

# Minimizing Marriage: What Liberalism Implies for Marriage Law

## **Introduction**

Recent defenses of same-sex marriage and polygamy have invoked liberal principles such as neutrality and equal treatment.<sup>1</sup> Such reasoning is generally sound but does not go far enough. This paper traces the full implications of liberal principles for marriage law; I will argue that they entail ‘minimal marriage’, which might also be described as marital pluralism or disestablishment. This is a legal framework for caring relationships which allows individuals to select from marital rights and exchange them with whomever they want, with no principled restrictions on the sex or number of spouses or the nature and purpose of their caring relationships.

It might be thought that neutrality implies abolishing marriage. Some defenses of marriage, including same-sex marriage, have conflicted with neutrality by grounding marriage law in supposed goods of marriage.<sup>2</sup> I will argue that there *is* a neutral rationale for a legal framework supporting adult caring relationships (‘marriage’), and that this framework is a fundamental matter of justice.

Neutrality is controversial, and I do not defend it here; my aim is to show how far-reaching its implications for marriage are.<sup>3</sup> Some may take my conclusions as a *reductio* of neutrality. But the value-pluralist perfectionist liberal cannot rest easy, for value-pluralist perfectionist liberalism which allows diversity in relationship ideals has the same implications.

## **1. Minimal marriage: the proposal**

Just as Nozick's libertarian state is *minimal* compared with current welfare states, so minimal marriage has far fewer state-determined restrictions than current marriage. And just as Nozick's minimal state is, in his view, the most extensive state justifiable, these restrictions on marriage, so exiguous from our point-of-view, are the most extensive set compatible with liberalism. The central idea is that a liberal state can set no *principled* restrictions on the sex or number of spouses and the nature and purpose of marital relationships, *except* that they be caring relationships. Moreover, the state cannot require exchanges of marital rights (entitlements, powers, obligations) to be fully reciprocal, or in complete sets. Thus, individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship, and which rights and responsibilities to exchange. Finally, many current marital rights – such as entitlements to healthcare and pension benefits, or rights of sexual access – would be unavailable or separate from marriage in an ideal liberal society.

In U.S. federal law alone, there are now “1,138 federal statutory provisions ... in which marital status is a factor in determining or receiving benefits, rights, and privileges,”<sup>4</sup> in addition to state property and divorce law. Marriage brings significant benefits, leading legal scholar Mary Anne Case to describe its “principal legal function” as the “designation, without elaborate contracting, of a single other person third parties can look to in a variety of legal contexts,” especially in distributing benefits.<sup>5</sup> These legal implications can be roughly (and incompletely) taxonomized as entitlements to direct or indirect financial assistance,<sup>6</sup> protection of surviving or divorced spouses,<sup>7</sup> and rights facilitating maintenance of a relationship or recognizing its significance.

This last category comprises the rights distinctive to minimal marriage in an ideal liberal society. Special consideration for immigration is an example: spouses cannot share daily life if they are in different countries. Other examples

are spousal employment and relocation assistance and preferential hiring,<sup>8</sup> in-state tuition eligibility, immunity from testifying, spousal care leave entitlement, default hospital and prison visiting rights, entitlement to burial with one's spouse in a veterans' cemetery, and emergency decision-making powers. Such entitlements and status designations allow spouses to express and maintain their caring relationships, and they form the distinctive content of minimal marriage as a law recognizing and supporting caring relationships. Thus, minimal marriage differs from proposals for contractualizing marriage, because this central cluster of rights is standardized in accord with the caring relationships they support and designate:<sup>9</sup> minimal marriage ideally consists only in rights which recognize and support such relationships.<sup>10</sup>

Many current marriage rights would be eliminated in an ideal liberal egalitarian society. Such a society would not provide health care and basic income through marriage. Nor would it, assuming economic dependency between spouses, provide economic assistance to the married. Because the state would not assume the terms of the relationship, property arrangements would be fully contractualized.

Let me now briefly address attempted *reductio* objections that such a law will countenance immoral or ludicrous marriages.<sup>11</sup> As minimal marriage complies with criminal law, it cannot permit rights violations, such as marital slave contracts or pedophilia. Children and non-human animals cannot make marriage contracts because they cannot make any contracts. Minimal marriage status designations require consent from both parties, and minors are not legally competent to consent. While there are no principled limits on number, the restriction to caring relationships imposes practical limits, for there are psychological and material limits to the relationships one can sustain. However, should a surprisingly large number of people genuinely sustain caring relationships, there is no reason to deny them *distributable* benefits such as

visiting rights. But feasibility considerations could limit transfer of certain entitlements, such as immigration eligibility.

