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What is the “Meaning” of “Marriage”?

CONNIE S. ROSATI*

In his essay on the meaning of marriage, Richard Arneson speculates, from a prioritarian consequentialist perspective, about appropriate state policy with regard to private relationships involving love, sex, and childrearing.¹ Arneson’s aim is not to defend particular policies; rather, it is to identify the values advanced by marriage as traditionally conceived and to explore ideas about alternative social arrangements for promoting these values. I find much to agree with in Arneson’s wide-ranging discussion. I generally concur, for instance, with the substantive positions he takes on the issues of same-sex marriage, monogamy, and the state’s interest in advancing the welfare of children. Our disagreements lie more at the level of theory than practice, for while I share Arneson’s interest in designing policies that advance human welfare, I do not share his consequentialist framework. Time constraints prevented me from delving into these disagreements when I commented on his essay at the “meaning of marriage” conference. While I cannot explore them fully even here, I will say a bit about our theoretical differences in the more extended commentary that follows. My hope in so doing is both to sharpen my earlier comments and to offer a few speculations that bear on our efforts to understand the meaning of marriage and to resolve complex issues in this area.

I shall begin with the limited remarks I offered at the conference. Arneson has addressed these remarks in his revised essay just as one would have expected from within his theoretical framework; and given

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1. See Richard Arneson, *The Meaning of Marriage: State Efforts to Facilitate Friendship, Love, and Childrearing*, 42 SAN DIEGO L. REV. 979, 981 (2005).

his starting point, his reply strikes me as entirely reasonable.² Still, it is the framework about which I have doubts, and it is these doubts which leave me unsatisfied, at least in certain respects, with his reply. My plan is to go beyond my earlier comments in two ways. First, I will offer a few, quite general reflections prompted by the conference papers and sessions. Second, I will use these reflections as an opening for presenting a different framework—a different understanding of the theoretical underpinnings of any appropriate state policies with respect to private relationships involving love, sex, and childrearing. Although I find this alternative framework the more appealing of the two, my aim is not to settle the issue of which to adopt in thinking about the meaning of marriage; rather, it is to expose what I worry may be missed by the framework Arneson employs. As already noted, I generally agree with Arneson’s substantive positions, and our shared views could fairly be described as the opposite of conservative. Nevertheless, I hope to suggest how one might begin to vindicate conservative thinking, not about the proper form of marriage and family, but about the special, foundational role of marriage and family in social life.

I. ARNESON ON THE MEANING OF MARRIAGE

Arneson helpfully sets out two quite different normative approaches to the state’s role in regulating the private affairs of love and childrearing. According to the Lockean natural rights approach, since consensual sexual relationships may produce children, and the children thus produced may negatively impact the rights of those who do not consent to bear the consequences of childrearing, even a “night watchman” state may legitimately see to it that children’s minimal needs for care are met.³ That is, even such a state has an interest in seeing to it that, in one way or another, people fulfill their obligations to see (minimally) to the well-being of any children they produce, preparing them for adult life. Beyond its interest in protecting the rights of those who have not consented to bear the

2. Arneson also sent me helpful written comments in response to an earlier version of this extended commentary. I have added a few qualifications in light of his remarks, and in a couple of places, I explicitly mention his reactions in footnotes, but the many insightful points he raises deserve a more detailed response than I can undertake to offer here. As his reactions make clear, the theoretical issues that seem to separate our approaches are enormously complex. I will cite to these written comments as “Comments from Richard Arneson, to Connie Rosati.” When I mention Arneson’s “reply” to my commentary, I will be referring not to these comments, but to the response he offers in the final version of his article.

3. As representative of the Lockean libertarian position, Arneson cites ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Arneson, *supra* note 1, at 979 n.1. See also JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

possibly negative effects of childrearing, the Lockean approach considers the state to have no legitimate interest in restricting family life or regulating how people arrange their private relationships. In particular, the Lockean approach regards the state as having no legitimate role in coercing or restricting people for the sake of their own welfare. As Arneson puts it, “Lockean adults are perfectly at liberty to enter into less than optimal or even self-destructive marital arrangements if they choose.”⁴

In contrast, Arneson favors an approach in which the normative standard that governs state regulation of family, love, and childrearing is given by prioritarian consequentialism. As Arneson explains it, the prioritarian tells us that the state’s policies toward childrearing and personal relationships ought to be selected on the basis of what will produce the best outcome in terms of people’s welfare, with a “thumb on the scale” for those who are worse off. The prioritarian “assigns greater moral value to obtaining well-being gains for people, the worse off they would be without those gains.”⁵

Arneson observes that welfare is enhanced by good childrearing practices—being well brought up increases a person’s lifelong well-being. It is also enhanced, he notes, by engaging in pleasurable casual sex. Arneson comments, in passing, that if humans were capable only of such low-level intimacy, then the state ought to promote “both the frequency and the quality of [casual sexual] encounters.”⁶ Just what he envisions is not entirely clear, though I confess that his remarks brought to mind the scene in which Woody Allen’s *Sleeper* character has his first happy encounter with the state-issued “orgasmatron.”⁷ We need not investigate the matter further, however, for as it happens, humans are capable of, and benefit far more from, something that goes well beyond casual sexual flings, namely, committed sexual friendships, or “CSFs”—relationships marked not only by sexual intimacy but by close friendship and shared

4. Arneson, *supra* note 1, at 981.

5. *Id.* at 984.

