

A Prima Facie Case Against Civil Marriage

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In 1970, President Richard Nixon expressed his support for interracial marriage; as for same-sex marriage, he exclaimed “I can’t go that far—That’s the year 2000.”¹ Nixon’s prescient remark, made shortly after the Supreme Court’s 1967 decision in *Loving v. Virginia* to overturn anti-miscegenation laws, expresses at once hesitancy for, yet resigned acceptance of, the inevitable expansion of civil marriage to include more and more kinds of loving partnerships. Nearly forty years later, Nixon’s uncanny prediction appears close to being realized. At the very least, many have gone where he claimed to be unable to go, adding their voices to a growing movement seeking state recognition of same-sex unions as a matter of equality, rights, and justice. And, indeed, a strong case might be made on such grounds were the state justified in sponsoring an institution of civil marriage in the first place.

However, as Nozick reminds us about political philosophy more generally, “the fundamental question . . ., one that precedes questions about how the state should be organized, is whether there should be any state at all.”² The same question must be asked not just of the state itself, but also of any of its institutions, whether property, punishment, or, as I will argue, marriage. Prior to asking how the state should organize civil marriage, we must ask whether and on what grounds the state ought to have such an institution at all.

In this paper, I will argue that taking Nozick’s question seriously requires coming to terms with the strong prima facie case in favor of a view I call *marital contractualism* (henceforth MC). This view holds that marriage ought primarily to be a private affair

worked out between or among partners, with the state's involvement limited to the enforcement of (1) general laws (regarding property, torts, crime, etc.) and (2) particular contracts that are individually designed within a defensible system of contract law. After describing the primary features of MC, I will offer a tripartite prima facie case in favor of this position and against civil marriage, arguing that MC is default-justified, has many attractive virtues, and avoids some important moral and social costs of civil marriage.

I. LIFE WITHOUT CIVIL MARRIAGE

It will be useful to begin by describing three cardinal features of life under MC.

(1) No state-defined, comprehensive legal status of marriage – The most obvious place where MC differs from civil marriage is in its thoroughgoing rejection of a preformed, state-defined legal status of marriage.³ Historically, there have been many kinds of legal status defined and recognized by law – a few of the more unsavory examples include titles of nobility, the status of “wife” under coverture law⁴, and the classifications of “subnormal mentality” (including “moron”, “low moron”, and “idiot”).⁵ What being legally “married” shares in common with these examples, and also with more respectable categories like “parenthood”, is that it forms a *comprehensive social identity*; it does not “relate directly either to episodes or transactions...[as do] ‘agent,’ ‘mortgagee,’ [and] ‘harasser’.”⁶ However, unlike many other non-episodic personal statuses such as parent or guardian, marriage does not directly relate to a relationship of dependency. It is in this way a unique status and just the kind of comprehensive state-defined identity that MC rejects.

(2) Enforcement of general laws – Under MC, laws governing torts, crimes, and property are applied consistently to persons across the board and take no account of

“marriage” per se. So for example the particular kinds of cover which abusive husbands historically have received from the fact that the abused happened to be their wives would have no place under MC. For the contractualist, abuse is abuse and it should not be redefined based on marital status or the lack thereof. And the same would hold for the requirements of other general laws and legal categories.⁷

(3) *Enforcement of particular contracts* – MC presumes that many will want the state to be a third-party enforcer to at least some aspects of their relationships. So long as the agreed-upon terms are consistent with a defensible system of contract law, the state is taken to have a legitimate role in enforcing these agreements.⁸ Moreover, under MC, persons are understood to have the same *freedom of contract* with marital partners as they would have with any other kind of contractual partners (i.e., the freedom to arrive at whatever terms are mutually agreed upon so long as they are consistent with the wider system of law under consideration). Similarly, persons would have the same *freedom to contract* as they would have in other kinds of contracts (i.e., the freedom whether or not to contract at all and also with anyone from whom one can secure agreement).⁹

II. THE PRIMA FACIE CASE FOR MC

A. MC is Default-Justified

The case for MC is strongest where two familiar presumptions are granted. The first holds simply that what requires defending is state regulation, control, and institutionalization, not their absence. Consider, for example, a representative expression of this presumption by Joel Feinberg.

