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**“YOU CAN’T GET THERE FROM HERE,” A
REPLY TO PROPOSALS TO DISESTABLISH
MARRIAGE AS A PATH TO CARE**

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Chapter 4

“You Can’t Get There From Here”: A Reply to Proposals to Disestablish Marriage as the Path to Care

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Introduction

More than twenty years after it began, the debate about whether or not to regularize or “institutionalize” heterosexual cohabitation in the family law of the United States continues apace.² Participating scholars ordinarily use the term “institutionalization,” to refer to the passage of laws conferring upon cohabitants the same or similar private or public rights and obligations as those ordinarily attached to marriage.³ The most recent round of debate was ignited by the American Law Institute’s 2002 proposal to confer legal status upon cohabitating unions which meet certain criteria.⁴ Over these past decades, state lawmakers have not moved far in the direction of erasing established bright lines between heterosexual cohabitation and marriage.⁵ Still, several current events or circumstances make the “institutionalization”

¹ Associate Professor of Law, George Mason University School of Law. The author would like to thank Christine Ciambella and research assistant Sophie Coy for their prolific assistance in the researching of this article. Any errors are solely mine.

²See, e.g., Case Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977); William A. Reppy, *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677 (1984); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAMILY L.Q. 309, 314–24 (2008).

³ Milton Regan, *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

⁴ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Chapter 6 (2002).

⁵ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, *supra* note 2, at 314–24 (2008).

debate of continuing importance. First, the number of heterosexual cohabiting couples in the U.S. continues to climb, with 6.4 million households counted in 2007.⁶ These figures act as a continuing invitation for legal proposals to provide an orderly, predictable, and just manner of handling the problems and outcomes associated with the dissolution of cohabiting households. Furthermore, other democratic nations are continuing to enact laws which either assign legal status to cohabitants based upon their conduct, or invite heterosexual couples to “register” their nonmarital relationships as a means to achieve certain interpersonal and/or state benefits.⁷

Proposals to institutionalize cohabitation are regularly framed as good means to channel public or private benefits to needy adults and children. Those who support a more general program of “disestablishing” marriage—*i.e.* eliminating laws basing legal rights and obligations upon marital status, in favor of assigning legal rights and obligations to “caretakers and dependents”—frame the debate similarly.⁸ Both tend to point out that cohabitation is more prevalent among vulnerable social groups, and that it encourages interdependencies which must be addressed when the relationship dissolves. They also regularly suggest that cohabitation selects for individuals who more often encounter difficulties securing stable marriages. A careful review of both sides of the institutionalization and disestablishment debates, however, reveals that they do not turn upon the question of willingness to assist vulnerable persons in nontraditional households. People on both sides of these debates are willing to extend such assistance. What really divides the participants are their beliefs about what is required for human beings to flourish in the context of heterosexual intimate relationships.⁹ Each side suggests that human beings possess certain identifiable traits or inclinations with respect to heterosexual intimacy; and that these must be recognized and addressed if laws about heterosexual relationships are to be effective instruments assisting human flourishing. For the sake of brevity, throughout this paper I will call the collection of traits or inclinations identified by any

⁶ America’s Family and Living Arrangements, Table A2. Family Status and Household Relationship of People 15 Years and Over, by Marital Status, Age, and Sex: 2008 U.S. Families and <http://www.census.gov/population/socdemo/hh-fam/cps2008/tabA2-all.xls>.

⁷ Regarding conscriptive schemes, see Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAMILY L.Q. 309, 324 (2008); Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 N. ENG. L. REV. 541, 549–50 (2006).

⁸ Martha Albertson Fineman, *Why Marriage?* 9 VA. J. SOC. POL’Y & L. 239 (2001); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307 (2004).

⁹ This paper will address only heterosexual relationships. The questions raised by the possibility of extending legal recognition to homosexual pairs are quite different from the questions raised in the debate about institutionalizing nonmarital heterosexual relationships.

particular author or authors, an “anthropology.” In this paper it is the anthropology associated with human behavior respecting heterosexual relationships which will concern us.

Painting with a very broad brush, and intending to summarize the positions of a variety of authors, it might be said that pro-institutionalization scholars propose that human persons are not made or capacitated naturally for enduring adult heterosexual relationships. Rather, free choice in sexual liaisons is a good for persons, though at least one author would concede that adults (and their children) might better flourish within stable parental unions. What is recommended regarding adult interpersonal relationships—free choice—is not recommended for parent-child relationships. Rather, supporters of institutionalization hold adults to be naturally responsible to care for children in enduring and stable relationships, albeit with the generous help of the state.

Those who favor preserving the special status of marriage, and continuing legally to distinguish it from cohabitation, seem to understand the human person as inclined to be “social” and needing stable “commitment” in a heterosexual relationship, whether for happiness and health for the adults and children involved, or in order successfully to achieve individual self-realization.

This paper will suggest not only that the latter anthropology “rings more true” than the former, but that it might find support from a relatively new and detailed account or anthropology of human inclinations and flourishing within intimate heterosexual relationships. It is an anthropology which seems to offer a more convincing explanation of both the aspirations and the problems facing women, men and children today, as these are delineated in current empirical data about the family. It also seems to offer a more likely path to achieve the goal supported by scholars on both sides of the institutionalization debate: stable care for vulnerable persons in society, including particularly children and their caretakers. This anthropology understands adults in the context of heterosexual relationships to be first and foremost “gifted givers,” with bodies designed to play crucial roles both in constituting and expressing this identity. At the same time, it acknowledges that heterosexual relationships are the *situs* of profound disorder between men and women, which must be acknowledged and addressed. The sources of this anthropology are theological and philosophical. They include the *Genesis* accounts of the creation of man, woman and marriage, the New Testament interpretations of these stories, and various theological and philosophical reflections on both. U.S. family law may be said to be still familiar with, if no longer “fluent” in these sources. Yet these same sources have been in the past, and continue today, to be influential in the shaping of U.S. family law. Furthermore, their influence is likely to grow in the wake of

ever-developing research which tends to correspond with these sources' characterization of human needs, failings and flourishing.

The anthropology arising from these sources was first and most thoroughly set forth by Pope John Paul II as the "Theology of the Body," the collective title of his first 130 Wednesday audience presentations from 1978 through 1982.¹⁰ Pope Benedict XVI has also explored this topic particularly in his first encyclical *Deus Caritas Est* (God is Love),¹¹ in the pastoral letter (during his tenure as the Prefect of the Congregation for the Doctrine of the Faith), *On the Collaboration of Men and Women in the Church and in the World*,¹² and in extensive commentary offered to various audiences throughout his ongoing papacy.

The scriptures from which these teachings are drawn were, at their origins, attempts to explain male-female relationships and the significance of these for the entire meaning of human life. Whether or not one believes them to be divinely inspired, or simply to be literate human beings' attempt to grasp the truth and meaning embedded within the fact of a two-sexed humanity, they have endured as influential accounts.¹³ This paper will suggest that they also "ring true," not only on their face, but in light of relevant empirical data, and as compared with accounts of intimate heterosexual relationships offered by those who would disestablish marriage and institutionalize cohabitation. For purposes of brevity, throughout this paper, the one word, "institutionalization" will be used to convey both proposals: the disestablishment of marriage as the only legally recognized form of heterosexual relationship, and the granting of various legal rights and obligations to cohabitation.

Part I of this paper will consider the anthropology suggested by the supporters of institutionalization. Part II will treat the anthropology of those who wish to preserve the status of marriage, undiluted. Part III will set out the anthropology of the Theology of the Body (hereafter "TOB"). Part IV will suggest that TOB provides a superior view of human needs and human flourishing in connection with heterosexual intimacy. The Conclusion will argue that laws influenced by such an anthropology are a good fit with various important themes and preferences characterizing U.S. family law.

¹⁰ JOHN PAUL II, *MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* (Michael Waldstein ed. trans., 2006).

¹¹ Pope Benedict XVI, *Deus Caritas Est* (2006).

¹² The Congregation for the Doctrine of the Faith, *Letter to all the Bishops of the World on the Collaboration of Men and Women in the Church and in the World* (2004).

¹³ See, e.g., PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* (1988); ELAINE PAGELS, *ADAM, EVE AND THE SERPENT* (1988).

Institutionalization: Rationales and Anthropology

Rationales

Several legal means of institutionalizing cohabitation have been proposed over the last decade. The state could “conscript” cohabitants involuntarily, by attaching to couples meeting certain conditions a “status”, *e.g.* domestic partnership, which would obligate them at the dissolution of their relationship to exchange some amount of property or financial support or both.¹⁴ Institutionalization might also be accomplished voluntarily by allowing cohabitants to register with the state as “domestic partners,” or a “civil union.” Obligations involving support and property distribution might thereafter attach either during the relationship and/or at dissolution. The contents of the rights and obligations springing up either involuntarily, or voluntarily after registration, could vary from as little as the right to obtain health care via the other party’s employer, to a set of rights and obligations more closely resembling those ordinarily attached to marriage. Another variation among institutionalization proposals concerns whether the rights and obligations would be private (between the parties) or public (in relationship to the state). What is common to all such proposals, however, is the intention legally to recognize intimate heterosexual relationships in which the partners knowingly delay, ignore or reject long-term commitment.¹⁵

Another proposal about the legal treatment of marital as compared with non-marital households, involves disestablishing marriage completely in favor of organizing all family-related legal rights and obligations around caretakers and their dependents, most often mothers and their children.¹⁶ Again, for purposes of brevity, I will use the one word, “institutionalization,” to refer both to proposals to disestablish marriage and to proposals to grant marital-like rights and obligations to cohabitants. The anthropology underlying both proposals is nearly the same.

¹⁴ See, *e.g.*, THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Chapter 6, Domestic Partners (2002).

¹⁵ Sociologists and family law scholars have identified a variety of reasons heterosexual couples cohabit. See, *e.g.*, Margaret Brinig, *Marry Me Bill: Should Cohabitation be the Default Option?* 64 LA. L. REV. 403 (2004). It is accurate to summarize participants’ various dispositions toward “commitment,” however, with the terms “delay, ignore or reject.”

¹⁶ Martha Albertson Fineman, *Why Marriage?* 9 VA. J. SOC. POL’Y & L. 239 (2001); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307 (2004).

As a prelude and guide to the anthropology of the proponents of institutionalization, this Part I will explore the *reasons* offered in support of institutionalization. Given that authors rarely articulate their entire anthropology explicitly, some of its elements need occasionally to be teased out from authors' discussions about what comprises the *opposite* of flourishing (suffering), what they explicitly reject as good or necessary for the human person in the context of heterosexual relationships, or even from their persistent ignoring of a good that is strongly endorsed by opponents of institutionalization.