6. *Id.* at 983.

7. SLEEPER (United Artists 1973). In response to my mention of Allen’s film, Arneson observes that when a person “properly seeks simple pleasures, there is no reason to eschew any useful technology.” Comments from Richard Arneson, to Connie Rosati 1 (2005) (on file with the San Diego Law Review). I assume, however, that Arneson would accept some such qualification as “except when the use of that technology seriously risks impairing a person’s ability to pursue more beneficial sources of satisfaction.”

life projects, which may, but need not, include childrearing. Accordingly, the state should promote both good childrearing and CSFs; it not only legitimately *may* but *ought* to regulate each in the interest of advancing welfare. Arneson suggests that at least the following three considerations should figure in the determination of appropriate state policy: (1) the state's "legitimate interest in promoting good childrearing to boost people's lifetime expected well-being," (2) its interest in "promoting CSF[s] to boost people's lifetime expected well-being," and (3) its interest in promoting social arrangements that bring us closer to a world in which the average well-being level of men and women is roughly the same.⁸

Having emphasized the state's legitimate role in promoting welfare, and having identified the corresponding considerations that must govern state regulation of love and childrearing, Arneson goes on to raise a host of questions about appropriate social policies. As our experience with the great utilitarians, Jeremy Bentham and John Stuart Mill, has brought us to expect—and as Arneson ably demonstrates—once one adopts a consequentialist perspective, the social world never looks quite the same.⁹ The question of the proper shape of social institutions becomes wide open—up for grabs and re-envisioning, constrained only by considerations of welfare and by such contingencies as our empirical investigations may reveal. Traditional institutions and practices have no intrinsic normative weight. That is to say, institutions and practices have no *per se* authority simply because they are traditional. Of course, the fact that they are longstanding and the source of expectations and reliance will partly determine the consequences of either retaining or altering them; and their consequences will make them relevant to consequentialist planning. But then any normative force they may possess must derive from whatever contingent role they happen to play in advancing welfare.

The state has long advanced welfare by bundling childrearing and CSFs in one social institution, that of traditional marriage. As Arneson observes, however, one can ask whether childrearing and CSFs are best

8. Arneson, *supra* note 1, at 984.

9. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Meuthen & Co. 1970) (1789); JOHN STUART MILL, THE SUBJECTION OF WOMEN, *in* THREE ESSAYS 425 (2d ed., Frederick A. Stokes Co. 1911) (1869). In our time, the utilitarian best known for drawing out what some find the rather startling implications of utilitarianism is Peter Singer. See PETER SINGER, RETHINKING LIFE & DEATH (1994). Singer's qualified support for such policies as the availability of euthanasia in cases of severe birth defects has brought him not only the derision of disability activists, who mistake his position for advocacy of genocide or eugenics, but death threats. See Claudette Vaughan, *Is This a Dangerous Philosopher? The Peter Singer Interview*, VEGAN VOICE MAG. (Australia), Feb. 2002, at 7–10, available at http://www.animal-lib.org.au/more_interviews/singer; Harriet McBryde Johnson, *Unspeakable Conversations or How I Spent One Day as a Token Cripple at Princeton University*, N.Y. TIMES MAG, Feb. 16, 2003, at 50.

promoted by their being bundled in this way. One can ask whether traditional marriage—that is, legally regulated, opposite sex, two person marriage—is, in all cases, the best vehicle for promoting either or both. Our efforts to answer these questions would properly depend, at least in large part, on careful empirical investigation.¹⁰

As already indicated, I am not inclined to defend state regulation of childrearing and intimate relationships on purely consequentialist grounds. Still, it is worth emphasizing the significant virtues of Arneson’s own consequentialist approach. Perhaps chief among them is the sheer light it brings, for it helps to expose key issues often missed in public debates about marriage—about whether it should be harder or easier to enter and exit marriage, and about who should be permitted to enter it in the first place. As his approach makes clear, we need to distinguish the “meaning” of marriage as an institution the state has an interest in recognizing and regulating, from the “meaning” of marriage as supplied by religious institutions or other civil associations. Having made this distinction, we can begin to investigate which of the underlying values promoted by traditional marriage the state has any legitimate role in advancing. We can also begin to consider whether traditional marriage or some alternative marital and childrearing arrangements might best promote those values.