This proposal might seem esoteric. But consider the case of Rose. Rose lives with Octavian, sharing household expenses. To facilitate this ménage, the two form a legal entity for certain purposes - jointly owned property, bank account access, homeowner and car insurance, etc. The arrangement is long-term, but not permanent. Octavian's company will eventually relocate him, and Rose will not move – but they agree to cohabit until then. They even discuss how to divide property when the household dissolves, and agree that if either leaves sooner, the defaulter will pay costs.

Rose's only living relative, Aunt Alice, lives nearby, in genteel poverty. Rose's employer provides excellent pension and healthcare benefits, and other perks such as reduced costs for its products, for which Rose's spouse is eligible. Octavian doesn't need these benefits, but Alice does.

While Rose enjoys Octavian's company, and has affection for Alice, only Marcel truly understands her. Marcel is, like Rose, a bioethicist, and understands her complex views on end-of-life decision-making. Rose wants to transfer emergency decision-making powers to him. In addition, they spend a lot of time together, discussing philosophy while enjoying recreational activities, and would like eligibility for 'family rates' at tourist attractions, health clubs, and resorts. Their local city gym has a special rate for married couples, but they don't qualify.

There could be more people in Rose's life who occupy a role associated with spouses. She might share custody of a child with an ex. She might cohabit platonically with Octavian, living separately from her long-term love, Stella. There is no single person with whom Rose wants or needs to exchange the whole package of marital rights. Moreover, doing so would be inconvenient, requiring her to make additional contracts overriding the default terms of marriage. Even worse, marrying any one person would expose her to undesired legal liabilities

and interfere with her eligibility for some loans and government benefits. But Rose wants and needs to exchange *some* marital rights with several different people.

Rose's ménage might seem strange to some – though investing all one's eggs in one basket might seem equally strange to Rose! It's not obvious that each person will find another with whom their major emotional, economic, and social needs permanently mesh. But minimal marriage does not take sides on this. It allows 'traditionalists' to exchange complete sets of marital rights reciprocally, while Rose distributes and receives them as needed. Minimal marriage is a law of *adult care networks*, including 'traditional' marriages.

## 2. The Argument

The argument that liberalism entails minimal marriage is grounded in neutrality, the principle that the state should remain neutral between competing conceptions of the good found in comprehensive religious, philosophical, or moral doctrines (excepting any which conflict with justice).<sup>12</sup> Neutrality (of *aim*) proscribes the state from justifying law or policy by appeal to a contested conception of the good. As Dworkin writes, "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."<sup>13</sup> As Rawls formulates the principle in *Political Liberalism*, "the state is not to do anything intended to favor or promote any particular comprehensive doctrine..."<sup>14</sup> If the principle holds, a liberal state must be neutral between the many contemporary competing conceptions of good relationships.

In *Political Liberalism*, Rawls argues for the exclusion of contested conceptions of the good at the constitutional stage. He focuses on constitutional issues in order to consider "the strongest case" for the exclusion of contested conceptions; he says that a fuller account would consider whether public reason holds in less fundamental matters.<sup>15</sup> Despite this lacuna, I will argue that

marriage *is* a fundamental question of justice, hence subject to neutrality, even if not part of the constitution. The reason is that legal frameworks for caring relationships are primary goods and so ground claims of justice.

Furthermore, two strong reasons for neutrality apply to marriage law. The first is the intuitive idea that neutrality is required “to treat ... citizens as equals” – not because all conceptions of the good are equally valid, but because reasonable people hold different ideals and have liberty rights to pursue them.<sup>16</sup> State action is implicitly coercive, and so state endorsement of ethical views from which citizens reasonably differ fails to respect their liberty.<sup>17</sup> These considerations are especially compelling when it comes to relationships, where there is both deep disagreement and a liberty interest.

Second, even were perfectionism theoretically correct, there are practical risks in trusting the state to judge and promote conceptions of the good. Doing so would require civil servants of extraordinary sensitivity, sophistication, and philosophical acumen. A special danger is that ethical views can reflect self- (or class-) interest. The relation between restrictive sexual codes and the oppression of women is an example. In the case of marriage, risks of fallibility are especially high. Of course, so-called ‘neutrality’ may also mask bias. Fallibility is not a reason to reject *either* neutrality or perfectionism in theory. But perfectionism, by *permitting* state action, increases the chances of invasive or unjust action, whereas neutrality *limits* state action.

So far, I have suggested that neutrality applies to marriage. The next step is to argue that neutrality applied to a legal framework designating and supporting adult caring relationships entails minimal marriage. But this raises another question – what about another much-mentioned function of marriage, reproduction and child-rearing? Is marriage merely a framework for adult relationships?