Because members of nonmarital households are poor and vulnerable

The most frequently offered rationale for recommending institutionalization is the prevalence of poverty among cohabiting, or formerly cohabiting, or single-parent, households. Professor Vivian Hamilton, for example, argues that disestablishing marriage is a requirement of justice, because children reared in married households receive far more government largesse than children in non-marital households (although she offers no precise figures to support this claim). Professor Hamilton holds that it is the obligation of government to bring about more equal outcomes for all children, and that disestablishing marriage in favor of supporting "caretaking" by any type of household grouping, is a good means to this end.¹⁷

Professor Cynthia Grant Bowman seeks to help mothers in particular who, at the dissolution of a cohabitation suffer economically because they have invested in childcare to a greater degree, to the detriment of their future careers and income potential.¹⁸ Professor Bowman also argues (against the weight of the evidence¹⁹) that cohabiting couples are more interdependent than previously acknowledged, and that the loss of income sharing at dissolution is a hardship as well.²⁰

Professor J. Thomas Oldham also favors institutionalization on the grounds that any partner in an unmarried union can suffer career damage because of the relationship, particularly if there is a common child and one partner has invested more time in childcare.²¹

¹⁷ Vivian Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 16.

¹⁸ Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1 (2007).

¹⁹ Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation* 52 UCLA L. REV. 815, 840 n.99 and sources cited therein (2005).

²⁰ Cynthia Grant Bowman, *Social Science and Legal Policy*, *supra* note 18, at 36–37.

²¹ J. Thomas Oldham, *Lessons for Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1427–28 (2001).

Professor Martha Albertson Fineman places some blame on the state for the situation of nonmarital households given that she believes that the state “construct[s] and utiliz[es]” the marital family.²² (This is to be distinguished from the notion that the marital family is an organic institution emerging from human needs and aspirations, and is not primarily a creature of the state, albeit often subject to state regulations). It is the responsibility of the state, therefore, for this reason and because of its power relative to citizens—whom she characterizes first and foremost as “vulnerable”²³—to channel benefits to all persons regardless of marital status in order to produce an equality of outcomes.

Professor Fineman and other promoters of institutionalization, ignore²⁴ or downplay²⁵ the empirical evidence of the close association between marriage and the well-being of children and adults. They do not seriously consider supporting marriage-strengthening efforts in addition to social welfare policies (the combination which Professor Don Browning refers to as a “marriage plus” policy²⁶) to assist particularly women and children. Professor Fineman’s adoption of this strategy seems triggered by her insistence upon the essentially, unalterably patriarchal character of marriage. Professor Linda McClain worries about this factor as well.²⁷ Professor McClain as well as Professor Hamilton reason to the institutionalization position also from their *a priori* commitments to the goods of sexual freedom (Hamilton) and diverse family forms (both). Neither McClain nor Hamilton offer empirical evidence to justify their claims that diverse sexual and family commitments are themselves a good for the human person.

It is more difficult to capture Professor Bowman’s rationale for proposing both conscriptive and voluntary methods of institutionalizing cohabitation. She is concerned about the hurdles faced by poor and minority citizens in their attempts to achieve stable marriages, which she still regards

²² Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19–20 (2008).

²³ *Id.* at 9–10.

²⁴ Don Browning notes this feature of Linda McClain’s treatment of various intimate partnerships: “One of the most peculiar features of this otherwise careful book is the lack of discussion regarding the emerging consensus in the social sciences that children raised in married, two-parent families measure better in health and well being.” Don S. Browning, *Linda McClain’s The Place of Families and Contemporary Family Law: A Critique From Critical Familism*, 56 EMORY L.J. 1383, 1400 (2007).

²⁵ Cynthia Grant Bowman, *Social Science and Legal Policy*, *supra* note 18, at 34–35; Vivian Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 17, at 360–61.

²⁶ Don Browning, *Linda McClain’s The Place of Families and Contemporary Family Law: A Critique From Critical Familism*, *supra* note 24, at 1402.

²⁷ LINDA MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* 205 (2006).

as the best option. She explicitly recognizes that cohabitation is correlated with higher levels of violence against women, although she does not take note of the association between cohabitation and child abuse. Still, she decides against a “marriage plus” approach to these problems.

Because it would be possible to support public and private assistance for citizens in diverse family contexts, without endorsing state recognition of relationships in addition to marriage, it is difficult to disagree with Professor Don Browning’s assessment that despite proponents’ claims that they embrace institutionalization as a means to assist vulnerable adults and children, they appear actually to be valuing adults’ sexual and procreative rights more than children’s well being.²⁸

Because caretaking “functions” in any family setting should be rewarded

Some authors hold that legal recognition of marriage at all, or alone among intimate heterosexual relationships, results in overlooking and undervaluing what is due to children and to the mothers who disproportionately forego financial opportunities in order to care for children. The state should recognize and benefit any household in which caretaking (usually maternal) is taking place. This will benefit children directly, and their mothers (whom Martha Fineman has dubbed “derivatively dependen[t]”²⁹) who merit aid on the grounds of their need and the valuable care work they perform.³⁰ Another way of characterizing scholars’ reasoning here is to say they propose rewarding the “function” of caretaking, which (they point out) takes place in cohabitating and single households as well as in married ones.

Because money might stabilize relationships

Professor Cynthia Grant Bowman proposes institutionalization via conscriptive or voluntary schemes, as a means for stabilizing cohabitant households, and perhaps even moving them closer to marriage.³¹ Conversely, Professor Vivian Hamilton sees no reason why the law would seek to encourage couples to marry; it should rather assist the stability of any kind of relationship, whether enduring or brief, same sex or opposite sex,³² married or unmarried. Professor McClain would agree with Professor Bowman that

²⁸ Don Browning, *Linda McClain’s The Place of Families*, *supra* note 24, at 1403.

²⁹ Martha Albertson Fineman, *Why Marriage?* *supra* note 16, at 270.

³⁰ See generally Martha Albertson Fineman, *Why Marriage?* *supra* note 16; Vivian Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 16.

³¹ Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, *supra* note 18, at 43.

³² Vivian Hamilton, *Family Structure Children and Law*, 24 WASH. U. J.L. & POL’Y 9, 25–26 (2007).

stability is a good, but offer cohabitants “registration” for the purpose of “contribut[ing] to the[] security and stability” of what she curiously calls “intimate, committed relationships other than marriage.”³³

Professor Bowman hopes that benefits might help stabilize cohabiting relationships or even assist their transition to marriage, but does not provide any data or rationale as to how or why this might occur. To the contrary, Professor Amy Wax has convincingly argued that poor women are not making an economic decision when they refuse to marry³⁴; in fact, a poor couple would be financially better off if they did marry. Therefore other factors are likely at work, possibly what Professor Wax identifies as cultural factors.³⁵

Marriage is intrinsically problematic; for this and other reasons, the law should respect alternative and “private” sexual choices

As noted above in Part I.A. 1, several scholars believe that marriage is likely indelibly marked by a history of oppression against women, or simply perceived as so marked. For these reasons, the law ought not to discourage women in particular from forming alternative types of households in order to protect themselves and their children.³⁶ In addition to this, some hold that marriage ought to be disestablished as a bow to the value of individual choices about sexual relationships generally. Relying on the broad language of *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁷ and *Lawrence v. Texas*³⁸, Professor Hamilton argues for example that sex and procreation merit privacy such that marital and nonmarital sex and procreation ought to be treated identically.³⁹ This is on the ground that each is important to an individual’s self- definition and identity.⁴⁰ Elizabeth Scott also speaks of legal “neutrality” toward individual choices regarding intimate associations⁴¹ as compatible with “contemporary” and “liberal”

³³ LINDA MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 27, at 193

³⁴ Amy Wax, *Engines of Inequality: Class, Race and Family Structure*, 41 *FAM. L.Q.* 567, 582–87 (2007).

³⁵ Amy Wax, *Engines of Inequality*, *supra* note 34, at 586–87.

³⁶ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 22, at 17 (referring to “demonizing” motherhood “outside of the patriarchal paradigm”) (citing MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 101–10 (1995)).

³⁷ 505 U.S. 833 (1992).

³⁸ 539 U.S. 558 (2003).

³⁹ Vivian Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 16.

⁴⁰ *Id.* at 311.

⁴¹ Elizabeth Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in *RECONCEIVING THE FAMILY* 331, at 342 (Robin Fretwell Wilson ed., 2006).

values.”⁴² Professor Linda McClain frames her version of this argument in terms of respect for the diversity of family forms as a positive good.⁴³

Because recognition might boost health care coverage and prevent cutoffs of benefits given to the divorced or widowed

Professor J. Thomas Oldham argues that state recognition of relationships short of marriage—which he dubs “marriage lite”—might serve the purpose of allowing more citizens to obtain health insurance via their partner’s employer and thus reduce public expenditures for health care. He also argues that recognition could allow surviving or divorced spouses to maintain income that would otherwise be cut off at “remarriage” via various private (separation) agreements or state laws.⁴⁴ To the argument that recognizing relationships short of marriage might chill marriage, Oldham replies that this situation would not be functionally different than allowing couples to draft premarital agreements which reduce or eliminate property and support obligations to one another. In either case, couples enter an intimate relationship which is shorn of the usual rights and obligations the state attaches to marriage.⁴⁵ This argument, however, fails to acknowledge how few couples likely make such agreements,⁴⁶ versus the number of couples who have or are likely to enter into “marriage lite” arrangements. Recent data from France, for example showed that the number of heterosexual couples entering into civil solidarity pacts (unions with fewer benefits and obligations and easier dissolution procedures relative to marriage⁴⁷)—90% of all filed—far exceeds the number anticipated when the law was first passed.⁴⁸ It also fails to consider that even couples who marry following the execution of a premarital agreement have still chosen “marriage” with all of

⁴² *Id.* at 342.

⁴³ LINDA MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 27, at 191–219.

⁴⁴ J. Thomas Oldham, *Lessons for Jerry Hall v. Mick Jagger*, *supra* note 21, at 1431.

⁴⁵ *Id.* at 1432–33 (2001).

⁴⁶ See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract* (September 5, 1997), 2, 8–9 at http://www.rasmusen.org/pacioli/published/Rasmusen_98.ILJ.marriage.pdf; Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 9 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ., and Bus. Discussion Paper Series, Paper No. 436, 2003), available at <http://lsr.nellco.org/harvard/olin/papers/436>.

⁴⁷ See France.QRD.org, *Gais et lesbiennes Branchés, The French Registered Partnership Law: The Civil Solidarity Pact*, Oct. 14, 1999, at <http://www.france.qrd.org/texts/partnership/fr/explanation.html> (May 20, 2009).