[M]ost writers on our subject have endorsed a kind of “presumption in favor of liberty” requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should

leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.¹⁰

Feinberg's specific claim concerns matters arising in the criminal law, but need not be so duly restricted. In fact, the logic of the position arguably extends beyond coercive state action to all state action, forming an *initial* presumption against regulating and organizing individual lives in any way.^{11 12}

In the case of civil marriage, there are two possible targets against which this presumption might do work: (1) the legal category of marriage, and (2) the institutional superstructure of policy and administration that supports and promotes this category. In the *first* case, the default position of law is one without special legal categories; the burden is on someone proposing that the law recognize and treat differently a certain category to offer sufficient justification. There are, after all, infinitely many categories of actions or relations that the law could create or recognize; it is entirely unreasonable to assign the burden *initially* to those who would oppose, rather than support, the law's recognition of some candidate category. In the *second* case, any state use of limited social resources requires justification; the institutional superstructure of civil marriage is no exception. Hence, the initial presumption is against the establishment of a political institution like civil marriage; its defenders bear the burden of advancing a compelling case for overriding this presumption.¹³

The second presumption that I will draw upon in defending MC holds that contracting is an essentially innocuous (if not beneficial) activity when conducted within a *defensible* system of legal and social institutions. According to this presumption, no *general formal* properties of contractual acts (i.e., properties of any conceivable contractual act) can plausibly be understood as *wrong-making* properties. Thus, since

there is nothing intrinsically wrong with parties negotiating, exchanging and relying upon promises, etc., the contractual act *itself* is never morally problematic (or at least not in ways relevant to the state). Rather, any purported moral defects with a contract (e.g., unconscionability, duress, unfair terms, etc.) are attributable instead to larger problems with particular legal and social institutions (e.g., bad contract law, bad social policies fostering conditions under which persons agree to unfair terms, etc.).¹⁴

Putting the two presumptions together, it follows that MC is *default-justified*; it is the proper starting point for inquiry into the proper relationship between the state and the institution of marriage. Unlike any form of civil marriage, which necessarily involves the creation of a special legal category, MC requires no further arguments in its defense in order to satisfy the first presumption regarding liberty as a default norm. And since, per the second presumption, there is nothing morally problematic about contractual acts themselves, it follows that no other general normative consideration mitigates the *prima facie* justified status of MC. Thus, it is not just one alternative position that might be taken on the question of state-marriage interaction, but rather the legitimate default against which any case for civil marriage must respond convincingly.

B. MC has Important Virtues

I now want to identify five of MC's primary virtues, thus enriching the *prima facie* case in its favor.

(1) *Efficiency in social policy* – Civil marriage is, at best, an indirect means for accomplishing the social goals put forward to justify its promotion by the state. The circuitous connection between the institution and these goals can be questioned at a number of levels (e.g., empirical credibility, normative adequacy, etc.). MC, by contrast,

does not use an institution like marriage as a tool of social policy, as it does not by itself have any particular social policy to recommend; it is, as I shall elaborate upon momentarily, compatible with many approaches to social policy. Instead, MC encourages the state to seek more direct means for accomplishing whatever goals it may have. After settling on some desideratum, the state would need to consider the most efficient policy for achieving it. For example, in securing the legitimate interests of children, the state would be encouraged to work directly through the categories of parenthood/guardianship to provide education, material resources, etc. Since every child will be assigned parents/guardians but not every child's parents/guardians will be married, this more direct approach to social policy should be more efficient in achieving the desired goal.