This question cannot be answered by appealing to ‘the’ definition of marriage. The legal definition is just what is at issue,<sup>18</sup> and neutrality requires setting aside religious and ethical definitions. Moreover, even a widely shared understanding of marriage does not in itself provide reason for legislation. Marriage design depends on what marriage is ‘for’, and what it is ‘for’ should be settled by independent reasons for what kind of institutions there should be.

*Prima facie*, the claim that marriage is ‘for’ reproduction and child-rearing seems false. Biological procreation cannot be the rationale of marriage, for spouses adopt, rear step-children, and use gamete donors. Fertility is not a condition for marriage. Nor is child-rearing the rationale of marriage: many marriages are childless, and marriages do not end when children leave home.

But this is too fast. An objector could admit that procreation, child-rearing, and marriage are not congruent, but insist that they should be. He might add that the deviation of some marriages from the institution’s underlying rationale is irrelevant. After all, the abuse of institutions does not affect their underlying rationale, and practice does not settle the normative question of what institutions we should have.

Let me briefly rehearse reasons for separating a legal framework designating and supporting adult caring relationships from one regulating and supporting parenting.<sup>19</sup> First, liberty requires that terms of adult relationships be contractual, while parenting obligations should be imposed and standardized. Second, separating parenting and marriage frameworks benefits children *outside* marriages, who are otherwise left out of parenting frameworks. Third, while it is sometimes claimed that children do best in heterosexual monogamous families, such claims are empirically dubious.<sup>20</sup> Finally, given widespread abuse and violence within marriage, women and children are often better off outside it.

Many liberal defenses of same-sex marriage take marriage as a framework for adult relationships and proceed with neutrality arguments. They argue that

same-sex relationships are relevantly similar to heterosexual relationships in the defining features of marriage.<sup>21</sup> Such a list is given by Ralph Wedgwood. Marriage “typically involves sexual intimacy, economic and domestic cooperation, and a voluntary mutual commitment to sustaining this relationship.”<sup>22</sup> However, relationships may be important, and their members desire marital benefits, without sexual intimacy or economic or domestic cooperation.

Likewise, Adrian Wellington argues that “same sex couples are entitled to the same state sponsorship as opposite sex couples”<sup>23</sup> because same-sex relationships functionally resemble marriages, as “voluntary intimate relationships.” Wellington admits that ‘voluntary intimate relationships’ applies to groups and friendships, but insists that marriage recognizes “couples,” and not “special friends.”<sup>24</sup> But limiting state sponsorship to couples, excluding “special friends,” *ménages à trois*, and other adult care networks, also runs afoul of neutrality.

Neutrality applied to a framework for adult relationships implies that law should not endorse a contested ideal of relationship – but this is just what the monogamous ideal, gay *or* straight, is. Cheshire Calhoun recognizes this, arguing that liberal same-sex marriage advocates should recognize that their reasoning extends to polygamy. She writes that defenders of same-sex marriage have failed to demand “that the law be neutral with respect to competing conceptions of how people can best satisfy their needs for emotional and sexual intimacy, care-taking, reproduction, and child-rearing.”<sup>25</sup> Once it is noticed how many varying conceptions of good relationships exist in our society, it is clear that neutrality implies that marriage law should not presuppose sex or romance, aspirations to permanence or exclusivity, or full reciprocal exchange of marital rights.

Marriage, including same-sex marriage, currently recognizes a single central exclusive sexual relationship of a certain priority and duration. But this

ignores alternative ideals, such as networks of multiple, significant, non-exclusive relationships providing emotional support, caretaking, and intimacy. Such adult care networks appear in the gay community, in African-American communities, among seniors, unmarried urbanites, ‘polyamorists’, and in ‘Boston marriages’.

Some gay and lesbian theorists have criticized the exclusive relationship ideal as a heterosexual paradigm. They point out that gays and lesbians often choose relationships which are less possessive, demanding, and insular, and more flexible and open. Some gay and lesbian theorists have rejected same-sex marriage on the grounds that instead of affirming difference, it will assimilate lesbian and gay relationships into the heterosexual model.<sup>26</sup> But this concern rather implies that marriage law should accommodate difference.

