Minimal Marriage: What Political Liberalism Implies for Marriage Law*

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I. INTRODUCTION

Recent defenses of same-sex marriage have invoked the liberal doctrines of neutrality and public reason, and similar reasoning has been extended to polygamy.[1] Such reasoning is generally sound but does not go far enough in examining the implications of political liberalism for marriage. This article takes to their appropriate conclusion the implications of political liberalism's commitment to excluding from the public forum arguments which depend on comprehensive doctrines.

It might be thought that excluding arguments depending on comprehensive doctrines implies the abolition of marriage. Some defenses of marriage, including same-sex marriage, have grounded marriage law

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1. On same-sex marriage, see Adrian Alex Wellington, "Why Liberals Should Support Same Sex Marriage," *Journal of Social Philosophy* 26 (1995): 5–32; Ralph Wedgwood, "The Fundamental Argument for Same-Sex Marriage," *Journal of Political Philosophy* 7 (1999): 225–42; Kory Schaff, "Kant, Political Liberalism, and the Ethics of Same-Sex Relations," *Journal of Social Philosophy* 32 (2001): 446–62, and "Equal Protection and Same-Sex Marriage," *Journal of Social Philosophy* 35 (2004): 133–47; and a related argument in Nicholas Buccola, "Finding Room for Same-Sex Marriage: Toward a More Inclusive Understanding of a Cultural Institution," *Journal of Social Philosophy* 36 (2005): 331–43. 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): 1023–42; and 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 Jeff Jordan, David Boonin, and Jason Beyer (see n. 66).

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in supposed goods of marital relationships.[2] Given the diversity of, and controversy over, conceptions of good relationships, such rationales for marriage appear to depend on particular comprehensive doctrines. However, I will argue that there is a rationale within public reason for a legal framework supporting nondependent caring relationships between adults ('marriage') and that this framework is a fundamental matter of justice.

The arguments in this article dovetail with a number of feminist concerns: the oppressive effects of state promotion of gendered marriage norms, the false neutrality of purportedly neutral policy, and the failure to recognize care as a political good. One aim of this article is to give a partial response to feminist critics of liberalism by showing that a thorough and open-minded application of neutrality and public reason can yield a marriage law which no longer arbitrarily privileges some members of society.[3] This, of course, does not show that feminists should accept political liberalism, merely that, properly interpreted, it can eliminate bias in this instance.

I open with a detailed proposal for a minimally restricted law of marriage. The central idea is that 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 involved, and which rights and responsibilities to exchange with each. For brevity, I call this "minimal marriage." This name for the proposal alludes to Nozick's minimal state (although the political framework here is liberal egalitarian, not libertarian). Just as Nozick describes the libertarian state as minimal in comparison 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 the point of view of the current regime, are the most extensive which can be justified within political liberalism.

My argument has two stages. In Section III, I show that public reason, with its ban on arguments which depend on comprehensive religious, philosophical, or moral doctrines, cannot provide justification for more-than-minimal marriage. In Section IV, I show not only that minimal marriage can be justified within public reason but also that a liberal state is required to provide such a legislative framework for per-

2. 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—e.g., the new natural lawyers and Roger Scruton—do not aim at following public reason.

3. The most influential critic is Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), esp. 157–70.

sonal relationships. I do not argue for public reason here; my aim is to show how far-reaching its implications are for marriage. Indeed, some may take my conclusions as a reductio of public reason. But the perfectionist liberal cannot rest easy, for perfectionism which allows diversity in conceptions of good relationships has the same implications.[4]

These arguments make ideal-theoretical assumptions, but we live in a non-ideal world. The transition from the actual to the ideal has been underexamined, and this has made liberalism less attractive to theorists of oppression. In Section V, I consider this transition, particularly the consequences of marriage reform and the question of whether any marriage law can be just given background injustices.

Before beginning, I must emphasize that I am discussing marriage law. My arguments do not apply directly to private-sphere benefits or religious practice, although marriage reform would alter the implications of statutes designating entitlements and prohibiting discrimination on the basis of marital status.

My focus on marriage as a legal contract threatens to trigger longstanding debates over an alleged tension between contract and care. Few propose an inherent tension between care and the legal structuring of marriage—law can support caring relationships (as parental rights support parental care). It is contractual bargaining which is seen as inappropriate. A familiar statement of this tension is that contract presupposes self-interest and choice, whereas care, and hence marriage, presupposes altruism and commitment.[5] But the alleged tension is sometimes overstated: attention to the contractual elements of marriage need not imply that marriage is essentially contractual. Nor is it obvious that care and contract are opposed, empirically speaking. For instance, chosen obligations may be more agreeable than imposed obligations, and spouses' careful long-term planning does not entail that they view each other as competitors.

However, I assume that the basic structure of society must be regulated by principles of justice, and accordingly my view might be crudely presented as entailing that justice trumps care. An objector might charge that, if it turns out that contractual bargaining does threaten care, I

4. On the conflict between public reason and perfectionism, see Steven Wall, "Perfectionism, Public Reason, and Religious Accommodation," *Social Theory and Practice* 31 (2005): 281–304.

5. The classic source is G. F. W. Hegel [1821], *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. Hugh B. Nisbet (Cambridge: Cambridge University Press, 1995), sec. 75, 161A; for a more recent example, see Stanley Vodrasta, "Against Blackstone and the Concept of Marriage as Contract," *Modern Schoolman* 81 (2004): 97–120. On the larger issues, see, e.g., Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 33, 169; and the reply by John Tomasi, "Individual Rights and Community Virtues," *Ethics* 101 (1991): 521–36.

would still be committed to contractual liberty. But I envision a deeper connection between justice and care. I argue that supporting caring relationships is an important matter of justice, and I show how this can be defended within public reason.

Discussions of marriage reform are also met with the objection that they wrongly treat marriage as a constructed, not a natural or prepolitical, relationship. As I argue below, there are empirical and theoretical problems with claiming that a certain form of marriage is "natural." But even were marriage "natural" in some sense relevant to institutional design, natural features could not specify its legal framework. In the next section, I review some of the more than one thousand legal implications of marriage in the United States. What these suggest—among other things—is that a legal marriage framework makes many decisions about the boundaries of marriage and its constituent legal powers, responsibilities, entitlements, and so on, which cannot be read off "nature."

II. MINIMAL MARRIAGE

Minimal marriage institutes the most extensive set of restrictions on marriage compatible with political liberalism. It is minimal in that limiting the institutional framework to only what is so compatible entails a significant reduction of the restrictions placed on marriage. It might also be described as marital pluralism or disestablishment. I argue that a liberal state can set no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships (a concept I will specify below). Moreover, the state cannot require exchanges of marital rights (shorthand for various entitlements, powers, and obligations) to be reciprocal and complete, as opposed to asymmetrical and divided. Minimal marriage would also reduce the marital rights available.

To show what is at stake, I will review some of the numerous entitlements, liabilities, permissions, and powers currently exchanged reciprocally and as a complete package in marriage. In U.S. federal law alone, there are "1,138 federal statutory provisions . . . in which marital status is a factor in determining or receiving benefits, rights, and privileges."[6] Laws concerning property, inheritance, and divorce are additional, falling under state jurisdiction.

Marriage entails rights "to be on each others' health, disability, life

6. At the end of 2003, reported by the General Accounting Office (GAO), Dayna K. Shaw, Associate General Counsel, in a letter of January 23, 2004, to Bill Frist. The letter accompanies the 2004 GAO report, labeled "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."

insurance, and pension plans," "jointly [to] own real and personal property, an arrangement which protects their marital estate from each other's creditors," and to automatic inheritance if a spouse dies intestate. Spouses have rights in one another's property in marriage and on divorce. They are designated next of kin "in case of death, medical emergency, or mental incapacity" and for prison visitation and military personnel arrangements.[7] They qualify for special tax and immigration status and survivor, disability, Social Security, and veterans' benefits. Marital status is implicated throughout U.S. federal law—in "Indian" affairs, homestead rights, taxes, trade and commerce, financial disclosure and conflict of interest, federal family violence law, immigration, employment benefits, federal natural resources law, federal loans and guarantees, and payments in agriculture. Marital status also confers parental rights and responsibilities—assignment of legal paternity, joint parenting and adoption rights, and legal status with regard to stepchildren. Mary Anne Case argues that marriage's "principal legal function" is not to structure relationships between spouses "but instead to structure their relations with third parties" through 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.[8] While this may be an efficient system, it is not, I argue, currently just.

