights and freedoms' and to live 'by the faith that human progress is most likely if individuals are left to find their own way towards whatever they happen to conceive of as the good.'[239] For him, the prevailing nature of this spirit is demonstrated by the fact that it is 'the common basis of both "liberalism" and "conservatism" as those terms are now used in everyday political parlance, and by the fact that liberalism's principles sound to most of

[238] Paul Franco, *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 1999), pp. 179-180.
[239] G.W.F. Hegel, *Elements of the Philosophy of Right*, Allen W. Wood (ed.), trans. H.B. Nisbet (New York: Cambridge University Press, 1996), p. xi. Citations are to section numbers (in-text), except in the editor's introduction and the Preface where only page numbers are given. In the case of consecutive references, only the initial citation will be provided.

us like platitudes, which no decent person could think of denying.'[240] Outside of the liberal canon, however, the conceptualization of freedom is far from settled, resulting in different ideas of what is required for its actualization. This much is clear in examining the idealism of G.W.F. Hegel. Granted, aspects of his framework are familiar to liberalism—representative institutions (the Estates), public criminal trials, and jury trials[241]—and he does make room for the type of negative freedom that is central to liberal thought,[242] but his own view of what truly constitutes freedom is a significant point of departure.

In a formulation that is notoriously difficult to grasp, Hegel argues that authentic freedom involves the combination of two moments in the development of the will: one that involves indeterminacy and one that involves determinacy. In regards to the former, he describes the will in terms of 'this *absolute* possibility of *abstracting* from every determination in which I find myself or which I have posited in myself, the flight from every content as limitation' (PR, §5). This '*negative* freedom' involves being entirely self-contained by freeing oneself 'from everything to renounce all ends, and to abstract from everything' (PR, §5A). In the most striking example of this first moment of the will, the individual 'is able to abandon all things, even his own life: he can commit suicide.' In fact, Hegel argues that if this version of freedom is actualized, it translates 'in the realm of religion and politics' to the destruction of the social order, the purging of 'individuals regarded as suspect by a given order,' and the annihilation of 'any organization which attempts to rise up anew' (PR, §5). It is only in the very destruction of something, according to him, that this 'negative will' feels its own existence. Concretely, Hegel argues that the Terror of the French Revolution was a manifestation of this aspect of the will

[240] Ibid.
[241] Ibid, p. x.
[242] Ibid.

because ‘all differences of talents and authority were supposed to be cancelled out’ (PR, §5A). This fanaticism ‘wills only what is abstract, not what is articulated’ and so negates any differences that may arise because they are incompatible with its own indeterminacy. This is why, according to him, the revolutionaries destroyed the very institutions they had set up ‘because all institutions are incompatible with the abstract self-consciousness of equality.’ From this indeterminacy, however, the will moves to a pure determinacy (PR, §6). In Hegelian terms, the ‘I’ moves beyond ‘undifferentiated indeterminacy to *differentiation, determination*, and the *positing* of a determinacy as a content and object.’ More concretely, this second moment involves the will actually willing something and, according to Hegel, that particular object constitutes a limitation because ‘the will, in order to be a will, must in some way limit itself’ (PR, §6A).

In the third moment, Hegel argues that the will truly evolves into a free will. This moment involves the unity of the previous two: ‘*particularity* reflected *into itself* and thereby restored to *universality*’ (PR, §7). As the ‘I’ determines itself it ‘still remains with itself and does not cease to hold fast to the universal’ (PR, §7A). This freedom, for Hegel, is manifested ‘in the form of feeling’ in both friendship and love in that ‘we are not one-sidedly within ourselves, but willingly limit ourselves with reference to another, even while knowing ourselves in this limitation as ourselves.’ This freedom associated with immediate feeling will be discussed at length below. For the time being, it is important to keep in mind that for Hegel freedom is ‘to will something determinate, yet to be with oneself in this determinacy [*bei sich*] and to return once more to the universal.’ In more plain terms, though Hegel frames free action in terms of dealing with nothing outside of our objective nature—the flight from content that characterized the first moment of the will—this does not imply that ‘freedom consists in withdrawing from

what is other than ourselves.'[243] As Allen Wood points out, Hegel argues that the absence of dependence on another is not achieved outside the other, but within the other.[244] And its actuality is achieved not by retreating from otherness, but by overcoming it.[245] Hegelian freedom, then, consists of 'being at home with oneself in one's other' or 'actively relating to something other than oneself in such a way that this other becomes integrated into one's projects, completing and fulfilling them so that it counts as belonging to one's own actions rather than standing over against it.'[246]

This mature idea of freedom is actualized—made physically present in the world—by way of what Hegel calls 'ethical life' or the '*laws and institutions which have being in and for themselves*' (PR, §144). Indeed, he argues that ethical life constitutes 'the *concept of freedom which has become the existing [vorhandenen] world and the nature of self-consciousness*' (PR, §142). It is within this sphere that the individual actively relates to otherness in such a way that that otherness becomes part of their objective nature. As Hegel points out, the substance of ethical life is the good in that it is 'the fulfillment of the objective [united] with subjectivity' (PR, §144A). Consequently, for example, the duties intertwined with the state that may appear as limitations in terms of 'abstract freedom' or the freedom that is traditionally associated with liberalism, become liberation for the developed will within the ethical sphere:

> On the one hand, he [the subject] is liberated from his dependence on mere natural drives, and from the burden he labours under as a particular subject in his moral reflections on obligation and desire; and on the other hand, he is liberated from that indeterminate subjectivity which does not attain existence *[Dasein]* or the objective determinacy of action, but remains *within* itself and has no actuality. In duty, the individual liberates himself so as to attain substantial freedom (PR, §149).