Different relationship ideals are not exclusive to the gay and lesbian community. Polyamorists promote multiple love relationships as involving less jealousy and more honesty than exclusive monogamy, which they see as unhealthily possessive, what Laura Kipnis calls the “domestic gulag.” Kipnis sees ‘traditional’ marriage as destructive of spontaneity, like Romantics who argue that marriage destroys passion.<sup>27</sup>

Other social critics hold ‘alternative’ relationship ideals because ‘traditional’ marriage is incompatible with more fundamental values, such as equality. For example, Adrienne Rich argued that exclusive heterosexual marriage undermines strong relationships between women.<sup>28</sup> Some feminists have criticized the idea of marriage as *union* insofar as women have lost their identity in it. Marxists understand marriage as ownership of women and embodying pernicious aspects of capitalism.<sup>29</sup> For such theorists, ‘traditional’ marriage conflicts with their ideals.

Other groups emphasize the importance of adult care networks rather than critiquing marriage. Quirkyalones and urban tribalists hold ideals of sociability beyond an isolated dyad. The quirkyalone movement began with one woman’s

recognition that her friends played the role in her life that marriage or coupledom does for many. Quirkyalones want respect for their choice to be 'single'; they argue that society treats the unmarried, or uncoupled, as incomplete and immature, and fails to recognize the importance of non-'traditional' relationships.<sup>30</sup> From another perspective, bell hooks proposes 'alternative' family models which reflect her working-class African American experience of strong inter-generational ties between women.<sup>31</sup> These networks help their members with challenges such as combining paid work and child-care. For different reasons, many people have abandoned the ideal of a central, exclusive relationship for ideals of networks, 'tribes', or groups of friends, and they defend these conceptions by appeal to other values.

Some theorists dismiss such ideals as academic theories removed from real life.<sup>32</sup> But there have been widespread calls for recognition of adult care networks,<sup>33</sup> quirkyalones and urban tribes. Marriage rates have decreased; the *New York Times* reported that, in 2005, 51% of U.S. women were "living without a spouse."<sup>34</sup> Popular U.S. entertainment, such as *Friends* and *Will and Grace*, suggests that many identify with the unmarried main characters.

The monogamous central relationship is only one contested ideal among many. Marriage law presupposing such a relationship appears to be based on a contested conception of the good.<sup>35</sup> In the absence of neutral reason for defining marriage as heterosexual, monogamous, exclusive, durable, romantic, sexual, and so on, the state must recognize and support all relationships - same-sex, polygamous, polyamorous, urban tribes - if it recognizes and supports any. Because it cannot assume that spouses must relate in a certain way, it also cannot assume one set of one-size-fits-all marital rights. What it can do is make available a number of rights designating and supporting relationships which individuals can use as they wish.

The argument has been framed in terms of neutrality, but it could be recast in terms of a value-pluralist perfectionism. I do not think that pluralist perfectionist liberalism can deny the value of adult care networks. In light of the idiosyncrasy and variability of good relationships, it would be odd for a value pluralist to impose a single norm in this particular area.<sup>36</sup>

### **3. Why marriage?**

Why should the state recognize and support any relationships? How can a law of adult relationships be neutrally justified?

State stability might seem to provide reason for marriage, as recent marriage promotion claims. But marriage is an inefficient, possibly counter-productive, route to stability. U.S. marriage promotion policy has distracted from more pressing bases of stability such as poverty and housing. Childhood relationships matter more than adult relationships in creating stable citizens, suggesting the need to support all parents, not just married ones. Moreover, such arguments overlook feminist critiques of oppressive and violent aspects of marriage.<sup>37</sup>

A second potential justification for marriage law is as satisfying wants or preferences. Wedgwood argues in this vein that marriage law can be justified neutrally as satisfying citizens' desires to have their relationships recognized as marriages. This forestalls the potential objection that marriage law is not neutral because *any* state support for relationships sidelines the ideals of hermits and the solitudinous. Neutrality requires that the state not invoke a contested ideal, and the rationale of satisfying wants avoids doing so.

But this rationale faces problems. First, wants are shaped by existing social practices; the preferences of oppressed people may be shaped by their oppression. This is a reason for some feminists to reject the proposal.<sup>38</sup> Second, preference satisfaction does not give sufficient reason for legislation. Consumers

may want various and cheap goods. This does not give legislators reason to use state coercive powers to create a framework providing them.