(2) *Treats citizens as equals* – Civil marriage, whatever its form, can be understood as a social program which awards special status and social support to some via imposing social and financial costs on others (i.e., those who do not seek out or qualify for this status). Hence, it constitutes a form of unequal treatment of citizens and requires justification for overriding the broader presumption against such treatment by the state.¹⁵ MC faces no such justificatory burden, since it treats all citizens as having an equal right to initiate and individually design contracts which are consistent with a defensible system of contract law.¹⁶

(3) *Respects diversity and individual freedom* – MC maximizes the extent to which persons are free to pursue their individual and relational projects without pre-established legal regulations and expectations.

(4) *Increases likelihood of informed consent* – One of the more peculiar features of civil marriage in its present forms, according to Susan Okin, is that “the parties to it

are not required to be familiar with the terms of the relationship into which they are entering – or of its dissolution.”¹⁷ Anita Bernstein follows Okin here, noting of preformed legal statuses in general that “legal consequences follow to status-bearers without consent; only a rare person who acquires a comprehensive status understands what it means before the label is bestowed.”¹⁸ And the aptly named legal scholar Barbara Stark puts the matter in its starkest terms, noting that civil marriage involves plunging “blindly into legal relationships” that partners “know little or nothing about.”¹⁹

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

While the salience of this might vary from case to case, it clearly can have profound implications for many persons and, in some cases, seriously troubling results. For example, Claudia Card highlights the case of Betty Mahmoody who “found after arriving in Iran that she had no legal right to leave without her husband’s consent, which he then denied her, leaving as her only option for returning to the United States to escape

illegally (which she did)” (Card, 1996, p. 12). Here the facilitating element is clearly the status component of civil marriage, which allows for substantive differences in contractual terms to be brushed over in favor of a comprehensive social identity.

MC, by contrast, encourages substantive familiarity with the contractual terms under which one is agreeing to be bound, if for no other reason than the fact that one would be *designing* (though not necessarily creating *de novo*) the broad contours of those terms. This increases significantly the likelihood that the marital contract will be a “fully articulated act of will.”²⁰

(5) *Compatible with many theories of justice* – MC is a flexible theoretical position that potentially can pair with many theories of justice. One could be a conservative, libertarian, liberal, feminist, or utilitarian and still consider MC the appropriate way for the state to involve itself with the personal relational choices of citizens. Indeed, MC receives precisely this kind of multidirectional endorsement in the literature, where, for example, the position is endorsed by libertarians (Boaz, 1997), liberals (Kymlicka, 1991), and feminists (Fineman, 1995; Card, 1996) among others. By contrast, any particular account of civil marriage is much more limited in application (with many thicker conceptions compatible only with one kind of theory of justice).

C. MC’s Alternative has Important Moral and Social Costs

I want further to bolster and enrich the *prima facie* case for MC by noting how any alternative to it (i.e., civil marriage) incurs a variety of social and moral costs.

Many people initially might be surprised to learn that civil marriage has costs, since, for whatever reason, the institution often is talked about only in terms of its benefits. This distorted portrayal of civil marriage, in turn, implies (incorrectly) that its

benefits are Pareto optimal in character (i.e., they make some better off without making at least one other worse off). However, the institution incurs many explicit and implicit costs (all of which arguably are Pareto non-optimal when measured against a baseline of equality). Here it is useful to separate out two broader kinds of detriment to the state and its citizens²¹ – direct and indirect.

Direct detriments are the most uncontroversial kind of cost incurred via the recognition and promotion of civil marriage. As Bernstein notes of these detriments in the U.S. situation, “the federal government alone – not to mention the dozens of state governments that follow similar policies – spends or declines to collect billions of dollars each year because of its recognition of marriage.”²² For convenience, we can assign most of these detriments to two larger categories: (1) *administrative and promotional costs* (i.e., the sum total of resources directly expended in maintaining, promoting, and subsidizing the institution²³), and (2) *forgone income* that must be recovered by alternative means (e.g., lost tax revenue). These costs, of course, will depend on a number of factors. However, a plausible conclusion to draw here is that the more effective civil marriage is in realizing various individual and social goals, the more social resources it will exhaust. And, of course, what is important is not merely a lost, expended, or foregone resource itself, but also the other social goods it could have been directed toward securing but was not.