[243] Hegel, *Elements of the Philosophy of Right*, p. xii.
[244] Ibid.
[245] Ibid.
[246] Ibid.

One does not attain this substantial freedom simply by becoming a member of a state and accepting the duties and obligations that accompany citizenship. Rather, the actualization of freedom involves hierarchical stages that contain their own ontology and responsibilities. The first of these stages involves the immediacy of the nuclear family wherein individuals are groomed for what Hegel terms 'civil society.' While the latter marks a closer proximity to the full development of substantial freedom, it is the family and its ethical determinations that are of primary concern for this thesis.

As noted above, Hegel argues that freedom is present in terms of immediate feeling in friendship and love. In terms of the latter, he offers the following:

> Love means in general the consciousness of my unity with another, so that I am not isolated on my own [*für mich*], but gain my self-consciousness only through the renunciation of my independent existence [*meines Fürsichseins*] and through knowing myself as the unity of myself with another and of the other with me […] The first moment in love is that I do not wish to be an independent person in my own right [*für mich*] and that if I were, I would feel deficient and incomplete. The second moment is that I find myself in another person, that I gain recognition in this person [*daß ich in ihr gelte*], who in turn gains recognition in me (§ 158A).

For Hegel, this unity is characteristic of the family, which he describes as the '*immediate substantiality* of spirit' (§ 158). And the process of completing the family unit begins with the marital union of two people. Hegel refers to this union as 'the *immediate ethical relationship*' (§ 161) and describes two moments therein: an initial moment of '*natural* vitality' that 'involves life in its totality, namely as the actuality of the *species* [*Gattung*] and its process' and, secondly, a '*union* of the natural sexes, which was merely inward (or had being only *in itself*) and whose existence [*Existenz*] was for this very reason merely external, is transformed into a *spiritual union*, into self-conscious love.' Furthermore, he argues for a duality of subjectivity and objectivity within marriage:

> The subjective origin of marriage may lie to a greater extent in the *particular inclination* of the two persons who enter this relationship, or in the *foresight* and initiative of parents, etc. But its objective origin is the free consent of the persons concerned, and in particular their consent to *constitute a single person* and to give up their natural and individual personalities within this union. In this respect, their union is a self-limitation, but since they attain their substantial self-consciousness within it, it is in fact their liberation (§ 162).

In terms of the 'external origin of a given marriage,' which Hegel regards as 'by nature contingent,' he describes two extremes: one involving 'the initial step take by well-intentioned parents, and when the persons destined to be united in love get to know each other as destined partners, a mutual inclination results,' while the other involves the 'mutual inclination of the two persons, as *these* infinitely particularized individuals, which arises first.' He regards the former extreme as 'the more ethical course' because, in the latter instance, it is the '*infinitely particular* distinctness [*Eigentümlichkeit*] which asserts its claims' and he associates this with the 'subjective principles of the modern world.' He argues that 'in those modern dramas and other artistic interpretations in which love between the sexes is the basic interest, we encounter a pervasive element of frostiness which is brought into the heat of passion such works portray by the total *contingency* associated with it.' Thus, the 'whole interest' is depicted as depending solely on the particular individuals involved, which Hegel argues 'may well be of infinite importance for *them*, but it is no such importance in *itself*.'

The ethical substance of marriage, for Hegel, consists of 'the consciousness of this union as a substantial end, and hence in love, trust and the sharing of the whole of individual existence [*Existenz*]' (§ 163). When the disposition appropriate to marriage and actuality are present, he argues that 'the natural drive is reduced to the modality of a moment of nature which is destined to be extinguished in its very satisfaction, while the spiritual bond asserts its *rights* as the substantial factor […]' This assertion leads him to differentiate marriage from concubinage in

that 'the latter is chiefly concerned with the satisfaction of the natural drive, whereas this drive is made subordinate within marriage' (§ 163A). And this is why, he peculiarly claims, that 'within marriage, one may speak unblushingly of natural functions which, in extra-marital relationships, would produce a feeling of shame.' This subordination of the natural drive also leads Hegel to argue that the union should be considered 'indissoluble *in itself*' because 'the end of marriage is an ethical end, which is so exalted that everything else appears powerless against it and subject to its authority.' This is not to say that he denies the possibility of divorce; rather he is only arguing that '[m]arriage should not be disrupted by passion,' yet because 'marriage contains the moment of feeling [*Empfindung*], it is not absolute but unstable, and it has within it the possibility of dissolution.' To be sure, however, Hegel does suggest that 'all legislations must make such dissolution as difficult as possible and uphold the right of ethics against caprice.'