⁴⁸ Peter Allen, “French heterosexual couples having ‘gay’ civil partnerships,” *The Telegraph* (UK), Feb. 16, 2009, available at <http://www.telegraph.co.uk/news/worldnews/europe/france/4631736/French-heterosexual-couples-having-gay-civil-partnerships.html>

its historical and traditional associations with permanence, fidelity and exclusivity. It would be virtually impossible for any new form of state-recognized intimate relationships to carry the identical associations.

Anthropology

Based upon the rationales offered above, and upon additional explicit claims made by institutionalization supporters, it can reasonably be concluded that they would identify the following human traits as relevant to human flourishing in connection with heterosexual relationships.

People are vulnerable, both alone and in intimate relationships

The most emphatic version of this opinion comes from Professor Fineman, who holds that “the most basic fact of the human person to be considered as the foundation for legal, social policy” is vulnerability, by which she means “the ever present possibility of harm, injury and misfortune.” Vulnerability is a physical condition and is also mediated for individuals by social, legal and financial situations.⁴⁹ Fineman claims that women are particularly vulnerable within marriage because of its traditional division of labor and because of lack of social support for, and the opportunity costs of, the caretaking functions women disproportionately undertake.⁵⁰ Professor Bowman agrees with Professor Fineman regarding women’s social and economic vulnerability, particularly insofar as it is caused by their inclination to care for children and forego work opportunities, and by their susceptibility to exploitation as a function of their greater measured “commitment” or investment into a cohabiting relationship.⁵¹

Material aid is of primary importance to relationships

An unmistakable presumption of the strategies recommended by institutionalizers is that money is the primary or best response to the difficulties faced by cohabitant or lone-parent households. Several aspects of this proposal indicate the anthropology underlying it. First, it is proposed without accompanying empirical evidence as to the possible results of introducing more income into the household. Second, it is not paired with recommendations to assist the adults involved to secure more stable intimate relation-

⁴⁹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, *supra* note 22, at 9.

⁵⁰ Martha Albertson Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187–88 (1995).

⁵¹ See Cynthia Grant Bowman, *Social Science and Legal Policy*, *supra* note 18, at 37.

ships—whether by avoiding cohabitation or preparing for marriage. Rather, Professor Bowman speculates without supporting data that additional money—whether from the government or from an intimate partner—could bring additional stability to the pair, or even move them toward marriage.

These aspects of the proposal indicate that those favoring institutionalization do not regard a committed heterosexual union as an important goal in itself for a woman or a man. Professor Hamilton in fact writes bluntly “Why should [the government] privilege one form of companionate relationship over others....?”⁵² Professor Bowman is more difficult to “read.” She suggests that stable unions might have instrumental importance for increasing household income and stability but also writes that marriage may “work better overall” to achieve happiness and health for adults and children.⁵³ She sees stable unions, in other words as beneficial, but likely more as instruments than as bonds which have value *in se*.

Individualism and dualism: an uncommitted sexual union may be a good in itself

Professors Scott, Hamilton, and McClain explicitly support the notion that the freedom to choose among a variety of consensual sexual relationships is a good for persons. Committed sexual relationships are not intrinsically superior. Professor Scott, in fact, specifically opposes legal endorsement of the notion that marriage is “morally superior.”⁵⁴ Professor Hamilton endorses as normatively correct the Supreme Court’s movement toward placing both marital and nonmarital sexual unions behind the veil of privacy.⁵⁵ Decisions about the length and type of relationships citizens undertake are completely subjective and personal. It is impossible in her view to grasp individuals’ “natural” preferences” regarding commitment.⁵⁶ Professor McClain appears to endorse state recognition of nonmarital intimate relations on the grounds that they can contribute to personal happiness, serve functions similar to marriage (*e.g.* caretaking) and allow individuals to reject problematic historical connotations about marriage.⁵⁷ As already well-noted by Professor Don Browning, however, McClain does not evaluate the outcomes for adults and children associated with nonmarital relationships.⁵⁸

⁵² Vivian Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 16, at 369.

⁵³ See Cynthia Grant Bowman, *Social Science and Legal Policy*, *supra* note 18, at 2, 43.

⁵⁴ Elizabeth Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 560–61 (2007).

⁵⁵ Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 16, at 355.

⁵⁶ *Id.* at 343.

⁵⁷ LINDA MCCLAIN, THE PLACE OF FAMILIES, *supra* note 27, at 197–98, 206, 209.

⁵⁸ Don Browning, *Linda McClain’s The Place of Families and Contemporary Family Law*, *supra* note 26, at 1400.

The anthropology underlying these commitments to a variety of intimate unions might be called “individualist” for its proponents’ regular habits of disregarding or minimizing evidence about outcomes for adults and children associated with nonmarital living arrangements, and relying more upon the decisions and subjective evaluations of individual participants. This is less true of Professor McClain who is conscious of the social goods that stable heterosexual unions can produce, and is eager to achieve respect for the equality of all citizens via her recommendations. Still, the absence of attention to the empirical evidence about adults’ and children’s well-being indicates that protection for individual sexual choices plays an important role in her thinking.

Endorsing sexual free choice as a good in itself might also be characterized as “dualist,” *i.e.* understanding the human body and bodily acts to be separate from and not integral to or constitutive of the human person. In fact, the authors who support institutionalization never take up the question of the incongruity between cohabitants’ physical acts and their intentions to reject, delay or ignore a commitment to one another. Cohabitants physically live as co-residents. They engage in a one-flesh union, a physical act of the type that leads to the conception and birth of a person who would be the living embodiment of their union. At the same time, however, they reject, delay or ignore commitment to one another. By their silence, the authors endorsing greater equivalency between marital and nonmarital partnerships indicate that the sexual actions of the human body are not any part of their analysis of the nature or the flourishing of persons in connection with intimate relationships. For them, the human body apparently offers no “clues” as to what might constitute good or bad choices for persons in relationship. This perspective might also account for these authors’ failure regularly to mention in some cases, or to discuss meaningfully in others, the physical harms which are correlated with cohabitation: infidelity, abortion, and violence. Rates of each of these problems are significantly higher among cohabitants than among the married.⁵⁹ Even Professor Bowman, who devotes attention to the higher prevalence of lethal violence among unmarried partners, does not suggest how her proposal for legal recognition of cohabitation might remedy

⁵⁹ See, *e.g.*, Cynthia Grant Bowman, *Social Science and Legal Policy*, *supra* note 18, at 26–29 (re: domestic violence); Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–01*, 34 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 226, 228, table 1 (2002) (Among all women between 15–44, 18.7% live in cohabiting households. Yet they account for 31% of all of the abortions within that age group. A portion of this effect is apparently caused by recent declines in the percentages of abortions among non-cohabiting women). See, *e.g.*, Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48 (2000) (infidelity).

such violence. An observer who understood the human person nondualistically might at least wonder about the relationship between the lack of commitment of intimate cohabitants, and their greater tendency to experience domestic violence.

Rather, it appears that for proponents of institutionalization, forming an intimate partnership is a useful instrument for pleasure or for procreation, or for bringing a wage-earning partner into a lone-parent household,⁶⁰ or even for obtaining rights to a partner's health insurance.⁶¹ What their intimate interactions might signify by their physical structures and fruits—as a one-flesh union, which is also the origin of new life—is not indicative for human flourishing.

The male-female union is not intrinsically valuable, but the caretaker-dependent bond is crucial

Strangely, given the attention devoted by institutionalizers to the importance of free choice in sexual liaisons, they offer no discussion of the good of the heterosexual union itself, as a kind of primordial expression of the social nature of human persons, or as the source for procreation. For example, Professor Fineman's discussion of procreation in the context of her recommendations about reorganizing legal benefits in service of the caretaker-dependent dyad, is confined to its being an instrumental good for the continuation of society.⁶² Generally, institutionalizers offer very little discussion of the good of a permanent heterosexual bond in itself—though Professor Bowman devotes some brief attention to the instrumental good of stability between adults—married or unmarried—for taking care of children. By ignoring the value of stable heterosexual unions, they more easily place committed and uncommitted intimate relations on the same plane.

Professor Fineman's willingness to dismiss the good of heterosexual unions seems to flow from her *a priori* commitment to the notion that heterosexual marital unions are inescapably patriarchal. For Professor Hamilton, it is her *a priori* commitment to the equality of all consensual sexual choices. Others willing to institutionalize cohabitation are possibly overwhelmed at the difficulties faced by disadvantaged persons—women in particular—who wish to achieve a stable marriage. Perhaps it is not so much that they disvalue heterosexual bonds as that they cannot see a way to help form or strengthen them for many vulnerable persons. Or perhaps they feel that the need to care for children in nontraditional households is so great, that radical and experimental means must be pursued to the exclusion of

⁶⁰ Cynthia Grant Bowman, *supra* note 18, at 35; J. Thomas Oldham, *supra* note 21, at 1431.

⁶¹ Cynthia Grant Bowman, *supra* note 18, at 46.

⁶² Martha Albertson Fineman, *Masking Dependency*, *supra* note 50, at 2211.

other things. The implications of their proposal, however, are troubling. In their view, relationships between caretakers and dependents, between “unequals” (in terms of maturity, autonomy/dependency and need, not essential human dignity) would assume more intrinsic importance than the relationships between two mature adults. This stance ignores the possibility, however, that these sets of relationships are interdependent. Evidence suggests they are: a pair of mutually supportive adults are, individually and together, far better capacitated to care for children than unsupported adults.

Another shortcoming of their proposal concerns the fact that children are “kin” while other adults are not. This point is a bit complex, but it is also important. It relies on the social fact that marriage is a crucial institution for linking unmarried persons with one another and with each other’s extended families. In marriage, as in few if any other relationships, men and women come to understand that another person—a person who is not kin—might be as important as they are.⁶³ If sustaining marriage is characterized as difficult or impracticable or even impossible, and legal and cultural supports for marriage are abandoned, then society has abandoned the leading avenue for human understanding of the possibility of loving all those who are not kin.⁶⁴ Reducing the legal and social status of marriage could obscure this insight as it applies to *all* non-kin relationships.

Anti-Institutionalization or “Marriage First” Proposals: Rationales and Anthropology

This Part treats the rationales and the anthropology of scholars who oppose institutionalization. For the most part, they reject both conscription and voluntary registration as paths to state recognition of nonmarital relations.⁶⁵ All are concerned that legal recognition of relationships which by definition exclude promised commitment, will undermine the social and legal status and practice of marriage which they hold to be the most likely union to produce good outcomes for adults and children.

⁶³ Vladimir Solovyov, *THE MEANING OF LOVE*, 42–51 (1995).

⁶⁴ Don Browning et al., *FROM CULTURE WARS TO COMMON GROUND* (2nd ed.) 301–03 (2000) (on the relationship between marriage and learning to love persons outside the family).