The large array of marriage rights can be roughly taxonomized according to function. Some marriage rights are entitlements to direct financial assistance: West Virginia's cash payouts on marriage,[9] increased Social Security disability payments for married persons, and increased disability pensions for married veterans and federal employees. Married soldiers can receive family separation allowance and increased housing allowance.[10] Tax benefits "permit married couples to transfer substantial sums to one another, and to third parties, without tax liability in circumstances in which single people would not enjoy the same privilege." Old Age, Survivors, and Disability Insurance (Social Security) "is written in terms of the rights of husbands and wives," and spouses may qualify for Medicaid, housing assistance, loans, food stamps, and military commissary benefits.[11] Many of these entitlements appear to reflect an as-

7. Craig Dean, "Gay Marriage: A Civil Right," *Journal of Homosexuality* 27 (1994): 111–15, at 112.

8. Mary Anne Case, "Marriage Licenses," *Minnesota Law Review* 89 (2004–5): 1758–97, 1781, 1783.

9. See "State Policies to Promote Marriage," a report prepared for the U.S. Department of Health and Human Services, 2002, available from the USDHHS.

10. Department of Defense Web site (http://www.dfas.mil/); Nathan McIntire, "Marrying for Money," *L.A. Weekly*, April 20–26, 2007, 26–27.

11. Both quotations are from the 1997 GAO report, Enclosure I.

sumption of a "traditional" single-breadwinner model, in which one spouse depends on the other for health insurance and income.[12]

Other rights directly facilitate day-to-day maintenance of a relationship or enable spouses to play significant roles in one another's lives. Special consideration for immigration is an example: spouses cannot share daily life if they are in different countries. Civil service and military spouses may receive employment and relocation assistance and preferential hiring. Out-of-state spouses may qualify for in-state tuition.[13] Other examples are spousal immunity from testifying, spousal care leave entitlement, hospital and prison visiting rights, entitlement to burial with one's spouse in a veterans' cemetery, and emergency decision-making powers. Through such entitlements and through status designation, marriage allows spouses to express and act on their care for one another.

Another function of note is protection of the widowed 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. Marriage law also provides protection for spouses on divorce.

In an ideal liberal egalitarian society, minimal marriage would consist only in rights which recognize (e.g., status designation, burial rights, bereavement leave) and support (e.g., immigration rights, caretaking leave) caring relationships. Care, broadly construed, may involve physical or emotional caretaking or simply a caring attitude (an attitude of concern for a particular other). 'Relationship', as I am using the term here, implies that parties know and are known to one another, have ongoing direct contact, and share a history. I will argue that a law performing the functions of designating, recognizing, and supporting caring relationships is justifiable, even required.

Unlike current marriage, minimal marriage does not require that individuals exchange marital rights reciprocally and in complete bundles: it allows their disaggregation to support the numerous relationships, or adult care networks, which people may have. Minimal marriage would allow a person to exchange all her marital rights reciprocally with one other person or distribute them through her adult care network.

12. In *Marriage: A History* (London: Penguin, 2006), Stephanie Coontz shows how this "traditional" ideal developed over the past 150 years, how its flourishing in the 1950s and 1960s was exceptional, and how it failed to apply to large numbers of working-class families.

13. I include these forms of financial assistance here as they are directly targeted to allowing spouses to maintain a relationship.

In an ideal liberal egalitarian society, law should not assume a dependency relationship between spouses, and so most marital entitlements to direct financial benefits would be eliminated (except for those, such as in-state tuition eligibility, whose primary purpose is to enable relationship maintenance). Likewise, the compatibility of specific "insurance" provisions of marriage with justice will depend on their rationale.

Minimal marriage is not the contractualization of marriage. To see why, consider what contractualization would involve. Proponents of marriage contractualization argue against state definition of the terms of marriage. The contract paradigm is characterized by voluntariness and individualization, in contrast with status relations, which are standardized according to preexisting social convention and often based on arbitrary criteria such as caste or gender. Marriage law has elements of both status and contract, and in the twentieth century it has shifted away from status—fixed, predefined terms—toward contract—with prenuptial agreements.[14] Yet marriage remains an anomalous contract: "There is no written document, each party gives up its right to self-protection, the terms of the contract cannot be re-negotiated, neither party need understand its terms, it must be between two and only two people, and these two people must be one man and one woman."[15] These anomalies reflect status elements: the terms of the relationship are assumed to be given by social convention.

Although early arguments for contractualization of marriage aimed for greater individualization and flexibility in marriage, this line of thought tends toward its abolition as a legal category. If marriage were thoroughly assimilated to contract, no distinctive status elements would remain to mark it as a legal category.[16] Although I argue for reducing state restrictions on the terms of marriage, I also argue for retaining marriage as a distinctive legal category, and for this reason, minimal marriage is not the contractualization of marriage. Minimal marriage

14. In 1888, the U.S. Supreme Court wrote that, while "other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties," in marriage, "a relation between the parties is created which they cannot change." This is cited in Carol Weisbrod, "The Way We Live Now: A Discussion of Contracts and Domestic Arrangements," *Utah Law Review* 2 (1994): 777–815, 779–80.

15. Will Kymlicka, "Rethinking the Family," *Philosophy & Public Affairs* 20 (1991): 77–97, at 88.

16. Early proponents of contractualization were Lenore Weitzman, "Legal Regulation of Marriage: Tradition and Change," *California Law Review* 62 (1974): 1169–288; and Marjorie Shultz, "Contractual Ordering of Marriage: A New Model for State Policy," *California Law Review* 70 (1982): 204–334. Both proposals retain a marriage contract, which sets out domestic aspirations as well as legally enforceable obligations and is constrained by public policy. See criticism of contractualizing marriage in Mary Lyndon Shanley, "Just Marriage," in Shanley's *Just Marriage*, ed. Joshua Cohen and Deborah Chasman (Oxford: Oxford University Press, 2004), 3–30.

consists in rights which recognize and support caring relationships; these rights designate a status, and their content is accordingly standardized. The rights which facilitate or recognize relationships are (roughly) currently available only through marriage: immigration privileges, automatic decision-making powers, and residency qualifications. They are not easily assimilated to contractual individualization because their content is defined by their function—recognizing and supporting relationships. Contractual individualization here only means that each individual chooses to whom to transfer the right.

As noted above, 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 provide economic assistance on the assumption of dependency between spouses. Because the state would not assume the financial terms of the relationship, property arrangements would be contractualized, allowing parties to decide property division, alimony, and inheritance and to set conditional terms and specify penalties for default. Some currently protected marital "privacy" rights would be retained within minimal marriage, but others would not. "Privacy" rights which allow individuals to choose the terms of their relationships are, for the most part, entitlements under freedom of association. For example, as Mary Anne Case points out, marriage law, unlike most domestic partnership laws, does not require couples to cohabit or share finances; marriage thus protects spouses' "privacy" in these choices as the contrasting partnership laws do not.[17] But "privacy" rights within marriage may conflict with justice when they override legal rights in other domains. For example, marriage currently carries involuntary exemptions from contract law, labor law, and criminal law. But exceptions to criminal law (as in exemptions for sexual battery within marriage) conflict with justice. Moreover, as the state cannot assume the nature of marriage relationships, it cannot automatically remove spouses' entitlements under tort and labor law.