As the overview of Tamara Metz's liberal account indicated, Hegel emphasizes the importance of the communal recognition of marriages. Indeed, he states in relation to the consent of the partners and the marriage ceremony that:

> Just as the stipulation of a contract in itself [*für sich*] contains the genuine transfer of property, so also do the solemn declaration of consent to the ethical bond of marriage and its recognition and confirmation by the family and community constitute the formal *conclusion* and *actuality* of marriage […] It is accordingly only after this ceremony has *first taken place*, as the completion of the *substantial* [aspect of marriage] by means of the *sign* – i.e. by means of language as the most spiritual existence [*Dasein*] of the spiritual – that this bond has been ethically constituted. The sensuous moment which pertains to natural life [*Lebendigkeit*] is thereby put in its ethical context [*Verhältnis*] as an accidental consequence belonging to the external existence of the ethical bond, which may even consist exclusively in mutual love and support (§ 164).

As this passage indicates, Hegel not only places great emphasis on the constitutive power of the consent of the individuals and the confirmation by the community, but he also reasserts the subordination of the physical aspect. However, despite the importance attached to the former,

Hegel also states in relation to the legal definition of marriage that no one characteristic of the institution is central:

> If, in order to establish or assess the legal determinations [of marriage], it is asked what the *chief end* of marriage is, this chief end will be understood to mean whatever individual aspect of its actuality is to be regarded as more essential than the others. But no one aspect on its own [*für sich*] constitutes the whole extent of its content which has being in and for itself – that is, of its ethical character – and one or other aspect of its existence [*Existenz*] may be absent, without prejudice to the essence of marriage.

This is not to suggest that Hegel's account lacks moral boundaries. In fact, his account of the nature of sexual difference implies the latter. As Elizabeth Brake points out, Hegel tried to illustrate 'the rationality of the natural world by explaining physics, chemistry, and biology in dialectical terms.'[247] Now, in terms of biology, this entailed the following:

> In a dubious argument, he attempts to give an account of reproductive biology, beginning with the claim that males and females are complementarily incomplete. Mammalian reproduction, in Hegel's dialectical biology, resolves the incompleteness through the union of these opposites in a more complete whole. Male and females genitals, according to Hegel, share the same type, but each sex is more developed where the other is lacking: '[T]he uterus in the male is reduced to a mere gland [the prostate], while … the male testicle in the female remains enclosed within the ovary.'[248]

Like the account of the new natural lawyers, Hegel sees sexual reproduction as a form of togetherness that completes incomplete organisms. As Brake's overview shows, he views the sex drive as a desire to overcome biological difference and sexual relations as the context in which 'the pair find themselves in each other by acquiring the deficient parts of themselves that the other has.'[249] Thus, in terms of homosexuality, Kirk Pillow asserts that, for Hegel, same-sex desire is not only unnatural, but also 'logically incoherent' because sexual desire aims to unite

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[247] Elizabeth Brake, 'Hegel, G.W.F. (1770-1831),' in Alan Soble (ed.), *Sex from Plato to Paglia: A Philosophical Encyclopedia*, vol. 1 (Westport, CT: Greenwood Press, 2006), p. 430.
[248] G.W.F. Hegel, *Hegel's Philosophy of Nature*, vol. 3, trans. Michael J. Petry (ed.), (London: Allen and Unwin, 1970), §368A, cited in Ibid.
[249] Ibid.

opposite anatomies.[250] Furthermore, in the *Philosophy of Right*, Hegel argues in regards to marriage that '[t]he relation of love between man and wife is not yet an objective one; for even if this feeling [*Empfindung*] is their substantial unity, this unity does not yet possess objectivity [*Gegenständlichkeit*]' (§ 173A). The latter is realized, for him, 'only in their children, in whom they see the whole of their union before them.' Prior to reproduction, Hegel claims that 'their unity is present in their [shared] resources only as in an external thing [*Sache*],' whereas afterwards 'it is present in their children in a spiritual form in which the parents are loved and which they love.' Thus, despite his claim that no single characteristic of marriage defines the institution and that any single aspect could be removed without prejudice to its essence, it would seem that Hegel's system is inherently hostile to non-traditional formulations.