⁶⁵ Professor Milton Regan makes the case for preserving the special status of marriage, while he would also recognize cohabitation under limited circumstances. See Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

Rationales

Adult happiness and health is promoted more by marriage than by cohabitation

Opponents of institutionalization regularly rely on studies indicating that marriage, as compared with cohabitation, is correlated with greater happiness, as well as with greater physical well-being and prosperity.⁶⁶ They acknowledge that selection plays a role in these results, but also suggest that there is some evidence that marriage itself causes good results. Mary Lyndon Shanley,⁶⁷ for example, asserts that marriage promotes adult well-being because humans are “fundamentally” social and interdependent; for them, autonomy and rational bargaining within relationships is not a sufficient good.⁶⁸ Professor Marsha Garrison judges that cohabitation simply does not “function” like marriage, and does not produce the benefits of marriage, and that the law should not treat dissimilar things equally. She points to copious data indicating that cohabitation is short-lived, increasingly less likely to lead to marriage, financially less secure, and less interdependent than marriage. She also summarizes evidence indicating that cohabitants are less likely to value commitment. They also experience more domestic violence and less fidelity than married couples.⁶⁹

Professor Milton Regan offers a unique perspective on the contribution made by marriage (specifically, marital commitment) to adult well-being.⁷⁰ He argues that marriage promotes powerful liberal values—including autonomy, authenticity and integrity—by encouraging adults intentionally to restrict future possible courses of action for the sake of values they regard as especially important.⁷¹ Committed intimate relationships also foster each partner’s discovering his or her identity and feeling valuable and even completed via the other’s love.⁷² Alternatively, Professor Regan indicates he may subscribe to Professor David Chambers’ view that marriage may not “necessarily have intrinsic importance,” but retains inescapable importance

⁶⁶ See, e.g., Linda J. Waite, *The Negative Effects of Cohabitation*, 10 RESPONSIVE COMMUNITY 28 (Winter 1999/2000) (lack of external supports for and instability of households to fulfill functions of marital households).

⁶⁷ MARY LYNDON SHANLEY, JUST MARRIAGE 15 (2004).

⁶⁸ *Id.* at 27.

⁶⁹ Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, *supra* note 2, at 308–13.

⁷⁰ Milton Regan, *Law, Marriage and Intimate Commitment*, 9 VA. J. SOC. POL’Y & L. 116 (2001).

⁷¹ Milton Regan, *Calibrated Commitment*, *supra* note 65, at 1443–44.

⁷² *Id.* at 1444 (quoting ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* 45 (1992)).

nonetheless, because it forms a kind of “of external horizon against which people measure their own choices/behavior.”⁷³

Cohabitants’ relatively low levels of mutual commitment play an important role in the analyses of some authors’ who oppose institutionalization. Margaret Brinig refers to cohabitation’s relative failure to promote intimacy and unconditional love. She points to the greater likelihood that cohabiting partners will rather conduct an “exchange relationship.”⁷⁴ She relies upon sociologist Steven Nock to suggest that cohabitants are more likely to live in the near term while committed spouses live in the past, present and future.⁷⁵ Sociologist Linda Waite also cites persuasive evidence that a lack of commitment may be the cause of depression and anxiety among cohabiting women.⁷⁶

Child welfare

Those opposing institutionalization further argue that marriage supports children’s well-being in ways cohabitation does not. Some of this may be mediated by the relative lack of stability in cohabiting households. Some is tied to the greater risk of violence against children in households containing an unrelated adult, frequently the mother’s boyfriend.⁷⁷

Supporters of institutionalization sometimes attempt to explain the good outcomes for children in married households solely in terms of the parents’ finances or education, but opponents argue that this seems increasingly unlikely. Marsha Garrison looks at evidence from countries where cohabitation has mainstreamed or where the government provides high levels of support for unmarried parents. She also looks at studies controlling for parents education, and finds that children in cohabiting and other nonmarital households continue to fare less well than children in

⁷³ Milton Regan, Law, *Marriage and Intimate Commitment*, *supra* note 70, at 149 (citing David Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 448 (1996)).

⁷⁴ Margaret Brinig, *Domestic Partnership, Missing the Target?* 4 J.L. & FAM. STUD. 19 (2002).

⁷⁵ *Id.* at 23–24 (citing Steven L. Nock, *A Comparison of Marriage and Cohabiting Relationships*, 16 J. FAM. ISSUES 53 (1995)); Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235 (1999).

⁷⁶ Linda Waite, *The Negative Effects of Cohabitation*, *supra* note 66, at 31.

⁷⁷ Patricia Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS 687 (Nov. 2005) (Death rate for children in households with parent and an unrelated adult was 50 times the death rate of households with two biological parents present. The unrelated male perpetrated the killing in 83.9% of the deaths. No difference in death rates was found between single parent households with no unrelated adult present, and two-parent biological parent households.)

marital households as to their health, their education and their living standards.⁷⁸

Professor Margaret Somerville writes about children's right to know their biological parents and families. While her works generally address the situation of children separated from their parents via use of assisted reproductive technologies, her rationales are just as applicable to the situations of the 45% of U.S. children in cohabiting households who are living without at least one biological parent.⁷⁹ Professor Somerville writes:

Knowing who our close biological relatives are and relating to them is central to how we form our human identity, relate to others and the world, and find meaning in life.... As far as we know, humans are the only animals who experience genetic relationships as integral to their sense of themselves. We are learning now that eliminating that experience is harmful to children, biological parents, families, and society.⁸⁰

Anthropology

There are two major aspects of human flourishing presumed by or otherwise embedded in the critique of institutionalization.

The human person regularly aspires to a permanent, intimate relationship with a person of the opposite sex

Critics of institutionalization regularly take note of the aspirations for life-long marriage expressed by women and men of all ages, races and socio-economic circumstances. They also refer to data indicating that stability in intimate relationships itself seems to contribute to human happiness. Conversely, when stability is absent in intimate relationships, or when the partners undertake an "exchange relationship," they experience less happiness, or even suffering.⁸¹ The legal scholars who write in this vein are not making an argument based on any claimed "complementarity" between men and women, whether physical, functional, psychic or other. Nor are they

⁷⁸ See Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible*, 41 FAM. L.Q. 491, 499–501 (2007).

⁷⁹ America's Family and Living Arrangements, Table A2. Family Status and Household Relationship of People 15 Years and Over, by Marital Status, Age, and Sex: 2008 U.S. Families and <http://www.census.gov/population/socdemo/hh-fam/cps2008/tabA2-all.xls>.

⁸⁰ Margaret Somerville, *Brave New Babies: Children's human rights with respect to their biological origins and family structure* (Published as "From Homo sapiens to Techno sapiens: Children's Human Rights to Natural Human Origins," Proceedings, 14th World Congress on Reproductive Technologies, Montreal, 17th—20th September, 2007).

⁸¹ Margeret Brinig, *Domestic Partnership: Missing the Target?* *supra* note 74; THE TIES THE BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 375 (Linda Waite & Christine Bachrach et al. eds., 2000).

focused on anything resembling the “good of procreation.” They are simply observing that adults report hopes and satisfactions which center upon stable, intimate relationships.

At the same time, authors opposed to the diluting of the status of marriage are not blind to data indicating that many people feel themselves unable to commit to another adult in a more or less permanent, intimate relationship. This may be because their own parents did not commit themselves to one another or to their children, or because they face uncertain futures due to economic or educational circumstances. They sympathetically report single mothers’ complaints about the want of faithful men within their communities.⁸² Importantly, however, critics of institutionalization do not render these obstacles the linchpin of their policies. They do not adopt a stance of “anthropological pessimism”⁸³ about some groups of human beings’ and their abilities to achieve or to be capacitated for, satisfying intimate relationships. Rather, they acknowledge the obstacles to marriage at the same time they recognize the evidence indicating that marriage better satisfies adults’ and children’s long-run needs and desires.

Often they suggest what types of targeted public assistance might help capacitate disadvantaged groups to achieve stable marriage. But they do not go so far as to suggest that money or education might constitute an adequate substitute for stable, committed intimate relationships. In fact, often they have already come to the conclusion that money has not and will not close the “relationship stability” gap between the more and less advantaged. Rather, and again, they combine their call for targeted assistance to reduce obstacles to marriage, with continuing recognition of the desire and need for stable intimate partners in the lives of all persons, rich or poor, black or white, etc.

Children’s welfare is an integral aspect of a judgment about adult flourishing within intimate relationships

By their substantial attention to the data about outcomes for children in various family forms, critics of institutionalization suggest that we cannot come to any conclusions about what is good for adults in intimate heterosexual relations, until we consider the welfare of all parties affected by adult choices. This is another way of saying that sexual choices have important community effects. It is a communitarian versus an individualist view.

⁸² See, e.g., Amy Wax, *Engines of Inequality*, *supra* note 34, at 590–92.

⁸³ See Part III *infra*.

Commentary on anthropological models thus far, and transition to the Theology of the Body

As compared with the anthropology examined in Part I, the anthropology of Part II seems to tell a story which rings more true. This is no doubt due in part to its proponents' practice of relying extensively upon data about the well-being of adults and children in connection with various intimate relationships. It is probably also due to the "fit" between this anthropology and what we might observe in the culture around us. Intimate commitment within marriage has not lost its hold upon the imagination of women and men in the United States. If anything, it has achieved an elevated status in the imagination of adolescents and young adults which does not likely comport with reality—as an "achievement" that guarantees lasting romantic feelings and experiences with a "soulmate,"⁸⁴ or as a place of economic stability and personal self-fulfillment.⁸⁵ In the words of political scientist Wendy Brown: "marriage and families are expected to hold every flower in the bouquet of personal happiness and fulfillment—great sex, great children, great freedom, great adventure, along with love, excitement, fidelity, stability, and harmony—and not only are these impossible expectations, but marriages are often crushed by their weight...."⁸⁶

Men and women do not aspire to a series of temporary sexual relationships. Over three-quarters of adolescents express a hope for a successful marriage and family life.⁸⁷ Female cohabitants in particular, are fairly sure that they will marry their partner.⁸⁸ And even after the trauma of divorce, over 70% of men and women remarry within 10 years.⁸⁹ Furthermore, the economically and educationally successful in American society—that group

⁸⁴ W. Bradford Wilcox, Seeking a Soulmate: A Social Scientific View of the Relationship between Commitment and Authentic Intimacy, at "Promoting and Sustaining Marriage as a Community of Life and Love," A Colloquium of Social Scientists and Theologians, October 24–25, 2005, at <http://www.usccb.org/laity/marriage/Wilcox.pdf>.

⁸⁵ Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004).

⁸⁶ Wendy Brown, *After Marriage*, in MARY LYNDON SHANLEY, *JUST MARRIAGE* 87, 89–90 (2004).