There is a better rationale for marriage law: care is a primary good.<sup>39</sup> The omission of care from the primary goods is striking. In *Political Liberalism*, Rawls defines primary goods as goods essential to the development and exercise of the moral powers and pursuit of varied conceptions of the good.<sup>40</sup> None of us would have moral powers or ideals to pursue were it not for care as children, and throughout our lives we are liable to need care in order to sustain and develop our moral powers. Indeed, in *Theory of Justice* Rawls recognizes this, basing his account of moral development on family relationships. The implications of including care as a primary good are far-reaching: primary goods ground claims of justice.<sup>41</sup>

‘Care’ is here construed as located in caring relationships, incorporating material care-taking, which can be done by a paid care-taker, and attitudinal care, involving concern for particular others.<sup>42</sup> Caring relationships involve attitudinal care between parties who know each other, take an interest in each other as persons, and share some history. They may exist between persons who are also related in other ways, as between a paid care-taker and cared-for.<sup>43</sup>

Anne Alstott, Martha Fineman, and Eva Kittay have recently argued for care-taking or dependency frameworks regulating, protecting, and providing state support for caring relationships.<sup>44</sup> My point dovetails with these: care is a primary good, necessary for the development and exercise of the moral powers. This necessity is especially clear in the case of dependency. Of course, marriages need not involve dependency. However, one reason to view *all* caring relationships, dependent or not, as primary goods is the overlap between dependent and non-dependent relationships. As adults age or fall ill, relationships shift from non-dependence to dependence and vice-versa. A currently non-

dependent relationship may lay the foundations (epistemic and motivational) for future care-taking.

Moreover, caring relationships are almost universally a context in which individuals develop and realize their moral powers. Most people do not and cannot develop and exercise those powers in isolation, but do so in relationships with others. We form our conceptions of the good in colloquy with significant others, and exercise our sense of justice in relationships. Relationships also *indirectly* enable parties to pursue ideals by providing psychological, emotional, and health benefits. Rawls says that “perhaps the most important primary good” is self-respect, and there are clear connections between interpersonal relationships and mental health.<sup>45</sup> The psychological value which relationships typically have, combined with differing needs for intensity and number of relationships, provides a rationale for a capacious, flexible legal framework for non-dependent relationships.

To be consistent with neutrality, caring relationships must be part of the thin theory of the good. This faces the ‘hermit objection’: the hermit may protest that relationships are not essential to the exercise of his moral powers. This recalls the criticism that Rawls’ primary goods are not neutral because they exclude anti-materialist ideals – e.g., monastic ideals of poverty.<sup>46</sup> The hermit objection is no more problematic than the monk objection – perhaps even less problematic, for someone who derives no psychological benefit from caring relationships may be psychologically disturbed. In any case, both present a problem for the Rawlsian, so anyone who wishes to defend a Rawlsian theory of justice will need to respond them. In my view, the appropriate response is to admit that the thin theory of the good reflects goods almost, but not quite, universally useful.

Of course, caring relationships, unlike social primary goods, are not distributable, nor a basis for interpersonal comparison. But this is also true of

self-respect; just as the ‘social bases of self-respect’ are the social primary good related to self-respect, so the social primary good related to caring relationships are legal frameworks designating and supporting them, like minimal marriage.

If frameworks for caring relationships are primary goods, presumably members of the original position would choose to distribute them on an equal-access basis. Given the variety of relationships and of how people prioritize them, and the fact that some relationships threaten autonomy, incentives to remain in relationships or reduced exit options would be viewed with suspicion. Thus, minimal marriage in an ideal liberal egalitarian society would perform functions of status designation and facilitating relationship maintenance – but not supporting dependency or constraining spouses to stay married.

#### **4. Non-ideal theory**

My arguments dovetail with a number of feminist concerns: false neutrality, the oppressive effects of state promotion of gendered marriage, and the failure to recognize care as a political good. But so far, I have been considering marriage law in an ideal liberal society, and, as feminism reminds us, we do not live in one. In non-ideal circumstances, it may be unjust to implement the results of ideal theory.

It might be thought that minimal marriage, by promoting non-traditional arrangements, would exacerbate poverty. U.S. federal policy addresses the poverty of single mothers through marriage promotion.<sup>47</sup> It is difficult to summarize the problems with this approach, but here are a few. First, trying to address the poverty of single mothers through marriage is like trying to shove an escaped elephant back into a barn. The conditions which, according to Stephanie Coontz, undermined the ‘traditional family’ – women’s economic independence, birth control, and the idea that marriage should be emotionally satisfying – are persistent. One-third of U. S. children are now being reared outside marriage.

Marriage promotion is an inefficient anti-poverty program.<sup>48</sup> In contrast, minimal marriage - assuming that for a transitional period benefits such as healthcare will be available through it – would provide women greater access to benefits. While current marriage promotion would increase women’s economic dependence on men and so exacerbate abuse, minimal marriage allows women more marriage options.