Before addressing this point in-depth, however, it is important to take stock of the way Hegel's system is helpful in overcoming assimilation and theorizing marriage as self-constitution. In the first place, Metz does seem to be correct in stating that he placed 'the meaning side of marriage' at the center of his account of the institution and its role in political society. Indeed, he argues that marriage involves a profound form of togetherness wherein the participants constitute a single person. Crucially, it also represents a concrete potentiality for self-making: the actualization of Hegelian freedom. This type of freedom, as was shown, involves being at home in the world or 'actively relating to something other than oneself in such a way that this other becomes integrated into one's projects, completing and fulfilling them so that it counts as belonging to one's own actions rather than standing over against it.' To be sure, the marital relation and the family is only an initial step in ethical life with the ultimate goal

[250] Kirk Pillow, 'Hegel and Homosexuality,' *Philosophy Today: SPEP Supplement* 16 (2002): pp. 75-91, p. 86, cited in Ibid, p. 433.

being participation in civil society, but it nevertheless represents a necessary motivating end that can be (freely) taken up in the pursuit of freedom.

The word 'freely' is placed here in parentheses because, initially, it is not clear that Hegel's system is able to overcome the problem of *participation* that plagued the new natural law account. Granted, there are instances in which he seems opposed to a rigid marital formulation. For example, he argues that the objective origin of marriage is simply the 'free consent of the persons concerned.' He also emphasizes the subordination of the 'natural drive' within the union and the fact that no single aspect constitutes its ethical character. This could be interpreted as being in tension with the new natural lawyers biology-based idea of marriage as a basic good. At the same time, the logic of his philosophy, as Pillow argued, appears to be in-line with the new natural lawyers' and reflects a vehement opposition to homosexuality. In addition, his other musings on marriage seem to focus on the brute facts of human anatomy. Indeed, as was shown, he suggests that the union between man and wife does not attain objectivity until the appearance of children. Thus, while the Hegelian theorization of the institution is based around its ethical and constitutive potential, the criterion of participation appears firmly linked to a binary and heterosexual logic. However, one of the main philosophical features of Hegel's system is its fundamental openness to interpretation. And as will be seen in the next section, this feature allows for the possibility of introducing participation to what is otherwise a useful ethical characterization of marriage.

3.2 The Case for Hegel, Participation, and Same-sex Marriage

The combination of *form*, *substance*, and *participation* within the ontology of marriage as self-constitution is manifested by way of an alternate interpretation (or more authentic understanding) of Hegelian political philosophy. This interpretation, as will be seen, allows for the possibility of

same-sex marriage and thus expands the boundaries of the institution. Now, in the first place, Joshua Goldstein argues that in discussing the marital relation, as it is represented in Hegelian thought, we ought to 'write "two subjects" and "marriage partners" instead of "man and woman" and "husband and wife" because the ethical foundations of marriage, no less than other ethical relations, stands wholly outside of natural differentiation of the human spirit.'[251] He argues that '[t]he human spirit makes itself free by taking up one of the possibilities of selfhood' and '[of] all the qualities each human spirit may possess, the only one of ethical significance is subjectivity, which we can understand here as the concrete possibility of choosing to become a self.'[252] This emphasis on the ability to choose suggests that '[i]n the case of the family, to deny two subjects their possibility of selfhood on the basis of their sexual differentiation is to deny the human spirit freedom.'[253] However, Goldstein also acknowledges the following potential objection:

> Is not the desire to specify the sex of one's marriage partner an example of the dominance of subjective ends in what ought to be a substantive relation? Should not the individual desirous of a same-sex partner 'surrender this personality' (*PR* §167), abandoning it for his or her choice of the ethically greater end of marriage? This argument has initial plausibility because it focuses on the one condition for this substantive self—i.e., that it is a life in which subjectivity chooses to submerge itself.[254]

Ultimately, he asserts that this objection is flawed 'because it does not adequately respect the ultimate right of subjectivity to its free determination of an ethical end.'[255]And this deference to participation and subjectivity does not require a debate about the origin of one's sexual orientation:

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[251] Joshua D. Goldstein, *Hegel's Idea of the Good Life: From Virtue to Freedom, Early Writings and Mature Political Philosophy* (Dordrecht, the Netherlands: Springer, 2006), p. 159.
[252] Ibid.
[253] Ibid.
[254] Ibid, p. 160.
[255] Ibid.

> We neither need to enter into debates surrounding the naturalness of homosexuality, nor determine whether homosexuality is something given or something cultivated. Instead, we need to know only whether a sexual preference (of whatever variety) is an enduring orientation in that subjectivity. As an enduring orientation, it does not stand in contradiction with the essence of substantive selfhood. Unlike, for example, an enduring and overriding desire for honour, sexual orientation is compatible with any of the possibilities of selfhood since it does not, in itself, order the relationship between subject and world. On the one hand, this orientation is indifferent to selfhood. On the other, if it is taken to be vital to the integrity of the subject, then respect for subjectivity requires that the community could no more have the subject violate that integrity by giving up his or her leg for the sake of marriage than it could the subject give up his or her enduring sexual orientation. A world that makes such a demand by denying subjectivity its rights of selfhood is a world in which the good does not fully live.[256]

To shape the marital relation around the enduring dispositions or characteristics of specific personalities would be to limit the self-constituting power of subjectivity. However, this more authentic understanding of the possibilities of the institution prioritizes choice and participation in the pursuit of self-making and Hegelian freedom. This marks a significant improvement, and a solution, to the participation-deficient account of the new natural lawyers that seemed to aim at curbing the influence of the conscious self in favor of 'what is.' It also presents the real possibility of including same-sex marriage within a framework that incorporates *form*, *substance*, and *participation* in properly theorizing the marital union.