⁸⁷ See Wendy D. Manning, Monica A. Longmore & Peggy C. Giordano, *The Changing Institution of Marriage: Adolescents' Expectations to Cohabit and to Marry*, 69 J. MARRIAGE & FAM. 559 (2007).

⁸⁸ Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 POPULATION & DEV. REV. 703, 711–12 (1990); Wendy D. Manning, Monica A. Longmore & Peggy C. Giordano, *The Changing Institution of Marriage*, *supra* note 87, at 572.

⁸⁹ Matthew Bramlett & William Mosher, *First Marriage Dissolution, Divorce, and Remarriage: United States*, 323 ADVANCE DATA (May 31, 2001) (Centers for Disease Control, Division of Vital Statistics).

of citizens who generally lead our most important social institutions—demonstrate with their choices, that when people feel free and capacitated to choose, they choose marriage and avoid divorce.⁹⁰ And they do so in the teeth of economic models which suggest that their choices are “irrational” from the standpoint of costs and benefits.⁹¹

By contrast, even though the anthropology of those supporting institutionalization refers to the benefits of commitment, stability and marriage—particularly in the writing of Professor Bowman—the discussion instrumentalizes commitment. Commitment is identified, for example as a path of “self-realization” by Professor Regan, or as a means of securing more household income, in the works of Professors Bowman and Hamilton. Even if the authors did not intend it, their characterization overlooks the good of mutuality in an intimate relationship. It overlooks the possibility that commitment “works” not only because of what is received, but because of what is given. This is a potentially important oversight, given data showing that intimate partnerships are happier and last longer when the couple eschews the “getting” or “exchange” paradigm in favor of ignoring accounting altogether.⁹²

Additionally, supporters of institutionalization seem to give far too little attention to the evidence about the exploitation and objectification of women associated with cohabitation. They devote little attention to the fact that women express more commitment than men, and that women are more resistant to cohabitation than men.⁹³ They also do not attend adequately to the rates of abortion, infidelity and violence in cohabiting households, all of which are suffered exclusively or disproportionately by women. As suggested above, these important oversights may well be associated with the tendency of institutionalization’s supporters to overlook or minimize the significance of the incongruence between cohabitants’ living as one—residentially and sexually—while simultaneously refusing, delaying or ignoring a full and public joining of their lives.

Part III, immediately following, offers an account of the meaning of intimate heterosexual relationships which in large part contradicts the account offered in Part I, while it may also help to interpret and explain

⁹⁰ Stephanie Coontz, *The Romantic Life of Brainiacs*, BOSTON GLOBE, Feb. 18, 2007, available at http://www.boston.com/news/globe/magazine/articles/2007/02/18/the_romantic_life_of_brainiacs/; Dan Hurley, *Divorce Rate: It's Not as High as You Think*, NEW YORK TIMES, Apr. 19, 2005, available at <http://www.nytimes.com/2005/04/19/health/19divo.html>.

⁹¹ See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* 324–41 (1981).

⁹² W. Bradford Wilcox & Steven Nock, “What’s Love Got to Do With It?: Equality, Equity, Commitment, and Women’s Marital Quality,” 84 *SOCIAL FORCES* 1321 (2006).

⁹³ Karen Benjamin Guzzo, *How do marriage market conditions affect entrance into cohabitation vs. marriage?* 35 *SOC. SCI. RESEARCH* 332, 349–51 (2006).

some of the findings and anthropology treated in Part II. It adds further and potentially persuasive rationales to the case for opposing the institutionalization of cohabitation or disestablishing marriage.

A Proposal about Flourishing within Heterosexual Relationships as if the Body Matters: The Theology of the Body

This Part will describe an anthropology of human persons in the context of their inclinations to form intimate heterosexual relationships. It draws from ancient Jewish and Christian Scriptures, specifically the book of Genesis and its New Testament interpretations, as further interpreted by two late twentieth century scholars, a philosopher and a theologian, respectively, Pope John Paul II and Pope Benedict XVI. Briefly summarized, this anthropology understands the human person to be an intrinsically social, as well as rational, free, and equal entity. It proposes that loving-self-gift is the natural mode of social relationships, the source of human flourishing, and that the male-female relationship has a privileged place in revealing this truth about all human relationships (and our relationship with God), given its identity as a mutual, permanent, one-flesh union which is also the source of new life. What follows is a brief account of the essential elements of this anthropology, sufficient to compare it with the anthropologies set forth above.

According to John Paul II, a crucial “source for revealing man and woman to themselves,”⁹⁴ is God’s act of creating every human being in his image and likeness. This is the source first of all of the fundamental equality of the man and the woman.⁹⁵ Because the source of our equality is outside of ourselves, it is not changeable by our will. It is not about appearances, functions, strengths or weaknesses—but simply the co-equal humanity of the man and the woman.

Like God, man and woman, are rational⁹⁶ and free. Also like God, we are made for relationships and communion. John Paul II writes that our social nature is a consequence of our imaging a “three person” God, who lives in an eternal communion of love. Human beings image the Trinity when they form a society.⁹⁷ Our social nature is also affirmed in that part of

⁹⁴ John Paul II, Apostolic Letter *Mulieris Dignitatem*, 6 (1988).

⁹⁵ John Paul II, Apostolic Letter *Mulieris Dignitatem*, 6 (1988) (italics in original).

⁹⁶ This poses an interesting challenge to some modern notions of rationality which would exclude women’s propensity for thinking about problem solving in a personal, relational manner. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

⁹⁷ John Paul II, *Mulieris Dignitatem*, supra note 94, at 7.

the *Genesis* creation account in which God concludes after the creation of man that “It is not good for man to be alone.” (*Gen* 2: 18-20) Both creation accounts understand the human being as a “unity of the two,” as existing always in relation to another human person. The goodness of the unity or communion, particularly of the male and the female is indicated further in *Genesis*’ second creation account. Immediately after creating Eve to be Adam’s “helper” (*Gen* 2:18-20), God directs that a man shall “leave[] his father and mother and cleave[] to his wife and the two of them become one flesh.” (*Gen* 2:24). There is also Adam’s reaction upon seeing the woman; he recognizes her immediately as “bone of my bones and flesh of my flesh.” In other words, he immediately sees the “somatic homogeneity” between them.⁹⁸ He also sees that they are different—different from all of the other creatures God has previously created (none caused the man to be any less “alone,” only Eve), and different from one another. She is not identical, but a “helper” by his side. As then-Cardinal Ratzinger wrote in *On the Collaboration of Men and Women*, one should not be distracted from the reality of Eve’s equality-with-differences by the language of “helper” to describe Eve. To modern ears, it may appear to connote someone “lesser” in rank. But Benedict XVI writes that “the Hebrew word *ezer*/ helpmate indicates the assistance which only a person can render to another. It carries no implication of inferiority or exploitation especially given that God too is at times called *ezer* with regard to human beings.”⁹⁹

It is important to note the role played by the physical complementarity of Adam and Eve in the *Genesis* accounts. In his summary of this aspect of John Paul II’s *Theology of the Body*, theologian Michael Waldstein writes that: “to be a person is to stand in a relation of gift,”¹⁰⁰ and that each human person, “live[s] as a body that offers a rich natural expression for the gift of self in spousal love.”¹⁰¹ John Paul II opines that while our bodies are not all we are, they manifest our person; they alone are capable of “making the invisible visible.”¹⁰² It is in seeing one another’s body that Adam and Eve understand that each is human, but also different from one another. Their differences sharpen their self-understandings.¹⁰³ Their bodies indicate companionship and complementarity but not identity.¹⁰⁴ They are indispensable

⁹⁸ John Paul II, *The Theology of the Body*, Nov. 7, 1979, at 45, John Grabowski (ed.) (hereafter *Theology of the Body*).

⁹⁹ CONGREGATION FOR THE DOCTRINE OF THE FAITH, ON THE COLLABORATION OF MEN AND WOMEN IN THE CHURCH AND IN THE WORLD 6 n.5 (2004).

¹⁰⁰ *Theology of the Body*, Introduction, at 95.

¹⁰¹ *Id.*

¹⁰² *Theology of the Body*, Feb. 20, 1980, at 76.

¹⁰³ *Theology of the Body*, Jan. 9, 1980, at 60.

¹⁰⁴ *Theology of the Body*, Nov. 21, 1979, at 9.

elements for understanding themselves and one another. John Paul II calls this the “nuptial” understanding of the body: that the male and female are different, and made not only *with* but *for* one another.¹⁰⁵ John Paul II concludes further that the man and the woman can only find themselves through a sincere gift to the other.¹⁰⁶

John Paul II comments that this reading of the story of the creation of the man and the woman indicates that they are called *to exist mutually* “one for the other.”¹⁰⁷ In his Letter to Women, he calls it a help which is not one-sided but mutual.¹⁰⁸ They are to be “gifts” to one another. This is the fundamental meaning of the “help” spoken of in *Genesis* 2:1 8-25 (“I will make him a helper fit for him”). John Paul II says it is always a matter of a “help” on the part of both, and at the same time a mutual “help.”¹⁰⁹ The gift, the mutual service between man and woman, “operates” first at the level of the person, not at the functional or utilitarian level.¹¹⁰ Eve’s very being—equal, but different—is a donation to Adam.¹¹¹ Like him, she is not an “object” but a subject. Her gift to the man is free; she is the “master of her own mystery.”¹¹²

Theologian Brian Johnstone has explored this “nuptial” or “gifting” understanding of the body even further. He proposes that we can conclude that the very nature of the human person is a “gifted giver.” This is deduced “not simply” from the structures of male and female bodies, but from the relationship between the two.¹¹³ His approach allows us to conclude that when we speak of the flourishing of the human person in connection with intimate relations, we are never simply speaking of the “fulfillment of the subject but [also] the fulfillment of the other as receiver of the gift. It is in freely giving the gift so as to ‘perfect’ the other, that the subject is fulfilled.”¹¹⁴ Thus the inclinations and desires of the other are as significant as those of the giver and must be “taken into account in order to be able to give a true gift to that other.” Furthermore, it is in giving to the other that I am “fulfilled.” Why does this count as moral fulfillment? Because I am a “gifted giver” by my natural constitution. If I choose not to be gifted giver, then I have rejected my self and this is hatred of self. The moral life, therefore, is not just a “trajectory of the individual toward excelling or

¹⁰⁵ *Theology of the Body*, Jan. 2, 1980, at 59, 70.

¹⁰⁶ *Theology of the Body*, Feb. 6, 1980, at 72.

¹⁰⁷ *Mulieris Dignitatem* 7.

¹⁰⁸ John Paul II, *Letter to Women* 7 (1994).

¹⁰⁹ *Mulieris Dignitatem*, 7.

¹¹⁰ *Theology of the Body*, April 2, 1980, at 89.