Susan Moller Okin and Mary Lyndon Shanley have argued against contractualizing marital property arrangements on the grounds that restrictive divorce law protects economically vulnerable women in ‘traditional’, gender-structured marriages.<sup>49</sup> Likewise, Carole Pateman worries that contractualization will legitimize oppressive forms of marriage.<sup>50</sup> Freedom of contract is compatible with women being pressured to make disadvantageous choices. These serious concerns may justify a transitional stage retaining alimony; these may be justified as remediating economic injustices caused by the state.<sup>51</sup> This raises questions of non-ideal theory – how to move from the actual to the ideal; but the need for non-ideal theory does not entail that ideal theory cannot guide just practice.

Despite these worries, minimal marriage has feminist benefits. First, unlike current marriage, it involves informing prospective spouses of their rights, the terms of the agreement, and its implications. Equal opportunity and rectification for past state injustice require educating women about potential economic vulnerabilities. Information about the likely consequences of their choices might lead women to resist exploitative relationships.

Second, minimal marriage gives women more opportunities, increasing their bargaining power. The worry that polygamy will devolve into male-headed polygyny is often raised. But economists who study “marriage markets” argue that polygamy, in a context of liberal rights, increases women’s bargaining power.<sup>52</sup> Further, as Calhoun points out, legal marital rights would benefit multiple wives.

Finally, minimal marriage denormalizes heterosexual monogamy as a way of life. In this respect, I consider my position, despite differences, responsive and sympathetic to lesbian and queer critiques of marriage such as Claudia Card's, Paula Ettelbrick's, and Drucilla Cornell's. By its extension of marriage to all caring relationships, minimal marriage really does affirm difference. Unlike current marriage, minimal marriage does not mark some relationships as 'legitimate'. Its rationale is to support caring relationships, not to make distinctions among them.

This has a further implication. Social pressures surrounding heterosexual monogamy contribute to women's economic vulnerability by promoting 'traditional' wifehood. Minimal marriage removes state endorsement from 'traditional marriage' and over time this will change people's aspirations. One tension between liberalism and feminism results from skepticism about whether choice will serve women's interests in light of social pressures. This paper has obliquely drawn attention to how state marriage promotion reinforces those social pressures, and how state neutrality, properly implemented, might combat them.

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<sup>1</sup> On same-sex marriage see Adrian Alex Wellington, "Why Liberals Should Support Same Sex Marriage," *Journal of Social Philosophy* 26:3 (1995): 5-32; Ralph Wedgwood, "The Fundamental Argument for Same-Sex Marriage," *Journal of Political Philosophy* 7:3 (1999): 225-242; Kory Schaff, "Kant, Political Liberalism, and the Ethics of Same-Sex Relations," *Journal of Social Philosophy* 32:3 (2001): 446-462, and "Equal Protection and Same-Sex Marriage," *Journal of Social Philosophy*, 35:1 (2004): 133-147; and a related argument in Buccola, Nicholas, "Finding Room for Same-Sex Marriage: Toward a More Inclusive Understanding of a Cultural Institution," *Journal of Social Philosophy*, 36:3 (2005): 331-343. On polygamy, see Cheshire Calhoun, "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy," *San Diego Law Review* 42 (2005): 1023-1042; Jeremy Waldron, "Autonomy and Perfectionism in Raz's *Morality of Freedom*," *Southern California Law Review* 62 (1988-89): 1097-1152. Neutrality also underlies the debate over same-sex marriage between Jordan, Boonin, and Beyer (see fn. 53).

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<sup>2</sup> I include the purportedly neutral rationale given in Christopher Bennett, “Liberalism, Autonomy, and Conjugal Love,” *Res Publica*, 9 (2003): 285-301; other defenders of marriage – the new natural lawyers, Roger Scruton – do not aim at neutrality.

<sup>3</sup> I must emphasize that I am discussing marriage law. My arguments do not apply directly to private-sphere benefits or religious practice, although marriage law reform would alter the implications of statutes prohibiting discrimination on the basis of marital status.

<sup>4</sup> At the end of 2003, reported by the General Accounting Office. Dayna K. Shaw, Associate General Counsel, in a letter of January 23, 2004 to Bill Frist. The letter accompanies the 2004 GAO report, labelled “GAO-04-353R Defense of Marriage Act.” See also Enclosure I, “Categories of Laws Involving Marital Status,” in a letter of January 31, 1997 by Barry R. Bedrick, Associate General Counsel, GAO, to Henry J. Hyde. The letter accompanies the 1997 GAO report, labeled “GAO/OGC-97-16 Defense of Marriage Act.”

<sup>5</sup> Mary Anne Case, “Marriage Licenses,” *Minnesota Law Review* 89 (2004-05): 1758-1797, pp. 1781, 1783.