Certain concerns that one might have about Arneson’s approach and his substantive suggestions can be addressed relatively easily. One might wonder, for example, whether his approach sufficiently respects the importance to many people’s identities of biological relationships which may be upset when CSFs and childrearing are not bundled. One might also wonder whether Arneson’s approach takes sufficiently seriously the importance of the accumulated wisdom that underlies traditional social institutions, and so the importance of going slowly when it comes to altering arrangements which appear to have long

10. It would depend as well on our theory of welfare. Arneson takes no position on the nature of well-being in his essay, taking for granted wide agreement about “what is desirable and worthwhile.” Arneson, *supra* note 1, at 982. While this strategy is generally fair, for reasons I hope will become clear later, which theory of welfare we adopt makes a larger difference than Arneson seems to allow. It matters not only to how we come out substantively on the question of which institutional arrangements and social policies to favor; it also matters to our choice of framework for addressing that question. It matters in this way because some conceptions of welfare may contain peculiarly nonconsequentialist elements.

served important human purposes reasonably well.¹¹ In particular, one might stress that we ought to go very slowly when it comes to further eroding an institution so critical to the welfare of children and, thereby, to social structure and stability. But the consequentialism Arneson favors will surely give due regard to these matters, at least insofar as they bear on welfare, if the facts are as those who might raise these points would seem to believe.

A different concern begins to move us closer to those more theoretical disagreements which I tabled for purposes of the conference. As I expressed it during the session on Arneson's paper, one might wonder whether his approach permits him to engage fully with those who do not share his views of sexuality, love, and childrearing—those who do not think casual, harmless sex acts are “good per se,” who would not hail the advent of the orgasmatron, who fear any unbundling of marriage and childrearing.¹²

The moral philosopher R.M. Hare famously observed that people have not only interests but ideals, which they do not see as a mere matter of their welfare or preference and which they may be prepared to advance even when doing so conflicts with their welfare.¹³ Hare struggled to reconcile the role of ideals with his own utilitarianism. In the end, he seems to have wanted to treat a person's attachment to an ideal as just another interest which might or might not be outweighed in the utilitarian calculus that takes place in what he called level-two or “critical” moral thinking.¹⁴ But not all moral philosophers, not even all of those within the utilitarian camp, have been so quick to abandon ideals as expressing values distinct from welfare.¹⁵

11. For an example of the sort of conservative view that underlies this worry, see JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 159–71 (2004) (distinguishing and evaluating two versions of Hayekianism and arguing that the milder, more plausible form does not count against gay marriage). See also Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 *SAN DIEGO L. REV.* 1059 (2005).

12. Arneson has rightly insisted that many people who disagree deeply can nevertheless fruitfully discuss issues by, say, adopting the other's perspective for argument's sake and then challenging that very perspective. I never meant to deny this, but my earlier, too brief comments failed to make my point clear. As I would now express it, my point is that Arneson's approach may prevent him from engaging fully with those who do not share his views insofar as it leads him, as explained in the next section, to miss what may be correct in their position.

13. See R.M. HARE, *FREEDOM AND REASON* 137–85 (1963).

14. See R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* §§ 10.1, 10.4–10.7 (1981).

15. Indeed, some utilitarians and perfectionists think the fundamental evaluative category is good, not welfare. See, e.g., GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* ¶¶ 110–35 (1903); Donald H. Regan, *Why am I My Brother's Keeper?*, in *REASON AND*

I suggest that those on the other side of the current marriage debate may be seen as holding a certain ideal of love and family life. That ideal is of the traditional, nuclear family, with enduring, romantic love between a man and a woman together with childrearing.¹⁶ No doubt those who hold this ideal also think that adhering to it—matching one’s life to it—also enhances individual welfare. But that need not be their primary reason for embracing it. The ideal stands in need of both further articulation and solid grounding, of course. One would like to know precisely why it is an ideal—something *normative*. The important point, however, is that the ideal might be thought to express a value not reducible to whatever impact adhering to it may have on individual well-being. The question then naturally arises whether the state has a legitimate interest in promoting a value or ideal apart from its impact on people’s welfare. I believe, and will argue later, that it does, though it is a value or ideal at best imperfectly expressed by the ideal of the traditional nuclear family. Or, to put the point more precisely, the traditional nuclear family is but one context for realizing the nonwelfarist value that the state has a legitimate interest in promoting.

Notice that the appeal to ideals is captured by neither the Lockean nor the consequentialist approaches that Arneson sketches, at least not as something of independent normative weight. And yet it seems that those who describe themselves as concerned with the protection of traditional marriage—those who express dismay about Las Vegas wedding chapels and Caribbean quickie divorces, who express grave concern that permitting same-sex marriage will erode traditional marriage—may regard themselves not as mere defenders of tradition but as advocates for an ideal that merits our deepest concern and our steadiest support. They may insist, moreover, that if a democratic society chooses to uphold such an ideal, that is enough to justify the state in its promotion.¹⁷

VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 202 (R. Jay Wallace et al. eds., 2004); Thomas Hurka, ‘Good’ and ‘Good For,’ 96 MIND 71, 71–73 (1987).

16. For a bit of evidence that such an ideal lies behind the views of some contemporary opponents of same-sex marriage, see Christopher Wolfe, *Why the Federal Marriage Amendment is Necessary*, 42 SAN DIEGO L. REV. 895, 916–21 (2005). For helpful examination of the limitations of conservative arguments against same-sex marriage, see RICHARD H. DEES, TRUST AND TOLERATION 120–44 (2004).

17. Moving beyond ideals, those who think certain forms of sexual conduct and certain forms of interpersonal relationships are intrinsically immoral—same-sex or polygamous arrangements—will reject the consequentialist picture Arneson favors. Wolfe evidently takes such a view. See Wolfe, *supra* note 16, at 897–98.