¹¹¹ *Theology of the Body*, Feb. 6, 1980, at 71.

¹¹² *Theology of the Body* May 30, 1984, at 372.

¹¹³ Brian Johnstone, *Natural Law* (monograph) 6 (2008) (draft on file with the author).

¹¹⁴ *Id.* at 16.

flourishing but a relationship in which persons are related to other persons as the receivers and givers of gifts.”¹¹⁵ In this way, the demands of charity and justice are fulfilled by one and the same act. I give in ways that respect my natural constitution as a gifted giver, with gifts that do not negate my constitution (render me unable to give gifts respectful of the identical nature of the other), and so as to enable or capacitate the other for giving gifts themselves, in accordance with their nature. In this way flourishing requires being both a good giver and good receiver.¹¹⁶

As to the physical relationship between the man and the woman, John Paul II writes that this might be characterized as “speaking” a “language” of which they are not the author.¹¹⁷ The language the body speaks is “union,” but, as John Paul II states, “by no means” in a reductively biological way. Rather, it concerns the “innermost being of the human person as such.” In fact, he claims, the language of their bodies is truly “human” *only* if it is part of “the love by which a man and a woman commit themselves totally to one another until death. In other words, their total *physical* self-giving and becoming “one flesh” would be a lie if it were not sign and fruit of a total *personal* self-giving, in which the whole person, including the temporal dimension, is present; if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.”¹¹⁸ Still, this overcoming of the human being’s original solitude is inextricably tied up with sex: “and the two shall become one flesh.” Only the body can make visible what is invisible. Conversely, when the body acts, it is communicating the person.

In sexual intercourse, men and women’s solitude is physically surpassed. Their capacities to move beyond themselves are, in other words, “inherent in the constitution” of their bodies.”¹¹⁹ For this reason, the union of the man and the woman is uniquely important for human communion generally. We are urged by religious and secular authorities alike to “do unto one another as you would have them do unto you” (*Luke* 6:31).¹²⁰ The relationship between a man and a woman helps us grasp how this might be possible. In this relationship we come, maybe for the first time, to understand what it means that another human being could be the “center of

¹¹⁵ *Id.* at 16–17.

¹¹⁶ *Id.* at 19.

¹¹⁷ *Theology of the Body*, Jan. 12, 1983, at 359; Jan. 26, 1983, at 364.

¹¹⁸ Pope John Paul II, *Familiaris Consortio* 11 (1981).

¹¹⁹ *Theology of the Body*, Nov. 21, 1979, at 50.

¹²⁰ Pope Benedict XVI, *Lectio Divina* on Paul’s Letter to Galatians,” Feb 23, 2009, at <http://www.zenit.org/article-25182?l=english>.

the universe,” could be as important as we perceive our own life to be.¹²¹ From here we might further come to understand how *all* of our non-kin “neighbors”—understood to mean all persons in need, in the sense of the story of the Good Samaritan parable (*Luke* 10: 25-37)—might also require our love. Finally, part of the character of marital love is permanence.¹²² This is observed in the natural inclinations of man and the woman toward one another. They are inclined to “intimacy, a certain exclusivity, the generation of offspring, and a joint life project.”¹²³

Were TOB to stop at this point, it would appear to be blind to what is played out in heterosexual relationships every day: rejection, inconsistency, betrayal, oppression, and even violence between men and women. But TOB is not blind. It devotes a considerable amount of effort to explain the “size” of the disturbance or disorder we witness in male-female relations. This is the portion of TOB treating the break between God and human beings, and between man and woman—original sin—and the hereditary character of this sin. John Paul II approaches this by contrasting Adam and Eve’s responses to one another’s bodies before and after their disobedience. Prior to the fall, they looked upon one another naked and were “not ashamed.” (*Gen* 2:25). After the fall, they see one another differently, feeling compelled to cover their sexual differences with fig leaves. (*Gen* 3:7). They become incapable

¹²¹ Vladimir Solovyov, *The Meaning of Love*, *supra* note 63, at 42–51; Pope Benedict XVI, “*Lectio Divina* on Paul’s Letter to Galatians,” *supra* note 120.

¹²² Pope Benedict XVI, Address of His Holiness Benedict XVI to the Members of the Tribunal of the Roman Rota, Clementine Hall (January 27, 2007), at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html (“The indissolubility of marriage does not derive from the definitive commitment of those who contract it but is intrinsic in the nature of the “powerful bond established by the Creator”) See also Pope John Paul II, Catechesis, General Audience 21 November 1979, n.2; ORE (26 Nov. 1979), 1:

People who contract marriage must be definitively committed to it because marriage is such in the plan of creation and of redemption. And the essential juridical character of marriage is inherent precisely in this bond which represents for the man and for the woman a requirement of justice and love from which, for their good and for the good of all, they may not withdraw without contradicting what God himself has wrought within them. It is necessary to study this aspect further, not only in consideration of your role as canon lawyers, but also because the overall understanding of the institution of marriage must also include clarity with regard to its juridical dimension. However, conceptions of the nature of this relationship can be radically divergent. For positivism, the legality of the conjugal bond would be solely the result of the application of a formally valid and effective human norm. In this way, the human reality of life and conjugal love remains extrinsic to the “juridical” institution of marriage. A hiatus is created between law and human existence which radically denies the possibility of an anthropological foundation of the law.

¹²³ Pontifical Council for the Family, *Family, Marriage and De Facto Unions*, at 20, 34 (2000).

of seeing one another's bodies as beautiful, as signs of their mutual gift to one another, and rather begin to see one another in "parts." This first disruption in creation, therefore, pertains to the relationship between the male and the female. The physical aspects of the relation remain, but the contrast with their "naked but not ashamed" state is clear. Now there is a covering of their differences, a fear, a lack of trust. Their sexuality seems an obstacle in the personal relationship, the very opposite of its original purposes of creating society, communion, and one-flesh union.¹²⁴

Following their disobedience, God "subject[s]" man and woman to the world. Their "subjection" pertains to their bodies, as did their creation and their dominion over the earth ("be fruitful and multiply, fill the earth..." (*Gen 1:28*)). Man will now earn his daily bread "by the sweat of [his] face." (*Gen 3:18*). The woman will "bring forth children in pain." (*Gen 3:16*).¹²⁵ Each is also subjected to their own bodily impulses. In Paul of Tarsus' later summary of the effects of Adam and Eve's "original sin" he utters the famous line: "In my members there is another law at war with the law of my mind." (*Rom 7: 22-23*). Benedict XVI has called this the "empirical aspect" of original sin, its "tangible reality": "[T]here is a contradiction in our being. On one hand every man knows that he must do good and he profoundly wants to do so. However, at the same time, he also feels the other impulse to do the contrary."¹²⁶

Furthermore, it appears that Adam and Eve's disobedience has "his and hers" consequences. While both sexes suffer a loss of understanding that the body is a place of communion,¹²⁷ *his* body becomes the place for domination, and *hers* for a form of desire which is similar to a manipulation of his attraction,¹²⁸ in order to attain her desire (*Gen 3:16*), closeness to him and children. "[I]n pain shall you bring forth children. Yet your urge shall be for your husband and he shall be your master."¹²⁹ John Paul II notes that this is the first time the word "husband" is used in *Genesis*; it acts as a sign of the broken communion of equality. The male and the female will still experience mutual attraction, will still be called to communion, but will fail to satisfy their aspiration for a real communion of persons even in the union of their bodies. After the Fall, they will be inclined to live now, not *for* one another, but *over* one another, again, precisely on the basis of their bodies

¹²⁴ *Theology of the Body*, May 28, 1980, at 116, 117.

¹²⁵ *Id.* at 114.

¹²⁶ Pope Benedict XVI, Address to General Audience: On Christ, the New Adam, Dec 3, 2008, at <http://www.zenit.org/article-24456?l=english>.

¹²⁷ *Theology of the Body*, May 28, 1980, at 118.

¹²⁸ *Theology of the Body*, June 25, 1980, at 123.

¹²⁹ *Theology of the Body*, June 18, 1980, at 120.

and sex, and become threatened by the insatiability of that union.¹³⁰ John Paul II writes that another way to understand the new order of male-female relationship is with the language of “lust,” the making of the other human being an object to satisfy a longing.¹³¹ Lust directs personal desires to satisfy the body, at the cost of a true communion of persons. Woman has rather an “insatiable desire for a different union” and he for domination over her.¹³²

Professors Robbie George and Gerry Bradley describe the effect of treating the body of the other as an “instrument”, whether for procreation or as a “pleasure-inducing machine” as “damaging the integrity of the acting person as a dynamic unity of body, mind, and spirit.” The body is “alienated” from the “consciously experiencing (and desiring) self” and this “*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 acting person as such.”¹³³

In addition to affecting each of them somewhat differently, the Fall also imbalanced that “*fundamental equality* which the man and the woman possess in the ‘unity of the two’ and which is an indispensable condition for the “*communio personarum*.” John Paul II points out that “this threat is more serious for the woman, since domination takes the place of being a sincere gift” and therefore living “for” the other: “he shall rule over you.” This is true even as males’ domination erodes their dignity as well,¹³⁴ but less obviously in the eyes of the world and therefore less to their worldly disadvantage given the way such power is ranked in the world. Still, he writes that the answer lies in a combination of resistance and denunciation of violence¹³⁵ without denying the two sexes’ fundamental orientation to communion. This contrasts with strategies which emphasize androgyny or conflict.¹³⁶

This fundamental and persistent disorder in heterosexual relations raises the question regarding whether the powerful presence of sin and evil in human life means that humans can no longer make a decisive, stable commitment to the good. Benedict XVI called this the stance that “[e]vil is equally original as good.” and, as such “is invincible.”¹³⁷ It is a stance of

¹³⁰ *Id.* at 121.

¹³¹ *Id.* at 122.

¹³² *Theology of the Body*, June 25, 1980, at 123.

¹³³ Robbie George & Gerald Bradley, *Marriage and the Liberal Imagination*, 81 *GEO. L.J.* 304 (1995).

¹³⁴ Pope John Paul II, *Mulieris Dignitatem*, 10.

¹³⁵ *Id.* at 11.

¹³⁶ CONGREGATION FOR THE DOCTRINE OF THE FAITH: ON THE COLLABORATION OF MEN AND WOMEN IN THE CHURCH AND IN THE WORLD (2004).

¹³⁷ Benedict XVI, Address to General Audience: On Christ, the New Adam, *supra* note 126.