At this point, an objector might suggest as a reductio that minimal marriage will have to countenance immoral or ludicrous marriages.[18] However, as minimal marriage complies with criminal law, it cannot permit rights violations. Actual marriage law has overridden human rights—under the doctrine of coverture, a wife contracted away her civil and legal rights for life. Indeed, while marital rape is now a crime in

17. Case, "Marriage Licenses," 1773. Where caretaking is involved, privacy rights may protect caretaker autonomy; see Martha Fineman, "Postscript," in her *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004); and Harry Brighouse and Adam Swift, "Parents' Rights and the Value of the Family," *Ethics* 117 (2006): 80–108.

18. John Corvino, in "Homosexuality and the PIB Argument," *Ethics* 115 (2005): 501–34, responds at length to the "polygamy, incest, bestiality" argument against same-sex marriage, an argument made by John Finnis among others.

all states, the marital rape exemption lingers in state criminal codes exempting spouses from sexual battery charges.[19] But minimal marriage, which respects criminal law, could not countenance such exemptions (or, a fortiori, marital slave contracts).[20] Pedophilia is ruled out on the same grounds. In addition, children and nonhuman animals cannot make marriage contracts because they cannot make any contracts. No one can marry unilaterally; minimal marriage status designations require consent from both parties, and minors are not legally competent to consent.[21]

Ludicrously large marriages are another potential reductio. Could Hugh Hefner marry his top fifty Playmates? Could a hundred cult members marry? No. As I will argue in Section IV, minimal marriage is a framework for caring relationships, and caring relationships require that parties are known personally to one another, share history, interact regularly, and have detailed knowledge of one another. These criteria impose practical limits, for there are psychological and material limits on the number of such relationships one can sustain.[22] However, should a surprisingly large number of people genuinely sustain caring relationships, there is no principled reason to deny them distributable benefits such as visiting rights (though they may be required to alternate, cut short visits, etc.), though other entitlements might be limited in number on grounds of feasibility. Minimal marriage could be implemented by giving prospective spouses a list of entitlements, which they could assign as desired, the form indicating numerical limits. For some rights, self-designation of a caring relationship would be feasible; for others, such as immigration eligibility, an interview to determine that parties do actually know each other well and (so far as can be determined!) care for one another may

19. For example, Kansas Code §21–3517, Ohio Code §§2907.03.

20. On legal access rights, see Claudia Card, "Against Marriage and Motherhood," *Hypatia* 11 (1996): 1–23. On how equity, partnership, labor, and tort law might apply, see Fineman, *Autonomy Myth*, 134–35. Fineman argues for abolishing marriage as a legal category and replacing it with a legal framework for caretakers; thus her proposal would shift many relations now governed by marriage to the realm of contract, labor, and tort law.

21. Their exclusion is overdetermined: parents or guardians have rights regarding minors in their care, with which minimal marriage contracts might conflict. See Brighouse and Swift, "Parents' Rights."

22. How many close relationships can one have? Apparently the social networking site Facebook limits users to 5,000 "friends"; most of these would presumably be mere acquaintances. I suspect the actual number of sustainable caring relationships is much lower. It might be objected that this criterion raises the bar as contrasted with current marriage, which does not require a caring relationship. It might be responded that, in immigration cases, spouses are required to document their intimacy and shared history. Although it would be impractical and invasive for the state to undertake such investigations in every case, it does not seem undesirable, in theory, to make such a relationship a criterion for legal marriage (ruling out, for instance, mail-order brides).

be appropriate.[23] Because minimal marriage rights differ in content and are implicated in different areas of law and policy, a general prescription as to their institutional design is undesirable; different rights will involve different specific considerations.

So far, the proposal might seem extravagantly removed from real life. But consider an example of how minimal marriage rights might be distributed. Rose lives with Octavian, sharing household expenses. To facilitate this ménage, Rose and Octavian form a legal entity for certain purposes—jointly owned property, bank account access, homeowner and car insurance, and so on. The arrangement is long term but not permanent. Octavian's company will relocate him in five years, and Rose will not move—but they agree to cohabit until then. They even discuss how to divide property when the household dissolves, and they agree that if either moves out sooner, the defaulter will pay the other compensation and costs. (The arrangement for default is not punitive but merely protective.)

Rose's only living relative, Aunt Alice, lives nearby. Alice lives in genteel poverty, and Rose feels a filial responsibility toward her. Rose's employer provides excellent pension and health care benefits, for which any spouse of Rose's is eligible (at a small cost), and other spousal perks, such as reduced costs for its products. Octavian is a well-off professional and does not need these benefits—he has his own—but Alice needs access to good health care and, should Rose die, she could use the pension that would go to Rose's spouse if she had one. Assuming that such entitlements comport with justice, minimal marriage would allow Rose to transfer the eligibility for these entitlements to Alice.

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

There could be more people in Rose's life who occupy a role usually associated with spouses. Rose might share custody of a child with an ex. Or she might cohabit platonically with Octavian, living separately from

23. "Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships," a 2001 publication of the Law Commission of Canada, available at http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf, examines the feasibility of self-designation (32–36) and other questions of institutional design. Thanks to Rachel Buddeberg for drawing my attention to this document.

the long-term love of her life, Stella. There is no single person with whom Rose wants or needs to exchange the whole package of marital rights and entitlements. In fact, doing so would be inconvenient, requiring her to make additional contracts to override the default terms of marriage. Even worse, marrying any one person would expose her to undesired legal liabilities, such as obligatory property division, and it could interfere with her eligibility for some loans and government programs. But Rose wants and needs to exchange some marital rights with several different people.

Rose's ménage might seem strange to some—though putting all one's eggs in one basket might seem equally strange to Rose! It is certainly 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 their complete sets of marital rights reciprocally, while Rose and others like her distribute and receive marital rights as needed. Minimal marriage is a law of adult care networks, including "traditional" marriages.

III. WHY MORE-THAN-MINIMAL MARRIAGE IS INCOMPATIBLE WITH POLITICAL LIBERALISM

I will offer a two-step defense of minimal marriage. I will argue, in this section, that any restrictions more extensive than those of minimal marriage cannot be justified within public reason. In the next section, I will argue that minimal marriage is required by liberal conceptions of justice.

A. Political Liberalism, Public Reason, and Neutrality

Minimal marriage, and no more extensive or restrictive law, is consistent with political liberalism. In the first stage of my argument, I will make a case that no more extensive marriage law can be justified within public reason. The ban on arguments which depend on comprehensive conceptions of the good precludes appeal to the special value of long-term dyadic sexual relationships, and without such appeal, I will argue, restriction of marriage to such relationships cannot be justified. I also show that public reason and neutrality, where invoked in the same-sex marriage debate, have not been consistently followed, even by those defending same-sex marriage.

Liberal societies are characterized by a pluralism of reasonable comprehensive (concerning all areas of life, as opposed to narrowly political) religious, philosophical, and moral doctrines. In such societies, legislators should refrain from enacting law and policy, especially in basic matters of justice, exclusively on the basis of controversial moral or religious views which many citizens may not accept. Within public reason, legislators give reasons for law and policy which those with differing

comprehensive doctrines may be reasonably expected to accept; public reason excludes reasons which depend entirely on comprehensive religious, moral, and philosophical doctrines. I cannot engage the different formulations of public reason here; I draw on Rawls's statement of it.[24] For my argument, it is sufficient that public reason applies to law makers and government officials acting in a public capacity, that it applies to matters of basic justice, and that it requires refraining from arguments which depend on contested comprehensive doctrines. Thus, I can avoid some of the debates over the scope of public reason.

While some arguments for same-sex marriage have appealed to public reason, many have appealed to the doctrine of neutrality. For neutralists, the state should remain neutral between conceptions of the good found in comprehensive doctrines, excepting any conflicting with justice.[25] As Rawls formulates the principle, "the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it." More broadly, "basic institutions and public policy . . . are neutral in the sense that they can be endorsed by citizens generally as within the scope of a public political conception."[26] The relevant conception is neutrality of aim, not the outrageously demanding neutrality of effect, which would require that states ensure policies have equal effect on which conceptions are adopted.[27] The less demanding neutrality of aim, to which justice as fairness is committed, requires that the state not justify law or policy by appeal to a conception of the good within a comprehensive doctrine.