I suspect that Arneson, like me, would be inclined to say that the proper approach to state regulation of marital and childrearing arrangements will leave people largely free to hold their ideals and adhere to them with like-minded people.¹⁸ But of course, those who embrace the ideal of traditional marriage worry about its fragility in an environment in which it receives no special sanction and support. Preserving that ideal need not require that society withhold its recognition from marital arrangements that depart in one way or another from traditional marriage. Perhaps, as a number of conservatives have argued, permitting same-sex marriages would enhance rather than erode the ideal, or at least what is truly essential to it.¹⁹ But we cannot hope to preserve the ideal of traditional marriage, or whatever genuine value it may imperfectly reflect, without proper recognition of what may be at stake, and what may be at stake is the thing that I worry may be obscured by the prioritarian approach.

In response to my comments, Arneson fairly notes that the theoretical issues that divide welfare consequentialists from believers in nonwelfarist ideals go far beyond what he could possibly attempt to address, and he reasonably questions the precise relation ideals stand in to welfare.²⁰ To the extent that ideals ultimately have normative force, they may have it only insofar as they form an integral part of our welfare or insofar as they may be instrumental to our leading flourishing lives. Arneson rightly observes that “the nature and depth of the disagreement between one who holds that some values are impersonal and do not reduce to well-being gains and losses and one who denies the existence of such values depend on the consequentialist’s understanding of well-being.”²¹ But the disagreement does not depend on that alone, and it is precisely this that prioritarian consequentialism may lead us to miss.²² The difficulty, I will be suggesting, is not, as Arneson remarks, that the emphasis on well-being may “seem crass from some ideal-based perspectives.”²³ Rather, there is something to the conservative idea that the

18. Allowing people to hold ideals and adhere to them obviously does not require the state to put its imprimatur on them or to provide their adherents with the benefits that currently accompany marriage. For example, the state might withhold the benefits of marriage from those who have children and maintain relationships with multiple partners; the state might even decide to withdraw all benefits from traditional marriage and, indeed, to get out of the marriage business altogether.

19. See, e.g., Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, THE NEW REPUBLIC, Aug. 28, 1989, at 20; RAUCH, *supra* note 11, at 11–54 (discussing which of the ideas associated with traditional marriage is really essential to marriage).

20. Arneson, *supra* note 1, at 995.

21. *Id.*

22. I say *may*, because, as I point out at the end of this essay, just what theoretical commitments a consequentialist may take on board is itself a large theoretical issue.

23. Arneson, *supra* note 1, at 995.

state has a legitimate interest in advancing some values regardless of whether they are reducible to welfare, and so there is also something to the conservative’s apparent insistence that the meaning of marriage is not exhausted by its impact on welfare.²⁴

II. MARRIAGE AND MEANING

Whether or not one views traditional marriage as an ideal, it is worth reflecting on why those who do might reasonably find it especially normative. Much has already been written about what marriage achieves such that society has a serious interest in its preservation. For example, Jonathan Rauch, in his defense of gay marriage, convincingly emphasizes the importance to society of marriage, as a social and legal institution, insofar as it helps to settle the young, especially young men, and provides for reliable, mutual caretaking by adults.²⁵ My sense, however, is that if we emphasize only such effects of marriage, important though they are, we will fail to get to the heart of the matter; we will not yet have gained full insight into whatever special normative significance marriage might have. Though I have indicated my interest in trying to vindicate the conservative idea that marriage and family have a foundational role in social life, in what follows, I will not attempt to track how conservatives understand this idea or to consider why they hold it. Rather, I want to engage in some speculations of my own. The emphasis here is on the word “speculations” for I offer mere hypotheses, broad conjectures that must still be tested by analysis and argument of a sort I cannot undertake to offer here. My suggestion will be that although we ought not to adopt the view of traditional marriage as itself an ideal, we ought to embrace a different yet closely related ideal or value, and this value may indeed serve to underwrite the importance

24. I should mention that I use such expressions as “the conservative idea” and “the conservative’s apparent insistence” with some misgivings. I am suspicious of the label “conservative,” because those who willingly apply it to themselves and their own views seem to hold more varied theoretical and practical positions than the label would imply.

25. See RAUCH, *supra* note 11, at 18–19. Rauch observes that settling the young, especially young men, is critical to social stability, as unmarried men are far more likely to be involved in antisocial behavior. As for how same-sex marriage ought to come about, Rauch defends a state-by-state, federalist approach. RAUCH, *supra* note 11, at 172–91. For an opposing view, see EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION (2004) (arguing in support of Supreme Court recognition of same-sex marriage). See generally SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997) (containing essays expressing a variety of views about same-sex marriage).

marriage has seemed to many to have. Before presenting my speculations, however, let me offer a few thoughts prompted by the sessions and the many conversations that took place at the meaning of marriage conference.