<sup>6</sup> E.g. entitlement to Social Security, pensions, and Medicaid, West Virginia’s cash payouts on marriage, increased Social Security disability payments for married persons, increased disability pensions for married veterans and federal employees, military family separation allowance and increased housing allowance. See ‘State Policies to Promote Marriage’, a report prepared for the U.S. Department of Health and Human Services, 2002, available from USDHHS, and Department of Defense web-site (<http://www.dfas.mil/>).

<sup>7</sup> Protection of the widowed, for example, through funeral and bereavement leave, pension and health-care entitlements, indemnity compensation or the right to sue for a spouse’s death, automatic precedence for life insurance payouts and final paychecks, control of copyright, and automatic rights to inherit if the spouse dies intestate and to make decisions about the disposal of the body.

<sup>8</sup> Currently an entitlement of US military and federal employees.

<sup>9</sup> Because their content is defined by their function, contractual individualization here only means that each individual chooses to whom transfer the right.

<sup>10</sup> Care, broadly construed, may involve physical or emotional care-taking or simply a caring attitude (an attitude of concern for a particular other). ‘Relationship’ implies that parties know and are known to one another, have on-going direct contact, and share a history.

<sup>11</sup> John Corvino, in “Homosexuality and the PIB Argument,” *Ethics* 115 (2005): 501-534, responds at length to the ‘polygamy, incest, bestiality’ argument against same-sex marriage, an argument made by John Finnis among others.

<sup>12</sup> A conception of the good is a view of what is good or valuable; a comprehensive doctrine concerns all areas of life, as opposed to the narrowly political.

<sup>13</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 191.

<sup>14</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 193.

<sup>15</sup> Rawls 1993, p. 215.

<sup>16</sup> Dworkin, 191; Rawls 1971, 329.

<sup>17</sup> Rawls 1993, p. 217; cf. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 33.

<sup>18</sup> See Adèle Mercier’s affidavit for the petitioners in *Halpern v. Canada, A.G.* on the meaning of the word ‘marriage’, filed in the Ontario Superior Court of Justice, Court files 684/00, 30/2001, November.

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<sup>19</sup> By a parenting framework, I have in mind proposals such as those made by Anne Alstott in *No Exit*, and Martha Fineman in *The Autonomy Myth*. Very briefly, such frameworks would protect the parent-child relationship from intrusion, regulate it, and support parents and children financially and in other ways.

<sup>20</sup> For more on harm-to-children arguments see Eric M. Cave, "Harm Prevention and the Benefits of Marriage," *Journal of Social Philosophy* 35:2 (2004): 233-243. A Hawaii Court review of social science literature on same-sex parenting did not show significant differences: see Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), p. 205. One study on divorce shows that children of high-conflict marriages benefit significantly from divorce, so effects of divorce are not simply 'additive': Paul R. Amato, Laura Spencer Loomis, and Alan Booth, "Parental Divorce, Marital Conflict, and Offspring Well-Being during Early Adulthood," *Social Forces* 73:3 (1995): 895-915.

<sup>21</sup> This is a too-fast summary of such reasoning for the purpose of a conference presentation.

<sup>22</sup> Wedgwood, p. 233.

<sup>23</sup> Wellington, p. 13.

<sup>24</sup> Bennett has similar difficulties (in my view) explaining why his rationale restricts marriage to pairs.

<sup>25</sup> Calhoun, p. 1035.

<sup>26</sup> Paula Ettelbrick, "Since When is Marriage a Path to Liberation?," reprinted in Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con* (New York: Vintage, 2004), pp. 122-128. See also Card, and Drucilla Cornell, "The Public Supports of Love," in Shanley *et al.*, pp. 81-86. Emma Goldman and Voltairine De Cleyre are earlier anarchist (not to my knowledge lesbian) critics of marriage distrustful of state regulation of sexuality, as well as the possessiveness and dependence of marriage.

<sup>27</sup> Laura Kipnis, *Against Love* (New York: Pantheon, 2003); compare Friedrich von Schlegel, *Lucinde*, and Eric M. Cave, "Marital Pluralism: Making Marriage Safer for Love," *Journal of Social Philosophy* 34:3 (2003): 331-347.

<sup>28</sup> Adrienne Rich [1980], "Compulsory Heterosexuality and Lesbian Existence," in Albert and Barbara Gelpi, eds., *Adrienne Rich's Poetry and Prose* (London: Norton, 1993), pp. 203-24.

<sup>29</sup> John McMurtry, "Monogamy: A Critique," *The Monist* 56 (1972): 587-99.

<sup>30</sup> See Sasha Cagen, *Quirkyalone* (New York: HarperCollins, 2006); Cagen writes, p. 18, that *Time* and *The Economist* reported in 2000 on the growing number of unmarried urbanites.