Neutrality constrains political decision making by excluding the giving of certain reasons for institutions and policy; it excludes the conceptions of the good of comprehensive doctrines. This constraint

24. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 212–54, and "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64 (1997): 765–807. It should be noted that citizens can invoke comprehensive doctrines in debate (e.g., referring to God) so long as their views are independently supported by public reason; Rawls, *Political Liberalism*, 252.

25. Many versions of this principle have been defended; here I introduce Rawls's later formulation, which complements his account of public reason. See Rawls, *Political Liberalism*, 190–95; and for comparison, John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), at 94, and sec. 50. See also the careful critical discussion of variant neutrality principles in George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997), chap. 2.

26. Rawls, *Political Liberalism*, 192–93.

27. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 114–24; Steven Wall, "Neutrality and Responsibility," *Journal of Philosophy* 98 (2001): 389–410. See responses in Rawls, *Political Liberalism*, 190–95; and in Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics* 99 (1989): 883–905.

applies to the state, in the person of legislators and public officers.[28] It prevents law makers from prohibiting actions, providing subsidies, or framing institutions for the purpose of promoting any such conceptions. As George Sher puts it, one "way of promoting the good is just to provide the right sorts of options," as by funding museums and universities or "deciding which agreements [the state] will and will not enforce," such as marriage.[29]

Within political liberalism, the scope of public reason and neutrality is a crucial question. If their constraints apply only to constitutional essentials or basic matters of justice, it might be thought that they would not apply to marriage law.[30] However, this would be mistaken. Rawls makes clear in "The Idea of Public Reason Revisited" that the state's "legitimate interest" in the family is constrained by public reason: "Appeals to monogamy as such, or against same-sex marriages, as within the government's legitimate interest in the family, would reflect religious or comprehensive moral doctrines. Accordingly, that interest would appear improperly specified."[31] Family law must be justified with reference to political values (such as reproduction and women's equality). Public reason applies to the family because the family, as one of "society's main institutions," is part of the basic structure of society and, hence, a "matter for political justice."[32] In light of Rawls's comments, it is clear that public reason applies to marriage and family law as part of the basic structure. However, given that Rawls claims that the state's main interest in family law is reproduction, a case must be made for legal frameworks for nonreproductive adult caring relationships. In the next section, I will make a case that the social bases of such relationships are primary goods and so can ground claims of justice.

Two further considerations in favor of the constraints of public reason and neutrality apply to marriage. State action is implicitly coercive, so state endorsement of ethical views from which citizens reasonably differ fails to respect their liberty.[33] In the context of neutrality, this was expressed as the intuitive idea that neutrality is required "to treat . . . citizens as equals"—not because all conceptions of the good

28. Rawls, *Political Liberalism*, 252; it also applies to citizens in political contexts.

29. Sher, *Beyond Neutrality*, 36. This exposition follows Sher at 28. Sher raises problems with defining "conception of the good"; but as judgments regarding sexual behavior and relationships are commonly given as examples of such conceptions, I set this aside. See Sher, *Beyond Neutrality*, 37–43; and Rawls, *Theory of Justice*, 331, and "The Idea," 779.

30. See Rawls, *Political Liberalism*, 214. Rawls, in *Theory of Justice*, and other neutral liberals (see Sher, *Beyond Neutrality*, 31–34) apply neutrality more extensively to all policy; in such theories, I would not face the objection.

31. Rawls, "The Idea," 779.

32. Ibid., 788.

33. Rawls, *Political Liberalism*, 217.

are equally valid, but because reasonable people hold different religious or ethical ideals and have a liberty right to pursue them.[34] These considerations are especially compelling when it comes to relationships, where there is deep disagreement and a strong liberty interest.

Second, state promotion of comprehensive moral, religious, or philosophical conceptions of the good in this area runs practical risks. It would require civil servants of extraordinary sensitivity, sophistication, self-awareness, and philosophical acumen. As Ackerman writes, "love, friendship, and the like are not readily susceptible of mass production."[35] A special danger is that ethical views can reflect self-interest (or class interest). The relation between restrictive sexual codes and the oppression of women is a good example. Rawls notes this problem: "When it is said, for example, that certain kinds of sexual relationships are degrading and shameful, and should be prohibited on this basis, . . . it is often because a reasonable case can not be made in terms of the principles of justice. Instead we fall back on ideas of excellence. But in these matters we are likely to be influenced by subtle aesthetic preferences and personal feelings of propriety; and individual, class, and group differences are often sharp and irreconcilable."[36] Risks of such fallibility are especially high in the case of marriage, where religion, culture, and sexual and heterosexual privilege combine to encourage investment in beliefs about the excellence of "traditional" marriage.

B. Marriage

Public reason requires that law makers not appeal to reasons depending on comprehensive moral, religious, or philosophical doctrines in framing marriage law. More fundamentally, it requires that there be publicly justifiable grounds for there being marriage law at all. In the next section, I will give such a justification. In this section, I will argue that public reason applied to a legal framework designating and supporting adult caring relationships entails that no law more restrictive than minimal marriage can be justified. There is an obvious question: is marriage "a legal framework designating and supporting adult caring relationships"? Is not, as Rawls claimed, the state's main interest in marriage reproduction?

I do not think this can be answered by appealing to "the" definition

34. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 191; Rawls, *Theory of Justice*, 329.

35. Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, CT: Yale University Press, 1980), 362.

36. Rawls, *Theory of Justice*, 331.

of marriage. The legal definition is just what is at issue.[37] Constraints of public reason rule out basing law on essentially religious understandings of marriage. Even a widely shared understanding of marriage does not in itself justify a legal definition. Marriage design will depend on what marriage is "for" and the question of what it is "for" will have to be settled by looking at independent reasons for what kind of institutions there should be.

One reason often given for marriage is that it is "for" reproduction and child rearing; if this were the case and "traditional" marriage were essential to child rearing, this could provide a justification for restrictive marriage laws in terms of public reason. It is sometimes objected that biological procreation is not the sole purpose of marriage, for spouses adopt, rear step-children, and use gamete donors. Moreover, fertility is not a condition for marriage. Nor is child rearing (whatever the provenance of the children) its only purpose: many marriages are childless, and marriages do not end when children leave home.

But this is too fast. The design of marriage law should presumably attend to its implications for child welfare, even if child rearing is not the primary purpose of marriage: for example, Rawls (without endorsing the view) suggests that child welfare could provide a public reason for rejecting same-sex marriage although claims about sexual morality cannot.[38] The objector to minimal marriage could contend that marriage law should promote optimal environments for children. To the extent that minimal marriage would encourage diverse relationships, it is likely to decrease the number of children reared by married biological parents, and this may affect child welfare.

This objection has three weaknesses: first, the nuances of the empirical evidence regarding child welfare suggest that there is no compelling reason to think that minimal marriage would have a harmful impact on children and no reason to think it would be more harmful than current marriage law; second, a parenting framework should not recognize only optimal parenting structures; third, reasons other than child welfare guide marriage legislation, for marriage has purposes other than child rearing.

A typical case for monogamous different-sex marriage points out that single-parent families have higher rates of poverty and that children

37. 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.