And even without this more authentic understanding of marriage and the role of participation and subjectivity, there is still reason to be untroubled by the rigid boundaries, and rejection of homosexuality, established by Hegel. Consider, first, his statement in the preface of the *Philosophy of Right*:

> To comprehend *what is* is the task of philosophy, for *what is* is reason. As far as the individual is concerned, each individual is in any case a *child of his time*; thus philosophy, too, is *its own time comprehended in thoughts*. It is just as foolish to imagine that any philosophy can transcend its contemporary world as that an individual can overleap his time or leap over Rhodes. If his theory does indeed

[256] Ibid.

> transcend its own time, if it builds itself a world *as it ought to be*, then it certainly has existence, but only within his opinions – a pliant medium in which the imagination can construct anything it pleases.[257]

The contemporary, then, bounds the objectives of philosophy; in uncovering the inner rationality of the world, the philosopher is forced to confront it as it already is. And so, while Hegel can formulate the ethicality and rationality of the institution of marriage, he cannot examine it as it *might* look at a different point in time. Rather, he is confined to the social realities of his time and, consequently, with a conservative nineteenth century version of marriage. This might explain why Hegel provides such an obscure account of reproductive biology and its implication for the marital union. As was shown above, however, the more authentic understanding of his formulation suggests a fundamental deference towards the conscious self and participation of *subjects*—not specific sexes—and the possibility of same-sex marriage. Thus, while Hegel is confined to the realities of his time, the authentic logic of his account implies an overcoming or an end to those existing limitations. Shlomo Avineri elaborates on the latter notion:

> If philosophy is nothing else than its own time apprehended in thought, then there is a curious corollary to it: if a philosopher can only comprehend that which is, then the very fact that he has comprehended his historical actuality is evidence that a form of life has already grown old, since only the fully developed can be philosophically comprehended. Thus below the surface of the apparent passivity of Hegel's statement, a basically critical theory can be discerned.[258]

In this, we see that in coming to know the present reality, the philosopher may be coming to know an actuality that is already reaching its final stage. At the conclusion of the preface, Hegel points out that:

> A further word on the subject of *issuing instructions* on how the world ought to be: philosophy, at any rate, always comes too late to perform this function. As the *thought* of the world, it appears only at a time when actuality has gone through its formative process and attained its completed state. This lesson of the concept is

[257] Hegel, *Philosophy of Right*, pp. 21-22.
[258] Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), p. 128.

> necessarily also apparent from history, namely that it is only when actuality has reached maturity that the ideal appears opposite the real and reconstructs the real world, which it has grasped in its substance, in the shape of an intellectual realm. When philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk.[259]

In this famous passage, Hegel is more explicit in his conviction that the comprehension of the contemporary is a comprehension of a time in the twilight of its actuality. In his analysis, Avineri argues that '[p]hilosophy is the wisdom of ripeness, and whenever a period in history finds its great philosopher who translates into the language of ideas the quintessence of its actual life, then a period in history has come to a close.'[260] And while conceding that Hegel is not advocating for a new world that is beyond the present reality, he argues that 'his very ability to comprehend his own world may already point to its possible demise.'[261] It is true that Hegel is not attempting to create a new world—such attempts are the object of his intense criticism throughout the preface—but the authentic understanding of his comprehension of the world he was situated in does plant the seed of future potentialities of marriage. In this way, his account of the institution has a dual philosophical significance: in the first place, the very examination, comprehension, and conceptualization of the institution points to the demise of that historically situated potentiality; second, the authentic understanding of the objective nature of marriage as being indexed to the participation and subjectivity of individuals points to future possibilities. The *Philosophy of Right*, then, comprises both an implicit demise of an inherently heterosexist actuality of an ethical institution and the resources by which that institution can persist as a valuable path to self-constitution and human flourishing.

3.3 Conclusion

[259] Hegel, *Philosophy of Right*, p. 23.
[260] Avineri, *Hegel's Theory*, p. 128.
[261] Ibid, p. 129.

This chapter has illustrated that the resources of G.W.F. Hegel, when interpreted according to a fundamental respect for the *choosing* of subjects, can provide the elements of *form*, *substance*, and *participation* that are necessary in theorizing marriage as self-constitution. And as was shown, this emphasis on the subjectivity of participants suggests the real possibility of same-sex marriage. In addition, with a potential ontology now in-hand, we are in a better position to overcome assimilation and to begin to authentically bind the institution. This is not to say, as will be made clear, that the *substance* of Hegel's account constitutes the objective nature of marriage, only that his approach to framing it as a form of self-making is coherent. And in what follows, some concrete implications of indexing the institution to his formulation, as well as potential criticisms, will be explored.