In reflecting on the conference I was most struck by two related things. The first was the variety of takes participants had on the theme of the conference. Participants responded to the theme of the “meaning of marriage” by exploring a range of topics, including the implications of empirical research into the sundry effects of marriage as a social institution and the relative merits of conservative and liberal views about same-sex marriage. They advanced views about appropriate social and legal methodology for thinking about questions relating to marriage, sex, and childrearing and challenged the expertise of lawyers to speak to these questions. Participants’ wide-ranging treatments were no doubt prompted by the expansive questions raised in the letter of invitation for the conference, as well as by differences in their research methods and interests.²⁶ Still, I would have liked to hear more explanation of why each participant approached the theme as he or she did.

I was perhaps even more struck, though, by how little seemed to be asked or addressed in the way of conceptual questions. Not only did conferees leave largely unexplored what the question of the “meaning of marriage” might concern, but they largely assumed a shared understanding of what marriage is.²⁷ I make these observations not to imply any criticisms. Conferees explored the issues posed for the conference in very fruitful ways. But I was left wondering whether the inattention to more conceptual questions forestalled a deeper exploration of the underlying normative issues. I believe these issues sorely need exploration if we are to make further progress in contemporary debates about marriage and childrearing. I therefore want to offer some preliminary thoughts about the theme of the conference and the concept of a marriage.

The question “*What is the meaning of marriage?*” naturally invites at least two distinct inquiries. The first concerns the nature of *marriage*. Just what is a marriage—what is the nature of the thing about whose meaning we inquire? The second concerns marriage’s *meaning*. Just what is an inquiry into something’s “meaning,” and given the nature of such an inquiry, what might we say about the meaning of marriage in particular? I am most interested in the second inquiry, and I return to it shortly. I want to begin, however, by offering some thoughts about the first inquiry.

26. Brian Bix makes note of these questions in his essay, *Everything I Know About Marriage I Learned from Law Professors*, 42 SAN DIEGO L. REV. 823, 825 (2005).

27. *But see id.* at 826–27. Bix briefly discusses the question of how marriage is to be defined, though that is not precisely the same as the question of what marriage *is*.

It is tempting to think that it is obvious what marriage is. It is tempting to think that we possess a single, social understanding of marriage, an understanding at once transparent, widely shared, and fundamental.²⁸ Most participants at the conference focused on marriage as a particular social institution or, rather, as a social institution that has had a characteristic form in our culture. But in fact, inspection of our talk about marriage suggests that the term ‘marriage’ is used to convey a number of ideas, with varying descriptive and normative content. I want to distinguish here between three types of talk about marriage.

The first is partly descriptive and partly normative. Both Arneson and Cheshire Calhoun characterize marriage, in their respective essays, as a (socially sanctioned) union that serves a number of important purposes. Arneson talks, as we have seen, in terms of committed sexual friendships involving sexual intimacy, close friendship, and shared life projects.²⁹ Calhoun notes that marriage has long been thought of as a “multipurpose association” that is supposed to satisfy a plurality of needs—for sexual and emotional intimacy, reproduction, childrearing, and the care of adults’ material needs.³⁰ As both observe, there may be problems with looking to a single union as a locus for satisfying all of these needs, though as Arneson also observes, certain considerations may tend to militate in favor of arrangements roughly along the lines of traditional marriage.³¹

The sort of union Arneson and Calhoun depict is itself a kind of ideal. Notice, however, that as familiar as the ideal they describe is, not all talk about marriage is closely tied to the idea of a multipurpose union. Some of our talk is more purely descriptive and treats marriage merely as a legal institution that creates a binding relation between parties. More or

28. During one session at the conference, Christopher Wolfe suggested that there is such a social understanding, but for reasons that I offer herein and could only gesture toward at the time, I have doubts about this.

29. Arneson, *supra* note 1, at 983.

30. See Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage?*, 42 SAN DIEGO L. REV. 1023, 1030 (2005) (citing KAREN STRUENING, *NEW FAMILY VALUES: LIBERTY, EQUALITY, DIVERSITY* 85 (2002)).

31. These considerations are, as Arneson expresses them, that children are generally better off when “raised under the steady supervision of a small number (larger than one) of parent or guardian individuals who have primary direct responsibility for meeting the child’s needs and carry out this function without interruption until the child is grown,” and that adults are generally better off if they live “with at least one other adult who is both a long-term friend and a long-term sexual partner.” Arneson, *supra* note 1, at 989.

less rigid social roles and expectations may accompany membership in this legal union, but they need form no essential part of it. Varying legal rules govern the relation of marriage—the terms of its membership, initiation, and dissolution—as well as the terms of ownership and control over property and authority over and access to offspring. Traditionally, marriage as a legal relation has been limited to heterosexual couples. But although, by our own tradition, only two, opposite-sex people can be married to each other at a time, nothing about marriage in the legal sense precludes a person from standing in like legal relations to more than one person at a time or to persons of the same sex. It is all a matter of the rules. Polygamy is, after all, marriage to multiple partners, and such “plural marriage,” as it is sometimes called, has historically been legally sanctioned in many places. At least since the emergence of an ideal of companionate marriage, marriage is supposed to occur between persons who have fallen in love. But marriage as a legal relation need be premised on no particular feelings between the partners—a mail-order or arranged union is as good, from the legal standpoint, as a romantic union. There need be no sexual contact nor any emotional intimacy. The legal relation has generally been treated as a prelude to, and a relation entered into partly in the interest of, producing and rearing children. Nevertheless, partners can be legally married yet have no children and, indeed, be engaged in no shared undertakings whatsoever. Britney Spears was as legally married in those fleeting twenty-four hours after her first walk down the aisle as were Bob and Dolores Hope after sixty-nine years of marriage.