Direct detriments, it should be emphasized, are not incurred solely by the state; citizens (or some subset) also incur detriments as a result of civil marriage. Consider, for example, a society adopting the familiar policy to forgo tax revenue in order to promote and reward marriage. Assuming expenses remain constant, and cannot be paid for by

taxing married persons (by hypothesis), then non-married citizens will be forced to pay at a rate higher than if there were no marriage benefit. In this way, civil marriage policies constitute a kind of subsidy/redistributive transfer which makes the married better off at the expense of the non-married. This direct detriment is especially problematic where the non-married are more likely to be poor and disadvantaged already. As Bernstein notes, this is the case in the U.S. where the allotment of “public funds to individuals on the basis of marriage tend[s] to subsidize the well-off at the expense of the less prosperous.”²⁴

Indirect detriments also result from the state’s institutionalization of marriage. These detriments, while not caused directly by the law, are facilitated either by its partial regulatory involvement or encouraged by marriage-related “norms, customs, or other extralegal forces.”²⁵ Though more removed from the institution, these indirect detriments often are more salient in their effects on persons’ lives, effecting as they do access to fundamental goods, services, and social status. Familiar examples in the U.S. include the effects of marital status on access to employment, health insurance, and other benefits. Where non-married citizens either cannot access these goods at all, or can do so only at higher costs than would otherwise exist, then again they bear the cost of benefiting those who are civilly married.

However, it is arguable that the less familiar detriments are potentially the most worrisome, including as they do the costs of marriage-related norms and customs. Here financial subsidies give way to what Bernstein refers to as “ideological subsidies”, by which she means the transfers of *social* currency in ways that work to the detriment of both the married and unmarried. For the *unmarried*, these detriments include the stigmatizing and devaluing of alternative ways of life, including living singly,

cohabitating, and other forms of non-recognized partnering, which result from awarding higher social status and support to married individuals. This can be especially worrisome where rates of civil marriage differ markedly along lines of race, ethnicity, and class such that the institution reinforces and expands the substantial advantages already had by historically privileged groups. For the *married*, conferring legal status exclusively to some subset of families encourages and supports even the problematic aspects of these relationships. Potential detriments include the decreased welfare of those adults and children who, for all practical purposes, become locked into bitter, abusive, neglectful, or otherwise bad marriages and families. Civil marriage also may protect a private sphere where wrongdoers “get away with what the state would elsewhere remedy, punish, and deter” and reinforce, for example, the various ways that the traditional family structure tends to work to the disadvantage of women including the gender gap in gains from marriage and concealment of the work of caregiving.²⁶

Taken together, the two kinds of detriments flowing from civil marriage further strengthen the *prima facie* case for its primary alternative in MC.

III. CONCLUDING REMARKS

If my arguments are sound, then at least three *prima facie* considerations weigh in favor of a contractual alternative to state-sponsored marriage. Taken together, they compel me toward something of a politically incorrect position. For like President Nixon, I find myself unable to “go there” with respect to same-sex civil marriage. However, unlike Nixon, who presumably was put off only by the same-sex component of the equation, I see no good reasons to “go there” with respect to *any* form of civil marriage. While

many undoubtedly will find MC less attractive than me, I hope, at the very least, to have clarified the initial justificatory deficit they face in going any further.

¹ Cf. Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law: An American History* (New York: Palgrave Macmillan, 2002), p. 240.

² Nozick, 1975, p. 4.