38. Rawls, "The Idea," 779.

do best in low-conflict marriages with both biological parents.[39] However, empirical findings of the benefits of marriage are mixed: while low-conflict marriage between biological parents benefits children, the presence of stepparents does not, and children benefit from divorce in high-conflict families, so much so that if "divorce were limited only to high-conflict marriages, then it would generally be in children's best interest."[40] In light of these mixed results, Marsha Garrison concludes that both critics and defenders of marriage have overstated their position: marriage sometimes benefits, but sometimes harms, children. Moreover, we should approach correlations between marriage and child welfare with caution. Some apparent benefits can be explained by "selection bias"—the more educated and wealthier are likelier to marry and thus have children within marriage. Correlation is not causation.[41] And studies showing that children within marriage do better do not tell us how children of divorce would have fared had their parents stayed married.[42]

Consistency in designing a framework supporting only what studies show is statistically best for children's well-being would require doing away with heterosexual privilege and replacing it with low-conflict biological-parent privilege. A Hawaii Court review of social science literature did not find significant differences between same-sex and different-sex parenting,[43] whereas high-conflict marriages are, statistically, detrimental.[44] However, in designing a parenting framework, promoting the optimal

39. William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991), 283–89. Recent findings of benefits of two-parent families are reported in Amy Wax, "Traditionalism, Pluralism, and Same-Sex Marriage," *Rutgers Law Review* 59 (2006–7): 377–412, 386.

40. Paul R. Amato and Alan Booth, cited in Marsha Garrison, "Promoting Cooperative Parenting: Programs and Prospects," *Journal of Law and Family Studies* 9 (2007): 265–79, at 266 n. 9. See also Paul R. Amato, Laura Spencer Loomis, and Alan Booth, "Parental Divorce, Marital Conflict, and Offspring Well-Being during Early Adulthood," *Social Forces* 73 (1995): 895–915, which finds that children of high-conflict marriages benefit significantly from divorce, so effects of divorce are not simply "additive."

41. See Iris Marion Young, "Mothers, Citizenship, and Independence: A Critique of Pure Family Values," *Ethics* 105 (1995): 535–56.

42. See Gary Becker, at the Becker-Posner blog, http://www.becker-posner-blog.com/archives/2007/03/should_marriage_1.html; cf. Fineman, *The Autonomy Myth*, 86.

43. On the Court review, see Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), 205. For more on harm-to-children arguments, see Eric M. Cave, "Harm Prevention and the Benefits of Marriage," *Journal of Social Philosophy* 35 (2004): 233–43.

44. Moreover, Garrison reports that inadequate evidence exists as to the success of marital conflict reduction under the Healthy Marriage Initiative, studies have not been done on the worst-off demographics, studies show that 25 percent of couples are worse off after therapy, and posttherapy divorce rates remain high ("Promoting Cooperative Parenting," 273–75).

must be balanced with protecting the many. A parenting framework does not only promote family forms; it also confers protections and benefits. Promoting low-conflict marriage between biological parents by excluding other parents would entail excluding many parents whose children would benefit from the family's inclusion. Society does not and cannot require that parents be ideally suited to maximize children's well-being (there would not be enough parents). There is, rather, a high threshold requirement precluding neglect and abuse and requiring nurturing.

The objector who presses against including same-sex, polygamous, or single-parent families on child welfare grounds should consider whether he would press such an objection in the cases of high-conflict biological parents, interracial marriages where mixed-race children were seriously disadvantaged, socioeconomically worse-off families, or parents who are junk food eaters and couch potatoes. If not, his view may incorporate an arbitrary bias. What matters greatly to child psychological development is continuity of care, which is available in polygamous, same-sex, single-parent, and extended families.[45]

A remaining concern may be that minimal marriage will increase the number of single parents. As noted, single parenting is correlated with poverty; however, justice and efficiency suggest that such poverty should be addressed by fighting its sources, not by promoting marriage.[46] Furthermore, minimal marriage would help single parents by increasing their marital options. Finally, the detrimental effects of single parenting must be weighed with the detrimental effects of high-conflict and abusive marriages. Given widespread abuse and violence within marriage and the additional harms of high-conflict marriages, women and children may often be better off outside marriage.[47] Indeed, if we accept the objector's claim that marital forms should be judged by their implications for child welfare, we must note that current marriage law promotes a form associated with high rates of abuse and conflict.

While I cannot pursue this argument in detail here, there is reason to separate a legal framework designating and supporting adult caring relationships from one regulating and supporting parenting. The high number—roughly one-third—of U.S. children being reared outside marriages suggests that parenting frameworks independent of marriage

45. Anne L. Alstott, in *No Exit: What Parents Owe Their Children and What Society Owes Parents* (Oxford: Oxford University Press, 2004), discusses continuity of care, 15–20.

46. See Fineman, *The Autonomy Myth*, 71–94; and Young, "Mothers."

47. According to U.S. Department of Justice statistics, of the "roughly 3.5 million violent crimes committed against family members during 1998 to 2000 . . . 48.9% were crimes against a spouse . . . 84% of victims of spousal abuse were female"; Matthew R. Durose, Caroline Wolf Harlow, Patrick A. Langan, Mark Motivans, Ramona R. Rantala, and Erica L. Smith, *Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, U.S. Department of Justice, NCJ 207846 (2005), 8, 1.

would be better positioned to address child welfare by benefiting children outside marriage. Financial benefits for parents and incentives to stability should attach to parenting, not marriage: focusing on marriage leaves out children of unmarried and divorced parents.

Martha Fineman, Eva Kittay, and Anne Alstott have recently developed independent parenting or dependency frameworks, and in this brief clarificatory sketch I borrow from them. Parenting frameworks in a society recognizing collective responsibility would provide support for parents, including economic assistance, informational resources, and child care. The frameworks would also establish and promulgate parental obligations and provide some mechanism for identifying children at risk, allowing families to govern themselves without shielding abuse. On equal opportunity grounds, the frameworks would offset the opportunity costs of child rearing for the caregiver.

A second reason for separating the frameworks is that marriage has purposes other than child welfare. In the next section, I will make the case that marriage confers relationship-protecting legal entitlements and that such legislative protection of adult caring relationships is a matter of justice. For the moment, let us assume that a framework for adult relationships can be justified and ask whether a more restrictive conception of marriage can be justified within public reason.

Typical defenses of same-sex marriage in terms of public reason and neutrality understand marriage as providing a legislative framework for certain adult relationships. They proceed by showing that same-sex relationships exhibit the features of different-sex relationships formalized by such a framework. A characteristic list is given by Ralph Wedgwood. Marriage "typically involves sexual intimacy, economic and domestic cooperation, and a voluntary mutual commitment to sustaining this relationship."[48] Wedgwood proceeds to argue that reasons supporting recognition of different-sex marriage extend to recognition of same-sex relationships with these features (and whose partners desire such recognition). However, relationships, or adult care networks, may be important without involving sexual intimacy or economic or domestic cooperation, and members of such networks may desire recognition or other benefits of marriage.

Likewise, Adrian Wellington defends a "functional" understanding of marriage and then argues that same-sex relationships functionally resemble marriages and hence "same sex couples are entitled to the same state sponsorship as opposite sex couples."[49] Wellington argues that a legal understanding of marriage as essentially procreative would violate neutrality; he suggests instead that the function of marriage is

48. Wedgwood, "The Fundamental Argument," 233.
49. Wellington, "Why Liberals Should Support," 13.

the recognition of voluntary intimate relationships. As Wellington himself admits, this description applies to configurations other than couples, but he claims that marriage recognizes "couples" as distinct from "special friends."[50] However, "state sponsorship" for couples, as distinct from "special friends," ménages à trois, and other adult care networks, also runs afoul of neutrality. If marriage recognizes voluntary intimate or committed relationships, then neutrality requires that marriage extend to adult care networks of various kinds. To put the point in terms of public reason, distinctions can only be drawn between the different relationship types by arguments depending on comprehensive doctrines regarding the value of dyads as opposed to networks, sexual as opposed to nonsexual relationships, and so on. Judgments regarding the comparative value of different relationship types are matters of comprehensive religious, moral, and philosophical doctrines, not public reason.

Public reason implies that a legal framework for adult relationships should not endorse an ideal of relationship depending on a comprehensive doctrine—but this is just what the monogamous ideal of marriage, gay or straight, is. Cheshire Calhoun recognizes this, arguing that liberal same-sex marriage advocates should recognize that their reasoning extends to polygamy and "marital disestablishment." As she writes, 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."[51] Once it is noticed how many varying conceptions of good relationships exist within different comprehensive doctrines, it is clear that public reason and neutrality imply that marriage should not presuppose sexual or romantic relationships, aspirations to permanence or exclusivity, or a full reciprocal exchange of marital rights.