Conclusion

This thesis began with the goal of overcoming the lack of philosophical integrity in contemporary marriage legislation and jurisprudence in North America. In particular, it was hoped that by properly theorizing the institution, a solution to the problem of assimilation, to both rights and tradition, could be found. This was to be accomplished by examining philosophical resources from different terrains: liberalism, new natural law, and Hegelian idealism. And what was discovered was that each account was an attempt to get at the *same* ontology. That is, marriage represents a concrete potentiality that can be taken up for the purposes of self-constitution. The task then became to decipher which philosophical framework best manifested this ontology in terms of *form*, *substance*, and *participation*. As was shown, the liberal accounts, represented by both political liberalism and perfectionism, were able to provide the proper form for theorizing marriage, but they ultimately suffered from various fundamental problems: assimilation, the attempted satisfaction of an externality, and the attribution of malleability to the essence of the institution. The latter problem from Tamara Metz's disestablishment narrative was particularly trying in that she *did* provide the 'extra value' of marriage, but indexed that value entirely to subjectivity. And though respecting subjectivity is an important component of participation, by basing her account around the free reign of that subjectivity, marriage lost its status as a definitive life path for self-making. In other words, in order for marriage to represent a potentiality of self-constitution, it needs to be a defined goal that can be taken up and not a potentiality that simply emerges from the subjectivity of the participant. Subjectivity needs to do the *choosing* of the potentiality, not *create* the potentiality. This type of choosing subjectivity was absent from the new natural law account despite the proper bounding of marriage as a basic human good geared towards fulfillment. Indeed, the rigid

marital formulation provided by the new natural lawyers severely limited participation, particularly when it came to same-sex relations. Fortunately, a reinterpretation of Hegelian idealism provided all three elements for theorizing marriage: this time as one potentiality for actualizing freedom (understood as 'feeling at home in the word'). Furthermore, Hegel's deference for the subjectivity of individuals opened the possibility of same-sex marriage within his system.

From Hegel's account, then, we were provided with an adequate philosophical foundation for bounding marriage as self-constitution. This is not to suggest that the moral boundaries and ethical substance extracted from his system are the final word on the matter; all that has been established is that Hegel *can* furnish an adequate understanding of marriage as an instance of self-making. That is, one that engages the institution on its own terms and maintains it as a concrete constitutive potentiality rather than simply assimilating it to external terrains of meaning or subjecting it to the caprice of individuals. The value of such an approach is two-fold: on the pragmatic and political side, we are provided with an account of what is ethically significant about the object *itself* and so are in a much better position to begin to *properly* bound the institution in public policy; and in incorporating subjectivity when it comes to *participation* rather than the *substance* of marriage (as was the case in Metz's malleable disestablishment framework), Hegel maintains marriage as a *tangible* and pursuable path towards self-making.

One may argue, however, that if Hegel's account is flexible enough to include same-sex marriage, is it not still subject to the problem of malleability when it comes to *accessibility* (rather than tangibility)? It does not appear to be. This is because pursuable ends need to be taken up with a certain volition and degree of steadfastness in order to be truly self-constituting. This does not imply, it would seem, an indefinite commitment that is never quite finished, as John

Finnis argues,[262] because even finite goals could potentially transform our self-understanding (for example, attaining a post-secondary degree, volunteering for a charity, or participating in an internship). At the same time, it would appear that *some* temporal devotion, combined with the correct disposition, is needed in order for an endeavor to be an instance of self-making. Otherwise it is simply one potentially arbitrary choice among many, with little or no bearing on how one characterizes oneself. When it comes to marriage, one could argue that it requires a certain willingness, commitment, and temporality; we need to *want* our partner(s) to be included in our life prospects and to transform the way we live and carry them out, and this requires some amount of time to be fully actualized. In this sense, we could say that marriage, as self-constitution within Hegelian thought, is inimical to certain manifestations of polygamy because having multiple partners inhibits the disposition of the will and degree of commitment necessary for self-making. It could also be interpreted as being hostile to adult-child marriages because a child's ability to will such a relationship is not sufficiently developed. These brief examples certainly do not reflect the full range of implications, but they do suggest that Hegel's authentic theorization of marriage is not subject to the pitfall of malleability.

A further concern may be that framing marriage in terms of self-constitution amounts to another form of assimilation. However, as was shown, Hegel's formulation fits with the analytical elements of *form* and *substance* that were utilized throughout this thesis and appear to be necessary for avoiding assimilation—that is, engagement with the ethical significance of the institution, on its own terms, and the identification of that significance *apart* from externalities. As chapter one illustrated, the liberal accounts displayed volition towards this approach, but they ultimately went *outside* marriage itself in order to characterize its essence. In particular, Rawls's

[262] Finnis, *Natural Law and Natural Rights*, p. 64.

preoccupation with the reproduction of society led to the collapse of his formulation into assimilation (more specifically, to the indispensability of children for marriage). This is not to say that Hegel's account completely avoids the threat of assimilation. Indeed, throughout his description of the institution, he seems to be on the verge of grounding or associating it with two potential assimilationist dynamics: tradition/nature/reproduction and freedom. But the reinterpretation of his system in terms of subjectivity highlighted the enduring constitutive aspect that goes beyond mere historical nineteenth century circumstances or the idea of actualizing freedom. Furthermore, as Hegel himself argues, the philosophical comprehension of the *present* also signals its historical demise and so the potential avenues towards assimilation within his formulation seem to close. All that remains, then, is the ontology of marriage as self-constitution, properly theorized in terms of form, substance, and participation. And perhaps the staying power of this idea is evinced by the fact that each of the accounts examined seemed to be founded upon it. However, it was only Hegel who, among the theorists considered, was able to provide the theoretical resources to grasp marriage on its own terms.