“anthropological pessimism.”¹³⁸ In relation to the body, this means that its sign value—as the possibility for full communion—has not been completely obscured by the effects of original sin, “but only habitually threatened.” John Paul II summarized it memorably: “the heart has become a battlefield between love and lust.”¹³⁹ Personal relations are easily “reductively” associated with the body and sex (versus a complete gift of persons)¹⁴⁰ but heterosexual communion remains possible. God is stronger than evil.¹⁴¹ Thus, there is always hope. Christians hold that humanity is “in fact cured” by God’s death and resurrection,¹⁴² a reality which, of course, he must accept or decline by free will. In the end then, the human heart is “above all the object of a call and not of an accusation.”¹⁴³ Commitment to commitment, and particularly the sacrament of marriage can strengthen their union,¹⁴⁴ but it is crucial, that both men and women “admit that the consciousness of sinfulness [associated with the heterosexual relations]” is, both a “necessary starting point,” and a “condition” of the “aspiration to virtue.”¹⁴⁵

While human beings are equal as to their orientation to loving communion, specific histories, cultures and situations of oppression can create obstacles to understanding one’s essential identity and dignity. In the face of structures of sin, clear understandings of human nature (oriented toward loving communion) and human weaknesses are required. Professors George and Bradley conclude that a denial of our identities as “gifts” or an acceptance of an equality between marital and nonmarital unions,¹⁴⁶ can “drain[]” our culture of the ability to understand the good of marriage, to observe it or to experience it. Such moves make it easier and more acceptable, to misunderstand or avoid it or even grow hostile toward it. Socially fragile groups will suffer the most.¹⁴⁷

¹³⁸ Benedict XVI, Address to the Tribunal of the Roman Rota, Jan 29, 2009, at http://www.vatican.va/holy_father/benedict_xvi/speeches/2009/january/documents/hf_ben-xvi_spe_20090129_rota-romana_en.html.

¹³⁹ *Theology of the Body*, July 23, 1980, at 126.

¹⁴⁰ *Id.* at 126.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Theology of the Body*, Nov. 24, 1982, at 347; Dec 1, 1982, at 350.

¹⁴⁵ *Theology of the Body*, Nov. 12, 1980, at 176–77.

¹⁴⁶ Pontifical Council for the Family, Marriage, Family and DeFacto Unions, *supra* note 123.

¹⁴⁷ See Robbie George & Gerald Bradley, *Marriage and the Liberal Imagination*, *supra* note 133, at 307:

The intrinsic value of marriage, knowledge, or any other basic human good is to be affirmed, it must be grasped in noninferential acts of understanding. Such acts

Getting to Commitment and Caretaking, Especially for the Vulnerable

Supporters of institutionalization want legal recognition of diverse family forms primarily as a means to channel financial benefits to children and other vulnerable citizens. They also speculate that reduced social stigma and some additional partnership stability might indirectly result from recognizing nonmarital families. Explicitly or implicitly, they base their recommendations upon the notion that human flourishing in relation to intimate adult partnerships is measured primarily in terms of material well-being and the freedom to choose among intimate relationships.

TOB disputes the notion that supporting a variety of intimate partnering arrangements itself encourages human flourishing. Yet there is nothing in TOB to dispute the good of materially aiding vulnerable citizens on the grounds that they are fellow human beings with intrinsic equality and dignity. In fact, TOB would easily endorse such a rationale. It would not, however, support the view that human beings are aided via recognizing and possibly elevating, their uncommitted sexual partnerships.

There are indications that TOB might perform better than other accounts, as an explanation of the relative situations of those in non-marital versus non-marital households. It comports with a great deal of modern empirical evidence. The story it tells about male female relationships still strikes a chord. Sociologist Neil Postman has observed in fact that exactly these types of accounts of human behavior have proved powerful over time. He is referring to accounts which provide an “interpretation to a set of human events” which “draws its appeal from the ... depth of its explanations, the relevance of its examples and the credibility of its themes.”¹⁴⁸ If this is true, then policies inspired by TOB’s view of human flourishing, are more likely to help us “get to” the good outcomes for families and

require imaginative reflection on data provided by inclination and experience, as well as knowledge of empirical patterns, which underlie possibilities of action and achievement. The practical insight that marriage, for example, has its own intelligible point, and that marriage as a one-flesh communion of persons is consummated and actualized in the reproductive-type acts of spouses, cannot be attained by someone who has no idea of what these terms mean; nor can it be attained, except with strenuous efforts of imagination, by people who, due to personal or cultural circumstances, have little acquaintance with actual marriages thus understood. For this reason, we believe that whatever undermines the sound understanding and practice of marriage in a culture-including ideologies that are hostile to that understanding and practice-makes it difficult for people to grasp the intrinsic value of marriage and marital intercourse (footnote omitted).

¹⁴⁸ Neil Postman, *Social Science as Theology*, 41 ET CETERA 21, 22 (Spring, 1984).

individuals identified by both sides of the institutionalization debate, as well as those good outcomes proposed by TOB alone.

This Part therefore, will elaborate upon how TOB's account of heterosexual intimacy could have superior explanatory powers regarding observed behaviors in intimate heterosexual unions today. The Conclusion which follows will identify themes already present in U.S. family law which might make it a receptive, even favorably disposed, environment for receiving the additional insights that TOB has to offer.

Explanatory power of competing anthropologies

You can't get to stable adult partner households, nor to care for vulnerable adult partners or their children, by dethroning marriage, or insisting that generally short-term, uncommitted relationships are "committed" or "function" like marriage, or that money is a substitute for a loving partner

An understanding of the human person as typically inclined to union with a person of the opposite sex, in a hoped-for long-term union, comports not only with the history of male-female relationships throughout recorded history,¹⁴⁹ but equally well with today's romantic search for a "soulmate," characterized by sociologist Brad Wilcox as a desire for a mate who will provide an "intimacy they have not yet found in this world—someone to share their lives, their dreams, and their desires for an enduring and heartfelt love."¹⁵⁰

Much has been made of the rising age of first marriage, or the increasing willingness of modern men and women to take up temporary sexual liaisons or even co-residence, as falsifying this claim. But these phenomena don't undermine what historian Nancy Cott calls the "resiliency of belief in legal marriage" and "preeminent stature of marriage in public opinion."¹⁵¹ Today still, marriage is a life goal for the vast majority of

¹⁴⁹ See IRVING SINGER, *THE PURSUIT OF LOVE* 66 (1994); EDWARD WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (1921).

¹⁵⁰ W. Bradford Wilcox, *Seeking a Soulmate, A Social Scientific View of the Relationship between Commitment and Authentic Intimacy*, at "Promoting and Sustaining Marriage as a Community of Life and Love," A Colloquium of Social Scientists and Theologians, supra note 84 at 1 (citing Barbara Dafoe Whitehead & David Popenoe, *Who Wants to Marry a Soulmate?* in *THE STATE OF OUR UNIONS* (The National Marriage Project, 2001) and SCOTT M. STANLEY, *THE POWER OF COMMITMENT* (2005).

¹⁵¹ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 225–26 (2000).

persons, no matter their race or economic conditions.¹⁵² In fact, even the rising age at first marriage is not as indicative as it first seems. According to economist Robert Michael, young adults still show a “strong propensity to pair off in [intimate heterosexual] living arrangements” at about age 25, no matter whether they were born in the 1930s or the 1970s. The difference is that more young adults today are choosing to cohabit first before they marry.¹⁵³ And those who cohabit, as discussed above, usually aspire to marriage.

TOB helps to illuminate the data about desires for marriage, about higher levels of happiness within marital relationships, and about the lower incidence of “betrayals” within marriage: infidelity, violence, or abortion. There is little doubt that selection factors play a role here. But there is also a likely role for marital commitment: the voluntary giving and receiving of persons’ entire selves, including their body, minds, strengths and weaknesses, their entire futures and their capacity for procreation. Within marriage, giving and receiving gifts is simply more practically possible. There is less risk involved in making investments into the other person, given not only their promise of faithfulness, but also the time horizon which provides each person with more opportunity for reciprocating to the other.¹⁵⁴ In marriage, the body is less likely to be understood as separate from the person. It is *part* of the gift given, not its most prominent aspect, as may well be the case with cohabitation, where the giving of the body stands out because it is in a sense *completely given*, while money, time, trust, and the other subjects that form part of heterosexual relationships are only *partially* given.

Not surprisingly, well-regarded research has concluded that children reared in low-conflict, marital homes containing two biological parents experience the best outcomes on average.¹⁵⁵ Children reared in other homes receive and should continue to receive public and private assistance—

¹⁵² KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005); Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004); Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor, Unmarried Parents*, 67 J. MARRIAGE & FAM. 1007 (2004); M. Belinda Tucker, *Marital Values and Expectations in Context: Results from a 21-City Survey*, in *TIES THAT BIND*, 182–83 (Linda J. Waite ed., 2000).

¹⁵³ Robert T. Michael, *An Economic Perspective on Sex, Marriage and the Family in the U.S.*, in STEVEN M. TIPTON & JOHN WITTE, JR., *FAMILY TRANSFORMED, RELIGION, VALUES AND SOCIETY IN AMERICAN LIFE* 94, 112 (2005).

¹⁵⁴ Margaret Brinig, *Domestic Partnership*, *supra* note 81, at 23 (citing Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCH. 71 (1991)).

¹⁵⁵ Kristin Anderson Moore et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can Be Done About It?* 6 (2002), http://www.childtrends.org/Files//child_Trends-2002_06_01_RB_ChildsViewMarriage.pdf.

including not only income, but also education about marriage before various problematic perceptions and behaviors become set in stone.¹⁵⁶ For their own flourishing and the success of their own children then, it would be better if they understood fully the good of marriage. On the other hand, a strategy that fails to recognize the aspiration to committed heterosexual pairing, across all races and socioeconomic groups, and the good of stable parenting for children, is very unlikely to produce good outcomes for adults or for their children.

You can't get to stability and care by failing to acknowledge the strength of both women's and men's disordered inclinations within heterosexual relationships

Perhaps the most helpful illumination offered by TOB concerns the widespread nature of the current disorders between men and women, as well-observed by scholars such as Professor Fineman. The separation, suspicion, and dissolution that characterize so many heterosexual relationships, men's objectification of and violence against women, and women's conniving in or condoning their ill treatment, are well-predicted by TOB. TOB also helps us to understand the particular "his and hers" characters of the disorder. He wishes to dominate her. One manifestation of this is his refusal to commit in the face of her greater desire to commit. He refuses to see her as a unified being, as a body-soul entity, but sees her rather as a body for his gratification. He refuses to acknowledge her equality on the grounds of her differences. In her longing for him, she is willing to debase herself. Or in the words of Professor Amy Wax, she is "complicit[]" and "contribute[s] to the very behaviors to which [she] objects."¹⁵⁷ She longs for love, but will turn to her children even to the exclusion of their father.