Rules governing the legal relation of marriage, then, may or may not limit it to heterosexual partners, to two partners, to mutually consenting adults, or to those who undertake childrearing. The law need not be bound by marriage’s conceptual limits, whatever those might be, but even if it were, nothing in the very concept of marriage would seem to dictate all of our traditional limits on the form and function of marriage as a legal or social institution. Arguably it does not, for example, dictate the prevalent legal restriction of marriage to opposite-sex partners. Supporters of same-sex marriage may be criticized (wrongly) for advocating “immorality” and supporting a misguided social policy. They may also be criticized (wrongly) for embracing the supposedly undesirable and conventional social institution of marriage, which gays would allegedly do better to shun. But they cannot, I believe, plausibly be criticized for conceptual confusion.

This last observation brings us to a third kind of talk about marriage. Talk about marriage of this third kind is perhaps closely tied to talk of the first kind, but I treat it separately to emphasize a certain, quite critical point: Some of our talk about marriage is what we might call

richly normative. When I say that some of our talk is richly normative, I do not mean to suggest that it has no descriptive content. On the contrary, its normativity is strongly tied to that content. Still, central to this talk about marriage is a fundamental *moral* relation between partners. This moral relation is accompanied by a characteristic emotional bond, a being in love with rather than a merely loving. This moral relation is also accompanied by a characteristic joining of forces, a uniting for common purposes rather than for what remain purely personal endeavors. In these respects it is akin to Arneson and Calhoun’s ideal of a multipurpose union. Its normatively distinguishing mark, however, is not romantic love as such, but a deep bond that is partly constituted by an abiding valuing of one another.³² This bond, the care each has for the other, manifests itself in acts of caretaking, of nurturing and support. But as Stephen Darwall has recently observed in his work on welfare, in caring for another we regard him or her as *worthy* of care—as having a value that warrants our caretaking acts quite apart from the fact that we happen to care.³³ Such is the regard loving parents have for their children and devoted spouses for one another.

Talk about marriage in this third sense is, I suspect, what we hear when people describe a legally unmarried couple as married or a legally married couple as not having a real marriage. On this understanding, Britney Spears, despite a legally binding union, was no more married to—what was his name?—than she was to any number of men she had dated without ending the evening at the Little White Wedding Chapel on the Las Vegas Strip.³⁴ And the same-sex couple, still together after ten

32. It might seem that I am confusing the love and care that exist in personal relationships for the more abstract moral love and concern we are supposed to have for all persons. The last thing I mean to suggest is that the love we feel for our partners and our valuing of them is identical in all respect to our love for and valuing of persons as such. My point is that insofar as our marital relations are moral relations, their moral character rests not in romance but in regard for the other’s value. Of course, that is the same regard that, according to Kantian ethics, morality requires us to have for all persons. My second point will be precisely that this regard seems to come more easily in the context of personal relationships. Morality *requires* us to value mere others in a certain way in which we more readily value intimates. I will not try to settle whether my second point is purely empirical or at least partly conceptual. Obviously to the extent that it is empirical, it will require support that goes well beyond the mere suggestions I am able to offer here.

33. See STEPHEN DARWALL, *WELFARE AND RATIONAL CARE* 8 (2002).

34. *Blink and You Missed Spears’ First Marriage*, L.A. TIMES, Jan. 5, 2004, at A11.

years, may be as married as any like, legally married heterosexual couple, despite the fact that their relationship lacks the law's sanction.

While I have not tried to offer an analysis of the concept of marriage, I believe that insofar as there is a well-formed concept of marriage, any efforts at analysis would do best to begin with this third kind of talk. Whether or not marriage admits of conceptual or philosophical analysis, however, it is talk of marriage in this third sense that I find of greatest interest, for reasons that will become clear as my hypotheses emerge. Before spelling out the earlier promised speculations, now would be the right time to turn to our second inquiry—inquiry about the *meaning* of marriage.

Various things might be meant by an inquiry into the “meaning” of marriage. One might be inquiring, among other things, into the significance people actually attach to a certain social institution, into the real world effects and operation of that social institution, or into its complex, possibly shifting normative foundations and their bearing on appropriate state policies. Arneson, as I understand him, engages in roughly this last sort of inquiry. In one signification of the term ‘meaning,’ the meaning of something is its value or, more precisely, the values it serves. Arneson’s approach, as we have seen, is to investigate the values the state may have a legitimate interest in promoting, values it has partly promoted through a certain social institution—traditional marriage. He then treats as separable questions whether those values are best promoted as a single bundle and whether they are best promoted through traditional marriage itself.