Finally, on a methodological and theoretical level, the Aristotelian-Nietzschean divide mentioned in chapter two provides an interesting parallel to the current state of discourse on difficult public policy issues. In particular, it would seem that the political decisions on these issues—whether it is same-sex marriage, polygamy, or abortion—emerge from a sort of nihilism. Not in the sense of being completely divorced from any system of meaning, but in terms of being separated from any morality that is not simply *given*. And as Alasdair MacIntyre suggests, we would do well to consider a normative alternative. The latter need not be a revival of Aristotle's virtue ethics, as MacIntyre prescribed,[263] but the idea of examining 'things in themselves' to

[263] See Alasdair MacIntyre, *After Virtue*, 2nd ed. (Notre Dame: University of Notre Dame Press, 1984).

uncover their ontology is valuable. It is hoped that this project was able to illustrate this assertion. Furthermore, it is hoped that the philosophical methodology utilized might act as a guide for the proper resolution, as far as that may be determined, of contentious issues that are far too often established on unstable foundations. This would not only allow for authentic moral bounding, but also for the advancement of the political relation. And while this may not, and likely will not, lead to consensus, it nevertheless provides accessible and coherent rationales that go beyond mere rights and tradition.

Bibliography

An Act to Protect Religious Freedom and Promote Equality in Civil Marriage. 2009. Vermont Statute.

Civil Marriage Act. 2005. S.C. c. 33.

Constitution of the State of Alabama. Amendment 774 (2006).

Defense of Marriage Act. 1996. House Resolution 3396 (104th Congress).

Gill v. Office of Personnel Management. 2010. District of Massachusetts 699 F.Supp.2d.

Marriage Equality Act. 2011. New York Statute.

United States v. Windsor. 2013. 570 United States ____.

'Aristotle' in *Internet Encyclopedia of Philosophy* (eds. Bradley Dowden and James Fieser), http://www.iep.utm.edu/aristotl/

Atkins, E.M. 2002. 'Review of *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School*' in *The Heythrop Journal*, vol. 43, no. 4 (October). Pp: 533-534.

Avineri, Shlomo. 1972. *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press).

Ball, Carlos A. 1997. 'Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism' in *The Georgetown Law Journal*, vol. 85, no. 6 (June). Pp. 1871-1942.

Ball, Carlos A. 2003. *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge).

Bamforth, Nicholas C. and Richards, David A. J. 2008. *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (New York: Cambridge University Press).

Brake, Elizabeth. 2006. 'Hegel, G.W.F. (1770-1831)' pp. 429-435 in *Sex from Plato to Paglia: A Philosophical Encyclopedia*, volume 1 (ed. Alan Soble) (Westport, CT: Greenwood Press).

Brake, Elizabeth. 2010. 'Minimal Marriage: What Political Liberalism Implies for Marriage Law' in *Ethics*, vol. 120, no. 2 (January). Pp: 302-337.

Brake, Elizabeth. 2012. *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press).

De Marneffe, Peter. 1998. 'Liberalism and Perfectionism' in *The American Journal of Jurisprudence: An International Forum for Legal Philosophy*, vol. 43, no. 1. Pp: 99-116.

Eckholm, Erik. 2014. 'Opponents of Same-Sex Marriage Take Bad-for-Children Argument to Court' in *The New York Times*, February 22, 2014, http://www.nytimes.com/2014/02/23/us/opponents-of-same-sex-marriage-take-bad-for-children-argument-to-court.html?_r=0 (24 February 2014).

Finnis, John. 1991. *Moral Absolutes: Tradition, Revision, and Truth* (Washington, D.C.: Catholic University of America Press).

Finnis, John. 1994. 'Law, Morality, and "Sexual Orientation"' in *Notre Dame Law Review*, vol. 69, no. 5. Pp: 1049-1076.

Finnis, John. 1997. 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations' in *The American Journal of Jurisprudence*, vol. 42, no. 1. Pp: 97-134.

Finnis, John. 2008. 'Reason, Revelation, Universality and Particularity in Ethics' in *The American Journal of Jurisprudence*, vol. 53, no. 1. Pp: 23-48.

Finnis, John. 2008. 'Marriage: A Basic and Exigent Good' in *The Monist*, vol. 91, no. ¾ (July/October). Pp: 388-406.