³ Civil marriage tends to have a complex identity, at once combining elements of preformed legal status with elements of contract law. On one hand, a preformed state-defined legal status of marriage is a conceptual prerequisite for any system of civil marriage. If the state is to recognize and support some form of union to the exclusion of others, it first must define in law the precise set of conditions which demarcate the preferred from the excluded relational-types. On the other hand, elements of contract law are not so much a conceptual, as much as a practical, necessity for civil marriage. For any state allowing even a small amount of freedom for persons to decide whether and with whom one can enter and exit a marriage, it would seem that something like a contractual understanding of the relationship will take shape. Unsurprisingly, the uneasy relationship between these two constitutive elements is often neither stable nor fully coherent.

⁴ This legal status not only denied women access to property of their own, but in important respects entailed that they were actually themselves the property of their husbands.

⁵ Cf. Bernstein, 2003, p. 133, fn. 8.

⁶ Cf. Bernstein, 2003, p. 132.

⁷ I want to emphasize in particular that MC does not itself say anything about the nature or status of “parenthood” as a legal category; on my own account, I presume it to still exist and to define and regulate the status, rights, and responsibilities of parents and their children. Moreover, this category is a more appropriate means through which the state might work to secure the interests of children, as it is more direct, efficient, etc. and likely to cover a substantial number of additional children (e.g., the millions of children living in homes without married parents or guardians).

⁸ It is worth responding here to a question that is certainly lurking in the minds of some readers – namely, what makes for a defensible system of contract law (as well as a defensible system of tort law, property law, etc.)? I am sorry to say to anyone with that question in mind that I will not be answering it in this talk and for two main reasons that I hope will be well appreciated. First of all, and not to be discounted, is a simple matter of practicality – an adequate answer would involve writing a second dissertation on the normative foundations of contract law. And as much as I have enjoyed working on the normative foundations of civil marriage, I am not that ambitious at present (though perhaps in due time). Secondly, though, I actually want to be neutral with respect to larger theories of justice. I want the project to have direct relevance for those defending any number of such theories. In my considered judgment, the best way to think about marriage is to structure the legal system, including contract law, according to principles of justice (whatever one takes these to be) and then understand marriage as an ordinary contract that takes place within this system. So, both as a matter of practicality and as a matter of principle, I will leave larger questions about justice and political morality in brackets for much of what I will say.

⁹ Hence, the state could not legitimately create a *de facto* kind of civil marriage by placing additional restrictions on contracts that apply *solely* to marriage-like relationships; any restrictions on contracts must be motivated by more general concerns that in principle would apply to a much wider range of cases.

¹⁰ Feinberg, 1984, p. 9.

¹¹ Of course, this presumption arguably can be outweighed in the case of certain institutions.

¹² And, of course, this is essentially what Nozick comes to in urging us to take anarchy seriously as a starting point for political philosophy (a point which, again, can and ought to be applied independently to particular social and political institutions and not just the overall state itself).

¹³ I want briefly to address a potential objection here – namely, the objection that I am resting my presumptive case on a liberal or libertarian premise that will be unacceptable to many other theoretical perspectives. In response to this kind of objection, I want to clarify that the presumption in favor of liberty need not be understood as a substantive and positive statement about the “value” of liberty; rather, it can be treated as a “thin” methodological consequence of political theorizing. What I have in mind here is that for any given state, animated by whatever principles of justice one may conceive, it will still need to be shown

that a particular institution or category will adequately and sufficiently serve its interests. Again, there are literally an infinite number of possible institutions and categories that a given society might endorse and promote; the reasonable procedure to follow is not to assume the *prima facie* validity of each example and then assign the burden of proof to the critics, but instead to start from a condition of institutional anarchy and look for or construct those institutions and categories which are necessary or sufficient for promoting whatever social and political values are held by that society. Thus, nothing in my presumptive case turns on one's acceptance of distinctively liberal or libertarian premises; marital contractualism is the default-justified position, whatever "thick" theories of the good and the right one holds.