Marriage, including same-sex marriage, currently recognizes a single central exclusive relationship of a certain priority and duration, often understood as "union." But this ignores alternative ideals of relationship: for instance, networks of multiple, significant, nonexclusive relationships which provide emotional support, caretaking, and intimacy and are not (all) romantic or sexual. Such adult care networks appear in the gay community, in African American communities, and among seniors, unmarried urbanites, and polyamorists.

This diversity reflects competing conceptions of valuable relationships. Some gay and lesbian theorists and critics of heterosexism have criticized the central, exclusive relationship ideal as a heterosexual paradigm. They point out that gays and lesbians often choose relationships

50. Bennett has similar difficulties explaining why his rationale restricts marriage to pairs, in "Liberalism."

51. Calhoun, "Who's Afraid of Polygamous Marriage?" 1035.

which are less possessive, demanding, and insular and more flexible and open. They have challenged the desirability of same-sex marriage on the grounds that instead of affirming difference, it will assimilate lesbian and gay relationships into the heterosexual model.[52] But this concern rather implies that marriage law should be reframed to accommodate difference.

Different conceptions of good relationships are not, of course, exclusive to the gay and lesbian community. Polyamorists (gay, straight, and bisexual) promote polyamory—engaging in multiple love relationships—as involving less jealousy and more honesty than exclusive monogamy. They see marriage as promoting a psychologically unhealthy norm of possessiveness, what social theorist Laura Kipnis calls the "domestic gulag." Like the Romantics, Kipnis argues that exclusivity and monogamy destroy passion and spontaneity.[53] Kipnis, along with Anne Kingston and other critics of the "wedding-industrial complex," sees commodification of marriage as obscuring deeper problems in the institution, such as the instability of romantic love matches and the confusion over the nature of spousal roles and duties.[54]

In other ways, social critics have come to value "alternative" relationships as they found "traditional" marriage to be incompatible with more fundamental ideals such as equality. For example, Adrienne Rich argued that the exclusive, prioritized relationship of heterosexual marriage undermines strong relationships between women.[55] Some feminists have criticized the idea of marriage as *union* insofar as women have lost their identity in the union. Marxists understand monogamous marriage as ownership of women and embodying pernicious aspects of capitalism.[56]

Other groups emphasize the importance of adult care networks. Quirkyalones and urban tribalists hold ideals of sociability that reach beyond an isolated dyad. The quirkyalone movement began with one woman's public musing that her friends played the role in her life that marriage or coupledom does for many. Her short article produced a

52. Paula Ettelbrick, "Since When Is Marriage a Path to Liberation?" *Out/look: National Lesbian and Gay Quarterly* 6 (1989): 14–17, reprinted in Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con* (New York: Vintage, 2004), 122–28. See also Card, "Against Marriage"; and Drucilla Cornell, "The Public Supports of Love," in Shanley, *Just Marriage*, 81–86. Emma Goldman and Voltairine De Cleyre are earlier critics of state regulation of sexuality and the possessiveness and dependence of marriage.

53. Laura Kipnis, *Against Love* (New York: Pantheon, 2003); compare Friedrich von Schlegel's novel *Lucinde* (1799) and Eric M. Cave, "Marital Pluralism: Making Marriage Safer for Love," *Journal of Social Philosophy* 34 (2003): 331–47.

54. Anne Kingston, *The Meaning of Wife* (Toronto: HarperCollins, 2004).

55. Adrienne Rich [1980], "Compulsory Heterosexuality and Lesbian Existence," in *Adrienne Rich's Poetry and Prose*, ed. Albert Gelpi and Barbara Charlesworth Gelpi (London: Norton, 1993), 203–24.

56. John McMurtry, "Monogamy: A Critique," *Monist* 56 (1972): 587–99.

flood of responses from others who felt similarly. Quirkyalones want respect for their choice to be "single"; they argue that society treats the unmarried, or uncoupled, as incomplete and immature, however old or accomplished the individuals may be, and fails to recognize the importance of non-'traditional' relationships.[57] For different reasons, many people find the ideal of a central, exclusive relationship irrelevant. Their conceptions of good relationships involve networks, "tribes," or groups of friends, and they defend these conceptions on moral and ethical grounds and by appeal to other values.

Quirkyalones are typically young urban professionals, but frustration with the hegemony of marriage is not limited to privileged members of society. Toni Morrison writes: "Inevitably [feminist debates over marriage] led me to the different history of black women in this country—a history in which marriage was discouraged, impossible, or illegal; in which birthing children was required, but 'having' them, being responsible for them—being, in other words, their parent—was as out of the question as freedom."[58] This history may to some extent account for the "alternative" family models which bell hooks argues reflect working-class African American experience.[59] In minority communities strong intergenerational ties between women or extended family members help people to face economic challenges by combining paid work and child care. Race theorists argue that models of the family which rule out such relations are ethnocentric and racist. For example, Patricia Collins writes that the "imagined traditional family ideal" makes hierarchy seem natural, an idea which lends itself to racism.[60]

Despite such reports of alternative practices, some theorists write as if critiques of the central relationship ideal reflect academic theories removed from real life. Thus, Wedgwood admits that the exclusion of "alternative" "social meanings" of marriage would be discriminatory if anyone seriously wanted to enter them, but then he writes dismissively, "so far as I know, no one in modern Western society seriously wants to enter one of these alternative legal relationships."[61] As the examples he

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

58. Toni Morrison, "Foreword," in *Beloved* (1987; rev. ed., New York: Vintage, 2004), xvi–xvii.

59. bell hooks, "Revolutionary Parenting," in her *Feminist Theory: From Margin to Center* (Boston: South End, 1984), 133–46.

60. Patricia Hill Collins, "It's All in the Family: Intersections of Gender, Race, and Nation," *Hypatia* 13 (1998): 62–82, 62. See also Enakshi Dua, "Beyond Diversity: Exploring the Ways in Which the Discourse of Race Has Shaped the Institution of the Nuclear Family," in *Scratching the Surface*, ed. Enakshi Dua and Angela Robertson (Toronto: Women's Press, 1999), 237–59.

61. Wedgwood, "The Fundamental Argument," 239.

gives of "alternative" relationships are marrying one's foot, Shiite Muslim "temporary marriages," and forced marriage, his claim may well be true. However, he ignores widespread calls in the queer community for recognition of adult care networks,[62] as well as similar demands made by quirkyalones and urban tribalists. Many contemporaries live outside marriage, many in alternative care networks—and many by choice. Marriage rates have decreased; the *New York Times* reported that, according to census data, in 2005, 51 percent of women were "living without a spouse."[63] Popular U.S. entertainment, such as *Friends* and *Will and Grace*, suggests that many identify with the unmarried main characters.

The monogamous central relationship ideal is only one contested ideal among many found within different comprehensive doctrines. Framing marriage law in a way which presupposes such a relationship fails to respect public reason and reasonable pluralism.[64] In the absence of a publicly justifiable reason for defining marital relationships as heterosexual, monogamous, exclusive, durable, romantic or passionate, 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 which designate and support relationships which individuals can use as they wish.

I can now state the reason for calling the proposed legal framework "minimal *marriage*." Nomenclature matters: political resistance to calling same-sex unions "marriages" is often an attempt to deny them full legitimacy. Extending the application of "marriage" is one way of rectifying past discrimination against homosexuals, bisexuals, polygamists, and care networks. While this departs from current usage, the reference of "marriage" need not be determined by past use (though there is precedent in "Boston marriage," probably originating from James's *Bostonians*, and referring to a companionate relationship between "spinsters"!). The objective is to rectify past state discrimination; such rectification might also take the form of an apology, reparations, or a monument to victims of discrimination on the basis of sexual orientation. If such measures were taken, it would be less important to retain the term 'marriage', and in

62. Wellington reviews this literature in "Why Liberals Should Support," 17 ff.

63. "51% of Women Are Now Living without Spouse," *New York Times*, January 16, 2007; an editorial ("Can a 15-Year-Old Be a 'Woman without a Spouse'?" published February 11, 2007) criticized the data but acknowledged that revised calculations showed a majority of spouseless women.