<sup>31</sup> bell hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984), "Revolutionary Parenting," pp. 133-146.

<sup>32</sup> E.g. Wedgwood, p. 239

<sup>33</sup> Wellington reviews this literature at pp. 17 ff.

<sup>34</sup> "51% of Women Are Now Living Without Spouse," January 16, 2007; an editorial ("Can a 15-Year-Old Be a 'Woman Without a Spouse'?" published February 11, 2007) criticized the data but admitted that revised calculations still showed a majority of spouseless women, albeit "by a small number that was well within the margin of error."

<sup>35</sup> Wellington and Cave 2004 both consider and reject harm-based arguments; I direct the reader to their able refutations.

<sup>36</sup> Raz's suggested argument for marriage might thus be extended, in my view, to adult care networks; a case would have to be made that monogamy is not the only valuable form of marriage. See Raz, pp. 161-162. A final issue concerns nomenclature. Resistance to calling same-sex unions 'marriages' is often an attempt to deny them full legitimacy. If 'marriage' confers legitimacy, its extension in minimal marriage exemplifies neutrality *and* rectifies past discrimination against homosexuals, bisexuals, polygamists, and care networks. But minimal

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marriage law is not intended to convey endorsement or legitimacy. If rectification were to occur in other ways - apology, reparations, monuments – replacing ‘marriage’ as a legal term might be desirable.

<sup>37</sup> Some conservatives and civil societarians argue that liberal divorce law has caused social breakdown. See Fineman, Chapter Three, for rebuttal. The most important point is that poverty is attributable to social problems other than divorce.

<sup>38</sup> See Ann Levey, “Liberalism, Adaptive Preferences, and Gender Equality,” *Hypatia* 20:4 (2005): 127-143.

<sup>39</sup> cf. Eva Kittay, *Love’s Labor* (New York: Routledge, 1999) – her discussion takes the point much further.

<sup>40</sup> Rawls 1993, 75-76.

<sup>41</sup> Rawls 1993, 188, 180, 190.

<sup>42</sup> For an analysis of care, see Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (London: UCLA Press, 1984), and see also Kittay. I do not mean to endorse Noddings’ ethical view, only to offer these as more detailed accounts than the sketch I give here.

<sup>43</sup> In practice, separating these two aspects of care, considered as a primary good, is difficult. Children need both material care-taking and caring relationships to develop psychologically. Adults are, of course, liable to need paid material care-taking throughout their lives, in illness or incapacity. Paid care-taking can enable adults to survive such conditions, but achieving more than mere survival, for adults too, requires caring relationships. Setting aside the psychological benefits of inter-personal relationships, material care-taking tasks which could in theory be performed by anonymous paid care-takers often require a detailed knowledge of the cared-for and the motivating concern that springs from a personal caring relationship.

<sup>44</sup> Fineman, Kittay, and Anne L Alstott, *No Exit* (Oxford: Oxford University Press, 2004).

<sup>45</sup> Rawls 1971, 396; for a survey of psychological benefits of inter-personal relationships, see Daniel Perlman, “The Best of Times, the Worst of Times: The Place of Close Relationships in Psychology and Our Daily Lives,” *Canadian Psychology* 48:1 (2007): 7-18 (text of Perlman’s 2006 Presidential Address to the Canadian Psychological Association).

<sup>46</sup> Defenders of Rawls respond that monks can use money to advance their ideals – perhaps by giving it away. However, it seems possible to hold a conception of the good which has no use for money (e.g., abstaining from capitalism). See Adina Schwartz, “Moral Neutrality and Primary Goods,” *Ethics* 83:4 (1973): 294-307; Thomas Nagel, “Rawls on Justice,” *Philosophical Review* 82:2 (1973): 220-34; Kymlicka, “Liberal Individualism.”

<sup>47</sup> ‘State Policies to Promote Marriage’, 1. See also the 1996 U.S. Personal Responsibility and Work Opportunity Reconciliation Act, Title I, Section 101, Findings and related congressional testimony claiming there is pressing public interest in maintaining our current understanding of marriage.

<sup>48</sup> Alstott, p. 8, cf. Cave 2004.

<sup>49</sup> Shanley, “Just Marriage.”

<sup>50</sup> Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).

<sup>51</sup> E.g. through employment bars for married women, lack of protection against sex discrimination at work, promotion of women’s economic dependency. While the first two ended, or were lessened, in the 1970’s, their effects linger.

<sup>52</sup> See Gary Becker, *A Treatise on the Family*, enlarged edition (Cambridge, Mass.: Harvard University Press, 1993), “Polygamy and Monogamy in Marriage Markets,” pp. 80-107.