¹⁴ It is worth emphasizing just how central this distinction between system and act is to the case for MC, for it makes possible two of the view's cardinal virtues: (1) its moral innocence and (2) its open-ended compatibility with any number of theories of justice. Without the first virtue, the contractual act itself might be constituted by a wrong-making or bad-making property that would then be inherited by MC. Without the second virtue, the view would be far less useful as a tool for political philosophy. Separating system from act enables us to link MC (and its focus on the contractual act) with almost any given system of contract law (defined and animated by whatever normative principles), thus freeing theorists from the task of constructing any number of narrow and idiosyncratic accounts of civil marriage – liberal civil marriage, feminist civil marriage, etc. Instead, they can focus their attention on developing the contours of a broader and more far reaching institution of contract law which in turn will structure the particular character of marital contracts as they play out within that system.

¹⁵ This does not straightforwardly entail that civil marriage is unjustified; the military, for example, might be thought of as a social program with the same broad kinds of unequal effects, but its benefits arguably outweigh these burdens.

¹⁶ It might be added that MC, unlike many forms of civil marriage, does not face the even weightier charge of treating persons unequally in paradigmatically wrong-making fashion – namely, by privileging the already privileged. I will discuss and defend this claim further in Section II, Part C.

¹⁷ Okin, 1989, p. 123.

¹⁸ Bernstein, 2003, p. 133.

¹⁹ Stark, 2001, pp. 1479, 1482-83.

²⁰ Okin, 1989, p. 123.

²¹ This separation takes inspiration from Bernstein, who has analyzed the detriments of civil marriage into three kinds (2003, pp. 167-191): (1) *primary detriments* (detrimental effects that are caused directly by the law's recognition and special treatment of the category of marriage), (2) *secondary detriments* (detrimental effects that, while not caused directly by the law, are facilitated by its partial regulatory involvement), and (3) *tertiary detriments* (detrimental effects encouraged by marriage-related norms, customs, or other extralegal forces).

I ultimately have decided to try to simplify this taxonomy by focusing on direct detriments (which on Bernstein's account are primary in character) and indirect detriments (which include both Bernstein's secondary and tertiary detriments).

²² Bernstein, 2003, p. 141.

²³ It would be very difficult to calculate the exact size of these administrative and promotional costs, which include (among other things) all the time, money, and labor invested in drafting, printing, processing, storing, accessing, interpreting, and enforcing marriage licenses/contracts and in efforts to promote the institution (cf. 'State Policies to Promote Marriage', a 2002 report prepared for the U.S. Department of Health and Human Services that is available at: <http://aspe.hhs.gov/hsp/marriage02f>). By contrast, MC has no promotional costs and any administrative costs associated with it more properly can be described as costs of a larger beneficial institution of contracting (and thus as requiring no special justification).

²⁴ Bernstein, 2003, p. 169.

²⁵ Bernstein, 2003, p. 167.

²⁶ Some will undoubtedly argue that these indirect detriments are only contingently related to civil marriage; particular versions of civil marriage could minimize or do without them. While this is, strictly speaking, true for any given detriment, it misses a larger point. Insofar as a regime of civil marriage is likely to do well in securing the goods it is enlisted to secure, it will be because the benefits of binding one's self legally to another are sufficiently substantial in their financial and/or social benefits. And, as we have seen, there are no "free" marriage benefits to be had here. All benefits, whatever their nature, come at a cost that must be borne by someone or some group; the greater the benefit, the higher the costs. Thus,

while a given form of civil marriage might outperform existing models in terms of minimizing or eliminating certain detriments, it will be impossible for them to work in the right ways (i.e., to secure and promote the goods they are enlisted to serve) without incurring significant detriments in other ways. One way to sum this up is to point out that civil marriage will either have substantial costs (as a consequence of actually successfully encouraging a certain way of life) or insubstantial benefits (as a result of not costing enough).