Finnis, John. 2011. *Natural Law and Natural Rights*, 2nd edition (New York: Oxford University Press).

Franco, Paul. 1999. *Hegel's Philosophy of Freedom* (New Haven, CT: Yale University Press).

George, Robert P. and Bradley, Gerard V. 1995. 'Marriage and the Liberal Imagination' in *The Georgetown Law Journal*, vol. 84, no. 2 (December). Pp: 301-320.

George, Robert P. 1997. 'Public Reason and Political Conflict: Abortion and Homosexuality' in *The Yale Law Journal*, vol. 106, no. 8 (June). Pp: 2475-2504.

George, Robert P. 1997. 'Natural Law Ethics' pp. 460-465 in *A Companion to Philosophy of Religion* (eds. Philip L. Quinn and Charles Taliaferro) (Oxford: Blackwell Publishers Ltd.).

George, Robert P. 1999. *In Defense of Natural Law* (New York: Oxford University Press).

Goldstein, Joshua D. 2006. *Hegel's Idea of the Good Life: From Virtue to Freedom, Early Writings and Mature Political Philosophy* (Dordrecht, the Netherlands: Springer).

Goldstein, Joshua D. 2006. 'Neither a Rights Bearer nor a Reproducer Be: Same-sex Marriage and the Task of Political Philosophy' unpublished paper prepared for the Canadian Political Science Association General Meeting (June).

Goldstein, Joshua D. 2011. 'New Natural Law and the Grounds of Marriage: Friendship and Self-Constitution' in *Social Theory and Practice,* vol. 37, no. 3 (July). Pp. 461-482.

Grisez, Germaine, Boyle, Joseph, and Finnis, John. 1987. 'Practical Principles, Moral Truth, and Ultimate Ends' in *The American Journal of Jurisprudence*, vol. 32, no. 1. Pp: 99-152.

Hartley, Christie and Watson, Lori. 2012. 'Political Liberalism, Marriage, and the Family' in *Law and Philosophy*, vol. 31, no. 2 (March). Pp: 185-212.

Hegel, Georg Wilhelm Friedrich. 1970 [1830]. *Hegel's Philosophy of Nature*, volume 3 (trans. and ed. Michael J. Petry) (London: Allen and Unwin).

Hegel, Georg Wilhelm Friedrich. 1996 [1821]. *Elements of the Philosophy of Right* (trans. H.B. Nisbet) (ed. Allen Wood) (New York: Cambridge University Press).

Hittinger, Russell. 1987. *A Critique of New Natural Law Theory* (Notre Dame: University of Notre Dame Press).

Holpuch, Amanda. 'Utah defends same-sex marriage ban in appealing opening arguments' in *The Guardian,* February 4, 2014, http://www.theguardian.com/world/2014/feb/04/utah-same-sex-marriage-ban-appeal (24 February 2014).

Lee, Patrick and George, Robert P. 1997. 'What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union' in *The American Journal of Jurisprudence*, vol. 42, no. 1. Pp: 135-157.

MacIntyre, Alasdair. 1984. *After Virtue*, second edition (Notre Dame: University of Notre Dame Press).

Metz, Tamara. 2007. 'The Liberal Case for the Disestablishment of Marriage' in *Contemporary Political Theory*, vol. 6, no. 2. Pp: 196-217.

Metz, Tamara. 2010. *Untying the Knot: Marriage, the State, and the Case for their Divorce* (Princeton: Princeton University Press).

Pillow, Kirk. 2002. 'Hegel and Homosexuality' in *Philosophy Today: SPEP Supplement,* vol. 16, no. 5. Pp: 75-91.

Rawls, John. 1971. *A Theory of Justice* (Cambridge, MA: Harvard University Press).

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

Rawls, John. 1997. 'The Idea of Public Reason Revisited' in *The University of Chicago Law Review*, vol. 64, no. 3 (Summer). Pp: 765-807.

Rawls, John. 1999. *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press).

Rawls, John. 2003. *Justice as Fairness: A Restatement* (ed. Erin Kelly) (Cambridge, MA: The Belknap Press of Harvard University Press).

Sandel, Michael J. 1998. *Liberalism and the Limits of Justice*, 2nd edition (New York: Cambridge University Press).

Sandel, Michael J. 2005. *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press).

Stein, Sam. 'Obama Backs Gay Marriage' in *The Huffington Post*, May 9, 2012, http://www.huffingtonpost.com/2012/05/09/obama-gay-marriage_n_1503245.html (7 August 2013).

'Timeline of Gay Marriage in the United States' in *Reuters*, March 26, 2013, http://www.reuters.com/article/2013/03/26/us-usa-gaymarriage-chronology-idUSBRE92P04B20130326 (15 August 2013).

Wall, Steven. 'Perfectionism in Moral and Political Philosophy' in *The Stanford Encyclopedia of Philosophy* (Winter 2012) (ed. Edward N. Zalta), http://plato.stanford.edu/entries/perfectionism-moral/