A view of heterosexual relationships which fails to understand that current patterns are the result of disorders versus informed, healthy choices, and which fails to understand that poor decisions are made by both sexes, will not help men and women achieve stable, nonexploitative relationships.

¹⁵⁶ See, e.g., U.S. Dept. of Health and Human Services, *Adolescent Romantic Relationships as Precursors of Healthy Adult Marriages*, Chapter Two: Describing Adolescents' Beliefs, Attitudes, and Behaviors with Respect to Romantic Relationships, available at http://www.acf.hhs.gov/programs/opre/strengthen/marr_precursors/reports/Adolescent_relationships/adolescent_chp2.html.

¹⁵⁷ Amy Wax, *Engines of Inequality*, *supra* note 34, at 590–91.

You can't get to care without understanding that the body reveals the person by "making visible what it is invisible"

TOB's willingness to understand the person as an integrated body-soul entity could assist in explaining the relationship between cohabitation and divorce, as well as the recent phenomenon of increasing infidelity within marriage. Marriage experts interviewed for commentary about the recent rise in marital infidelity suggested that people who "hook up or have relations with multiple partners" before marriage, develop "habits" which are "likely to affect their marriages."¹⁵⁸ Sociologists and other scholars have likewise suggested that premarital sexual practices could easily account for part of the robust correlation between premarital cohabitation and later divorce. TOB would add that premarital sexual relationships encourage the partners to misunderstand or to deny the meaning of the "language of the body." For them, whether sex is performed before or after marriage, it would not indicate a complete gift or commitment as between the parties. TOB might further suggest that sexual encounters which are a partial giving, or even simply a taking, help to negate the partners' powers to give good gifts to others. This loss, this inability to make a complete gift to another, or the tendency to understand sex as purely a taking, would easily persist past a cohabiting relationship into a marriage.

Closely related to the relationship between cohabitation and divorce is the intergenerational practice of noncommitment. TOB could help to explain how children exposed to their parents visible failures to commit to one another—whether via divorce, nonmarital sexual relationships, cohabitation or violence—themselves experience difficulty making intimate commitments.¹⁵⁹ Professor Amy Wax suggests that the failure to rear boys in committed parental environments might be responsible for poor women's disproportionate failure to marry these men when they grow up. Professor Wax cites the stories told by poor women in the landmark research of Professor Kathryn Edin and Maria Kefalas on single mothers in Philadelphia.¹⁶⁰ The fathers of their children regularly came from homes without married parents. Often the fathers were completely absent. Their sons, now fathers themselves, were unfaithful with multiple partners, and created "conflict, jealousy, resentment, mistrust and tumultuous personal lives." But the women they impregnated refused to join themselves permanently with

¹⁵⁸ Naomi Schaefer Riley, *The Young and the Restless: Why Infidelity Is Rising Among 20-Somethings*, Nov 27, 2008, at <http://online.wsj.com/article/SB122782458360062499.html> (visited May 20, 2009).

¹⁵⁹ Amy Wax, *supra* note 34, at 599.

¹⁶⁰ Kathryn Edin & Maria Kefalas, *Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage*, *supra* note 152.

such men.¹⁶¹ Physical loyalty and physical betrayals are important. An anthropology that does not factor these conclusions into its prescriptions for human flourishing within heterosexual partnerships is not likely to offer effective proposals.

Conclusion: Policies based upon the view of human flourishing suggested by the Theology of the Body are well attuned to the aspirations and preferences long and still exhibited within U.S. family law

Though TOB was not elaborated until the late 20th century, it is not surprising that it does not contradict, but rather affirms and even illuminates a variety of bedrock principles within U.S. family law. Part of this may be due to the important role played by Judeo-Christian notions about the family in the formation of U.S. family law; even while ours has always been a “secular” versus ecclesiastical family law, Judeo-Christian ideas are part of its “genetic code” in the words of Professor John Witte.¹⁶² Part of the coincidence between TOB and U.S. family law might also reflect the predilection of both to make rational observations and recommendations based upon observable patterns of human behavior in connection with heterosexual relationships. Three principles in particular merit commentary.

Privacy and Capacity within the Family

Both TOB and U.S. family law posit that adults are capacitated to care for one another and for their children. This presumption undergirds U.S. family law’s generally characterizing the family as a “private realm.”¹⁶³ We assume regarding husbands and wives, for example that in medical situations requiring substitute decision making for an incapacitated person, the spouse is the person who can be best trusted to render a decision in the best interest of the other spouse. We also leave decisions about children first and foremost to their parents and explicitly adopt the presumption that fit parents are presumed to act in their children’s best interests.¹⁶⁴ Parents are seen as capacitated givers, who, as such, also have rights to make determinations about their children without the interferences of the state, even about

¹⁶¹ Amy Wax, *supra* note 34, at 590.

¹⁶² JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 15 (1997). *See also* Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MARYLAND L. REV. 540, 544–45 (2004).

¹⁶³ *Troxel v. Granville*, 530 U.S. 57, 58 (2000).

¹⁶⁴ *Troxel v. Granville*, 530 U.S. at 69.

subjects on which the state has an undoubted interest, such as their children's medical health and education.

The limits we place on spouses' or parents' decision making are triggered by circumstances and events indicating that the responsible parties are *not* able to give good gifts to one another at a particular time, or are even acting explicitly for their own interests or against the other's interests. Thus the state denies marriage to those below a certain age or mental capacity. It closely examines contracts struck between engaged or married partners when they are negotiating about the terms of the dissolution of their relationships. If parents are acting against their children's interests in cases of abuse, neglect or abandonment, the law will limit or remove parents' powers over their children, briefly or even permanently, as necessary.

The presumption, in other words, is that the state's "place" respecting family governance is a distant second, behind the capacitated and committed adult members. It will not first and foremost understand the state to be a replacement for a spouse or a parent. The state may, however, recognize and promote behavior which supports benevolent mutuality between partners, and care for children, particularly for the benefit of disadvantaged parents and children whose own family settings or other hardships have reduced the adults' capacities for good giving as between partners or from parents to children.

Equality of Persons Respecting Marriage

Both U.S. family law and TOB hew to the principle of the equality of persons of different sexes, races, cultures or socioeconomic groups in connection with their interests in marriage. There are no legally recognized exceptions to our laws regarding entry into marriage, or interspousal relations based upon the sex or race or culture or income and educational levels of the spouses or would-be spouses. The goals and anthropology of the institutionalization position, on the other hand, come perilously close to suggesting that the best we can do is to suggest that a lack of interpersonal, heterosexual commitment is either as good as commitment—and should be recognized as such in law—or can be made functionally similar to commitment via an infusion of money. These strategies would be played out most frequently among the poor and minority communities in the United States. Proponents believe that they would help avoid the "demonizing" of nontraditional households. But a different result is more likely. So long as wealthier, better educated citizens continue to testify with their lives what people of means and education understand to be a good way of life for themselves and for their children, and so long as the empirical data continue to indicate that marriage promotes the welfare of adults and children alike, neglecting to assist the disadvantaged to realize marriage (in addition to

assisting their immediate needs) is tantamount to doubting their very equality. TOB's insistence that every human person is intrinsically social and essentially gifted, and that marriage is the way most human beings will realize their identity, broadly affirms the equality of all human beings.

The Body Matters

U.S. family law, like TOB, indicates that the body matters. It treats harm to the body as problematic and actionable, even if the person harmed claims not to care, or is not even able to comprehend his or her own bodily suffering or destruction. Thus we continue to debate at both the national and the state level laws concerning abortion, or assisted suicide or research requiring the destruction of human embryos.

Furthermore, U.S. family law continues to contain provisions which can be characterized as attempts to preserve the dignity of the body, and to prevent a separation in the public mind between the body and the person. Thus state laws continue to forbid bestiality, even though bestiality does not likely cause lasting physical harm to human beings involved.¹⁶⁵ There remain laws on the books banning cohabitation and adultery. In the process of constitutionalizing homosexual sodomy, Justice Kennedy in his *Lawrence v. Texas* opinion, apparently felt constrained by the long history of U.S. family law's interest in dignity, to assure the public that such a sexual encounter would surely take place only within a "personal bond that is more enduring."¹⁶⁶

U.S. law also strongly signals that the body matters with laws forbidding the exchange of bodies for money. This is the substrate of laws banning prostitution, surrogacy, baby-selling, as so well discussed by Margaret Radin in her important work on "inalienable property."¹⁶⁷ This is the explanation for the *Marvin v. Marvin* court's simultaneous allowing of cohabitation contracts while forbidding such contracts if they appeared to be explicit exchanges of promises for sex.¹⁶⁸ There is also evidence of our discomfort with assigning dollar values to bodies in aspects of assisted reproductive technologies. Clinics soliciting "donor" sperm and eggs often insist that they exchange payment for the human labor involved and not for the human gametes.¹⁶⁹

¹⁶⁵ Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 ST. JOHN'S J. LEGAL COMMENT. 445, 484 (2007).

¹⁶⁶ 539 U. S. 558, 567 (2003)

¹⁶⁷ *Market Inalienability*, 100 HARV. L. REV. 1849 (1987)

¹⁶⁸ 557 P.2d 106 (Cal. 1976).

¹⁶⁹ See generally Helen Alvaré, *The Case For Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. LEGIS. 1 (2003).

TOB helps us further understand the meaning and dignity of our bodies. Its insights are compatible with extant U.S. laws and legal debates which seek to preserve the dignity of the body.

Marriage Matters

Despite predictions over the last several decades that marriage is passing away, or must diminish in importance relative to parent-child relationships, states and the federal government have moved very little toward recognizing or normalizing non-marital relations. Professor Garrison has chronicled this well.¹⁷⁰ In fact, over the last 15 years, state and federal governments have begun to pay far greater attention to marriage again. Three administrations in a row—Presidents Clinton, Bush and now Obama—have been willing to fund “marriage promotion” efforts.¹⁷¹ Grass roots and interest group activity in support of marriage is high. And sociological research continues to confirm the importance of marriage for the health and well-being of adults and children. Conversely, decades of experience with and research about cohabitation and single parent households indicate that these are not generally good ways to capacitate couples for mutual care or for stable parenting. TOB’s understanding of the centrality of marriage, in other words—the centrality of a committed, exclusive, procreative union—is still very much reflected and supported by current events and policies.

Proposals to aid persons who have been unable to realize the gifts of marriage are important—whether they are living as cohabitants or lone parents, or otherwise. But marriage is also important and ought not to be compromised by proposals to disestablish it or to institutionalize nonmarital relationships.

¹⁷⁰ See Garrison, *Nonmarital Cohabitation: Social Policy and Legal Regulation*, *supra* note 2.

¹⁷¹ See, e.g., Obama-Biden Plan, Agenda—Family, at http://change.gov/agenda/family_agenda/ (last visited May 9, 2009).