64. Wellington, "Why Liberals Should Support," and Cave, "Harm Prevention," consider and reject harm-based arguments for restricting marriage; I direct the reader to their able refutations.

that case, it might be desirable to replace 'marriage' as a legal term with 'personal relationships' or 'adult care networks'.

The argument has been framed in terms of public reason. However, it could also be framed in terms of perfectionist liberalism. For example, I do not think that pluralist perfectionist liberalism—as opposed to some more narrowly sectarian perfectionist politics—can deny the value of adult care networks. In light of the idiosyncrasy and variability in relationships, it would be odd for a value pluralist to impose a single norm in this particular area.[65]

At this point, I should address two objections. First, some "traditionalists" complain that same-sex (and a fortiori minimal) marriage violates neutrality or public reason by endorsing homosexuality.[66] But this objection is confused. Minimal marriage does not endorse any relationship ideal; rather, it refrains from endorsing any. Prescriptions about sexual behavior and the value of relationships are found in comprehensive, not political, doctrines. Moreover, the objector's rights are not infringed in the way that those of same-sex couples or care networks prohibited from marrying are. And, on the neutrality point, the neutrality in question is not neutrality in effect but in aim. Thus, it cannot be an objection on grounds of neutrality that minimal marriage will affect marital demographics.

A second objection is that marriage is exempt from justice and, hence, from public reason. As Susan Moller Okin has shown, political philosophers from Locke to Rawls have ignored the application of their own theories of justice to marriage and the family. However, as Okin, Veronique Munoz-Dardé, and others have argued, the family is part of the basic structure and subject to the principles of justice.[67] While there is controversy over what the application of justice within the family implies, it is not controversial that marriage and family law should conform to principles of justice.

The burden of proof lies on those who would make exceptions here. Jennifer Morse has argued that "marriage is an organic, pre-

65. Raz's suggested argument for marriage might thus be extended to adult care networks. See Raz, *Morality of Freedom*, 161–62.

66. See Jeff Jordan, "Is It Wrong to Discriminate on the Basis of Homosexuality?" *Journal of Social Philosophy* 26 (1995): 39–52. David Boonin ("Same-Sex Marriage and the Argument from Public Disagreement," *Journal of Social Philosophy* 30 [1999]: 251–59) and Jason A. Beyer ("Public Dilemmas and Gay Marriage: Contra Jordan," *Journal of Social Philosophy* 33 [2002]: 9–16) respond.

67. Veronique Munoz-Dardé, "John Rawls, Justice in the Family, and Justice of the Family," *Philosophical Quarterly* 48 (1998): 335–52; Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic, 1989); see also discussion in Rawls, "The Idea," 787–894.

political institution" based in nature, which the state must respect.[68] But arguments from nature are dubious. The concept of human nature is under dispute in ways that undermine such claims; as Mill argued in *The Subjection of Women*, socialization precludes knowledge of human nature. Anthropologically, the diversity of marital forms undermines the claim that only one is "natural": prehistoric marriage involved an annual exchange of spouses between nomadic groups; "husband-visitor" societies like the Na in China are arranged around the female line; Native American societies recognized some same-sex marriages; historically, polygyny has been dominant.[69] In any case, arguments from nature have no role to play in Rawlsian liberalism. Institutions are to be regulated by principles of justice; nature is not normative. Appeals to the traditions of American democracy are similarly problematic. These traditions also include slavery, coverture, and Jim Crow; some traditions need reform. An objector might appeal to Judeo-Christian tradition, but polygamy and same-sex marriage have been part of this tradition,[70] and public reason anyway excludes such an appeal.

IV. WHY A LIBERAL STATE SHOULD RECOGNIZE MINIMAL MARRIAGE

Why should the state recognize and support any relationships? How can a framework for adult relationships be justified? Two cases need to be made. First, a publicly justifiable rationale for marriage law must be given. This rationale must face the potential objection that it cannot be defended within public reason. Second, it must be shown that marriage law serves a purpose which private contracts alone cannot and thus that there is reason to legislate marriage.[71] Many functions of marriage can be carried out through private contract: wills, property settlements, and executorships. Why need the state provide specific marital rights?

I begin by considering two purportedly neutral rationales which fail to make a case for current marriage law. State stability might seem to provide neutral reason for marriage. Rawls writes that one "conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations."[72] In Rawls's account in *Theory of Justice*, the family is key

68. Jennifer Roback Morse, "Why Unilateral Divorce Has No Place in a Free Society," in *The Meaning of Marriage*, ed. Robert P. George and Jean Bethke Elshtain (Dallas: Spence, 2006), 74–99, 75.

69. Coontz, *Marriage*, 10, and chap. 2.

70. John Boswell, *The Marriage of Likeness: Same-Sex Unions in Pre-Modern Europe* (London: HarperCollins, 1994).

71. See Wedgwood, "The Fundamental Argument"; he cites Leslie Green, 236, at n. 14; cf. Raz, *Morality*, 307–13.

72. Rawls, *Theory of Justice*, 454.

to developing the sense of justice. More recently, liberals have pursued the connection between marriage and stability with emphasis on the effects of single-parent families on children.[73] While stability is a political value, this is problematic as a defense of current marriage law. To the extent that different-sex-only marriage reinforces gender norms, current marriage law may teach children injustice and is thus by definition destabilizing.[74] Insofar as stability provides a rationale for marriage, it provides a rationale for supporting all configurations which can provide children with support networks—as minimal marriage does. Finally, stability gives a reason to choose between equally just schemes; if justice requires that there be minimal marriage, or no marriage law, stability cannot itself justify marriage.

A second possible neutral justification for marriage law is that it satisfies citizens' preferences. Wedgwood argues that marriage law can be justified neutrally as satisfying citizens' desires to have their relationships recognized as marriages. This avoids appeal to a contested conception of the good by appealing to people's wants; the legislative rationale is satisfaction of wants, not a conception of the good. However, in the case of marriage there may be reason for the state to resist satisfying wants. Preferences are shaped by existing social practices and so may reflect oppressive power structures. Thus, satisfying wants regarding marriage could be in tension with equal opportunity.[75] And insofar as preference satisfaction is reason for law and policy, it supports minimal marriage, which better accords with citizens' diverse preferences than current marriage law does.[76] But this rationale does not make marriage a matter of justice.

There is a better rationale for marriage law: the social bases of caring relationships are primary goods.[77] In light of its importance in human life, the omission of care from the primary goods is striking. Its inclusion has far-reaching implications: primary goods are bases for claims of justice.[78] Primary goods are introduced in *Theory of Justice* as a basis for interpersonal comparison of resources, specifying persons' wants whatever plans of life they may have. They are, roughly, all-purpose goods which people are assumed to want whatever their plans: "With

73. For example, Galston, *Liberal Purposes*. While Galston's influential version challenged neutrality, a neutrality-respecting version is possible. For critical discussion, see Young, "Mothers"; and Fineman, *The Autonomy Myth*, 71–94.

74. Susan Moller Okin, "*Political Liberalism*, Justice, and Gender," *Ethics* 105 (1994): 23–43.

75. See Ann Levey, "Liberalism, Adaptive Preferences, and Gender Equality," *Hypatia* 20 (2005): 127–43.

76. Thanks to an anonymous reviewer for *Ethics* for this point.

77. See Eva Kittay, *Love's Labor* (New York: Routledge, 1999).

78. Rawls, *Political Liberalism*, 188, 180, 190.

more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be."[79] As developed in *Political Liberalism*, the idea of primary goods provides a "political understanding of what is to be publicly recognized as citizens' needs" and, hence, one admissible in public reason.[80] Primary goods are here defined in terms of the needs of citizens understood under the political conception of persons. This conception defines persons in terms of their moral powers (capacities for a sense of justice and a conception of the good), and hence primary goods are those goods essential to the development and exercise of the moral powers and to the pursuit of varied conceptions of the good: "To identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents."[81] I will show that minimal marriage is publically justifiable, and a matter of justice, by arguing that the social bases of caring relationships and (more briefly) material caretaking are, like the social bases of self-respect, social primary goods, and that minimal marriage rights just are these social bases.