Arneson, as a prioritarian consequentialist, views the state’s legitimate regulatory role in the areas of intimate relationships and childrearing as based on the promotion of welfare. The state has a legitimate interest in advancing the welfare of those who reside within its territory, and because people’s welfare is critically affected by good childrearing and CSFs, the state may legitimately promote both. This seems right, so far as it goes, but it leaves unanswered certain fundamental theoretical questions, chief among them, why we should care about people’s welfare in the first place.³⁵ Why would people’s welfare make a normative claim on the state? I am inclined to answer this question along the lines suggested in recent work by a number of moral philosophers: people’s welfare matters because *they* matter; their welfare makes a normative claim on us because *they* have a value for which we must

35. Arneson has indicated to me that he thinks welfare is uncontroversially normative. See Comments from Richard Arneson, to Connie Rosati, *supra* note 7, at 3. He may be right that welfare is normative, but Mooreans have historically disputed this. See generally Regan and Hurka, *supra* note 15.

have proper regard.³⁶ The idea that persons have an inherent value which both places limits on how we may act and places demands on us to act derives, of course, from the ethical theory of Immanuel Kant.³⁷ According to Kantian ethics, morality rests on the value of persons, or more precisely, on the value of rational nature, a value reflected in the various formulations of the moral law.

The speculations I want to offer have their starting point in the foregoing considerations, and they rest upon a number of assumptions. Suppose, first, that the broadly Kantian picture of ethics is correct. Suppose further that social stability and coherence fundamentally depends upon our more or less perfectly operative capacity to recognize others as having a value we may not violate. Finally, suppose that it is, ordinarily, through the emotion of love that we first come to apprehend value in another—love of the sort that we see in intimate, romantic relationships and in the relationship between parent and child.³⁸ Then we can begin to see why the state would have a special interest in fostering such relationships.

Our welfare is no doubt advanced through our involvement in intimate, romantic relationships and through good parenting; it is also advanced by broader social stability and coherence. The state has an interest in advancing our welfare because the state is both warranted in

36. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 91–92 (1993); DARWALL, *supra* note 33, at 8; J. David Velleman, *A Right of Self-Termination?*, 109 ETHICS 606, 610–13 (1999).

37. See Donald H. Regan, *The Value of Rational Nature*, 112 ETHICS 267 (2002). For a reply to Regan, see David Sussman, *The Authority of Humanity*, 113 ETHICS 350 (2003). See generally IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Robert Paul Wolff ed., Bobbs-Merrill Co. 1969) (1785). Philosophers have, of course, challenged the idea that persons of rational nature have inherent value.

38. Whether social stability and coherence indeed depends on our capacity to see others as valuable seems to me to be an empirical matter. Whether we first come to apprehend the value of another through the emotion of love, may be a purely empirical matter, or it may be at least partly conceptual. See *supra* note 31. My supposition that it is through love that we first come to apprehend value in another should not be confused with the idea that love just *is* an apprehension of value in another. For defense of a view roughly along those lines which links love to Kantian ethics, see J. David Velleman, *Love as a Moral Emotion*, 109 ETHICS 338 (1999). But if something like the latter view were correct, then the link between love and apprehension of value would indeed be partly conceptual. For an exploration of how good parenting involves appreciation of the value of a child, see Connie S. Rosati, *Autonomy and Personal Good: Lessons from Frankenstein’s Monster* 25–26 (2004) (unpublished manuscript, on file with the *San Diego Law Review*); Connie S. Rosati, *Preference-Formation and Personal Good*, PHILOSOPHY (forthcoming 2006) (on file with *San Diego Law Review*).

having and obligated to have a proper regard for our value. The state advances our welfare and exhibits proper regard for our value not only by acting in ways that are consonant with our value; it also does so by doing what it can to promote the conditions that make for social stability. These will be conditions in which we come to have a proper regard for the value of one another, or in which we at least come to act in accordance with a proper regard for the value of one another. Insofar as our capacity to appreciate the value of others becomes active in our most personal of relationships, the state has a special interest in protecting and supporting these relationships.

The legal relation of marriage has been one vehicle by which the state protects and supports these relationships, and inchoate recognition of this fact seems to lie behind the third kind of talk about marriage—the talk that treats marriage as a fundamental moral relation. But it is “genuine” marriage with its abiding, valuing of another that the state has a fundamental interest in advancing and securing, rather than traditional marriage *per se*. What the legal relation of marriage must look like in order for the state to advance genuine marriage is a complex question. It may well be that the law will have to treat marriage as something at least roughly along the lines of traditional marriage. For instance, it may have to treat marriage as a relation limited to two adults. Whatever the correct answer to this question may be, recognizing marriage as a legal relation will remain a quite imperfect means of advancing genuine marriage. Recognition of the legal relation will secure protections and benefits for relationships that fall far short of the ideal—that show contempt rather than consideration for the value of another. But apart from setting higher bars to entry or exit, something along the lines of traditional marriage may be the best the state can do without intolerable intrusion into the private sphere that would do more to hinder than foster our appreciation of one another.

The foregoing considerations raise various puzzles, of course, which I merely mention here. One puzzle concerns why, and the extent to which, our capacity to appreciate the value of another becomes active within these close interpersonal relationships. It would be good to have a more complete account of the normative, psychological, and evolutionary bases for this, though no doubt, some of the requisite materials for providing it already exist. A second puzzle concerns how and why our ability to appreciate the value of the ones we love would have any tendency to generalize in ways that make possible not a mere social life but a recognizably *moral* social life. One possibility might be that the value one sees in the individual one loves is a value the beloved shares

in common with others.³⁹ That is to say, the very thing one apprehends in apprehending her value is something that she has, not due to her merit or her idiosyncratic features; rather, it is something she simply *has*, a value that inheres in her as in all others. To apprehend her value is, at the same time, to apprehend the value of persons. Another possibility might be that the value one sees in the individual one loves generalizes via the operation of reason: One apprehends the inherent value of another, a value she simply has, and one sees as well that no reason can be given why that individual has inherent value, while others lack it. Whatever explanation we might ultimately offer, a final puzzle will concern why and how our capacity to apprehend the value of another can fail to become activated or to generalize appropriately.⁴⁰

Again, I simply mention these as problems that remain to be explored. The point I want to make for present purposes is that the foregoing considerations, with suitable development, will go as far as we can go, I believe, toward vindicating the conservative emphasis on the primacy of marriage and the family. And such considerations will do much to vindicate that primacy, for they make sense of how marriage and family could indeed be so fundamental to society. I suggested earlier that there is an ideal or value closely related to the ideal of traditional marriage that we ought to embrace and that would ground what many have seen to be the fundamental importance of marriage. Let me now state that earlier claim a bit more precisely. The value that underlies the importance of marriage and family, I have been suggesting, is the value of persons, and the ideal related to that of traditional marriage is an ideal of appropriate and abiding valuing of another. Insofar as the framework I have been sketching is correct, the foundations of moral life and the basis for social cohesion are to be found in intimate romantic and familial relationships, for it is in the context of these relationships that the ideal can get a hold on us. Insofar as love brings us to appreciate another's value and insofar as appreciation of our value grounds morality and has stabilizing effects, it is in the context of our loving relations that moral and social life finds its roots. Yet if the foregoing considerations provide support for conservative emphasis on the importance of marriage and family, they also provide the normative

39. See Velleman, *supra* note 38, at 366.

40. Obviously, each of these possible explanations stands in need of a great deal of development and defense. I take no position here as to which, if either, we ought to adopt.

basis for rejecting many conservative ideas about the form each must properly take. In particular, we cannot plausibly deny that same-sex partners experience genuine love for one another or an appreciation for the value of each other. And it is just this genuine love and appreciation which we should seek to foster. To the extent that extending the legal relation of marriage to homosexuals helps to encourage regard for the value of another, much as it does in opposite-sex marriage, the state has compelling reasons to extend the boundaries of the legal relation of marriage to encompass same-sex unions.

III. CONCLUSION

In offering the foregoing speculations, my aim has not been to try to settle the question of what framework we ought to adopt for assessing state policies regarding private relationships and childrearing. It has merely been to set out an alternative to Arneson's framework in an effort to articulate what I worry the latter framework may lead us to miss. And that is not simply, as my brief remarks at the conference misleadingly suggested, a distinct normative role for ideals or values not reducible to welfare. Rather, it is the role of a *particular* value that is not reducible to welfare because it grounds welfare's normativity.⁴¹ I can imagine, given his reply to my remarks at the conference, how Arneson might respond. He might say, to repeat those remarks, that the extent to which our preferred frameworks are really in tension will depend on the conception of welfare the consequentialist adopts, and with this I agree. In fact, the conception of welfare or personal good I favor itself reduces the tension, because it sees goodness for a person as partly constituted by the tendency of a thing to support a person's sense of her own value.⁴² Still, the extent of the tension does not depend solely on what conception of welfare we adopt. If Kantian ethics is right, it resides in the very structure of value, or as Kant might have put it, in the relation between conditioned and unconditioned value.⁴³

Complex theoretical questions remain, of course. On the one side, it remains to be settled whether a consequentialism that deserves the name

41. We can now see why the problem is not that the emphasis on welfare is somehow crass, as Arneson's reply to my conference comments suggested. It is that the emphasis misleads in certain ways.

42. See Connie S. Rosati, *Personal Good*, in *METAETHICS AFTER MOORE* (Mark Timmons & Terry Horgan eds., forthcoming 2005) (manuscript at 17, on file with the *San Diego Law Review*).

43. Arneson's written comments suggest even more complex theoretical replies, which challenge the Kantian picture of the structure of value. For a hint of how these replies might go, see *supra* notes 35 & 44. Here, of course, is the beginning of a very long debate.

must deny the value of persons and insist that only states of affairs are bearers of intrinsic value. I can imagine that some who call themselves consequentialists may embrace the idea that welfare matters only because we matter.⁴⁴ In the end, it matters very little what labels we choose to attach to our positions and very much what does and does not have value. As for the other side, proponents of Kantian ethics have yet to satisfactorily articulate and defend the idea that persons have inherent value. That murky idea continues to be, as many consequentialists would remind us, merely an idea in search of an argument.⁴⁵ I personally find it a particularly gripping idea. What I hope to have done is indicate how attention to it might deepen our understanding of the meaning of marriage.

44. Of course, consequentialists are likely to want to cash out the value of persons in terms of the value of certain states of affairs involving their flourishing.

45. See Regan, *supra* note 37.