First, 'care' needs definition.[82] One aspect of care is material caretaking, which can be done by a paid caretaker and which includes tasks such as feeding and dressing or activities to cheer or stimulate the cared for, such as grooming or chatting. Another aspect of care is attitudinal care. Caring relationships involve attitudinal care; they are emotionally significant personal relationships between parties who know one another in their particularity, take an interest in each other as persons, interact regularly, and share a history. Caring relationships may exist between persons who are related in other ways, as between a paid caretaker and an individual who is cared for.

In practice, separating these aspects is difficult. Attitudinal care tends to prompt material caretaking and vice-versa. Children need both material caretaking and caring relationships to develop. Adults are liable to need material caretaking throughout their lives, when incapacitated, and such caretaking is generally done better in caring relationships. Material caretaking tasks which could be performed by strangers often require detailed knowledge of the cared for, and nonurgent aid is encouraged by the motivating concern which springs from caring rela-

79. Rawls, *Theory of Justice*, 92.

80. Rawls, *Political Liberalism*, 179.

81. Ibid., 75–76; also 178–82, 187–90.

82. For more detailed, and critical, discussion of various definitions proposed in the literature, see Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford: Oxford University Press, 2006), 29–43.

tionships. Much material caretaking for dependent adults is done in the context of unpaid caring relationships.[83]

Material caretaking for children is necessary for the development and exercise of their moral powers and pursuit of conceptions of the good. None of us would have moral powers, or conceptions to pursue, were it not for care as children. Children's normal psychological development also requires caring relationships. As adults, too, we are liable to periods of dependency in which we need care to sustain and develop our moral powers.[84] These facts give reason for the liberal egalitarian to accept legal frameworks supporting caretakers of children and dependent adults.

But minimal marriage is a framework for adult caring relationships, dependent or not, so my main task is to show that caring relationships in general (not just for dependents and children) are primary goods. One reason depends on the foregoing points: dependent and nondependent caring relationships overlap. As adults age or fall ill, relationships will shift from independence to dependence and back again, and when nondependent adults become dependent, earlier relationships may provide epistemic and motivational foundations for future care.[85]

But caring relationships in themselves, dependent or not, are essential to developing and exercising the moral powers. Caring relationships are almost universally a context in which individuals do so. Most people simply do not and cannot develop and exercise their moral powers in isolation but do so in relationships with other people. We form our conceptions of the good in colloquy with those close to us and exercise our sense of justice in relationships. Rawls's own account of moral development in *Theory of Justice* includes attachment to family and friends. It might be objected that one can exercise moral powers with strangers, or without caring relationships, in settings such as communes or churches and that one can form a conception of the good through solitary philosophical reflection or impersonal dialogue. However, it might similarly be objected that one could develop and exercise the moral powers without using the liberties or money. Caring relation-

83. Such caretaking has costs for caretakers; this speaks to the need for dependent caretaking frameworks, for which there have recently been a number of arguments; see Fineman, *The Autonomy Myth*; Kittay, *Love's Labor*; and Alstott, *No Exit*.

84. Rawls suggests that adult dependency be dealt with at the legislative stage under the assumption that citizens are normally able to cooperate (Rawls, *Political Liberalism*, 184–86). As almost everyone will need care at some point, excluding this fact about human life is problematic, but I do not pursue this here; it is tangential to my main point about caring relationships.

85. There are differences: Fineman and Kittay argue for state support for dependent caretakers, which would not be appropriate in nondependent caring relationships.

ships are normally an ongoing site of development and exercise of the moral powers, and normally as essential as money in so doing.

We can strengthen the case by adding that caring relationships are "all-purpose means normally needed" in the pursuit of widely different conceptions of the good. Caring relationships are comparable to the good of self-respect: they provide psychological benefits which underpin varied pursuits. Rawls says that "perhaps the most important primary good" is self-respect, or self-esteem, because without it "nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them."[86] The clear connections between close interpersonal relationships and mental (as well as physical) health suggest that caring relationships are comparable to self-respect in psychologically supporting individuals in their plans of life.[87] As well, they normally provide the support of another person, which aids in the pursuit of diverse conceptions of the good.

It might be objected that such benefits alone do not a primary good make; spa treatments, for example, might have benefits (relaxation, radiant skin) which help one in pursuit of various conceptions of the good, but it would be absurd to consider them primary goods. Here three features of care are noteworthy. First, caring relationships are themselves important to most humans. Second, their benefits are not negligible but "crucial to our well-being," and these benefits are not commonly obtainable through substitutes. Like self-respect, caring relationships are an essential, for most irreplaceable, support in the pursuit of our projects. Psychologically, they are normally ingredients in, as opposed to mere means to, mental health (to adopt Mill's distinction). Third, the correlation between caring relationships and such objective benefits is widespread.[88] Citizens, under the political conception of persons as having plans of life, normally need caring relationships to carry out their plans of life—and hence they are primary goods.

The claim that caring relationships are primary goods faces the "hermit objection": the hermit may protest that they are not essential to advancing his plan of life or exercising his moral powers. This recalls the criticism that Rawls's list of primary goods is not neutral because it rules out antimaterialist ideals, for example, monastic ideals of poverty. Defenders of Rawls respond that monks can use money to advance their

86. Rawls, *Theory of Justice*, 440, cf. 396.

87. For a survey of psychological benefits of interpersonal 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 (2007): 7–18 (this was Perlman's 2006 presidential address to the Canadian Psychological Association).

88. See Perlman, "The Best of Times," 7–8, on centrality; quotation from 11. Perlman also notes the devastating psychological effects of abuse and exploitation; however, that bad relationships are injurious does not make good ones less important.

ideals—perhaps by giving it away.[89] However, some conceptions of the good do conflict with private property (e.g., those of communists). The hermit objection is no more problematic than the monk objection. Both hermit and monk present a problem for the Rawlsian, so anyone who wishes to defend a Rawlsian theory of justice will need to respond to an objection structurally similar to the hermit objection. In my view, the appropriate response is to admit that the thin theory of the good reflects goods almost, but not quite, universally useful.

A second objection concerns whether caring relationships are distributable and an apt basis for comparison. Rawls divides primary goods into two classes: social and natural. The former includes goods which society can distribute: liberties, opportunities, income, wealth, the social bases of self-respect. The latter includes goods whose distribution society can influence but not directly control, such as health.[90] Only the former goods are, in justice as fairness, subject to claims of justice. It might be thought that, like health, caring relationships cannot be distributed. Their just and efficient distribution results from choice. Furthermore, primary goods provide a simple, objective basis for interpersonal comparison. Again, it might be thought that relationships do not provide a good basis for interpersonal comparison, as individual preferences differ greatly, and thus their inclusion would undermine the appealing simplicity of the account of primary goods.

However, self-respect is not in itself distributable nor a good basis for interpersonal comparison either. Just as the social bases of self-respect are the social primary good related to self-respect, so there are social primary goods related to caring relationships which can be distributed and objectively compared: the social bases of caring relationships, that is, the social conditions for their existence and continuation. These are the rights identified above as distinctive to minimal marriage, those rights which designate and enable day-to-day maintenance of relationships. Insofar as caring relationships depend on social arrangements for their existence and continuation, their social bases—the socially distributable conditions for such relationships, or the legal frameworks designating and supporting them—are subject to claims of justice. The status of caring relationships as a primary good, combined with the diversity of such relationships, provides a publically justifiable rationale for a capacious, flexible legal framework supporting them. Minimal marriage just is this framework.

Now the question arises, why do caring relationships need such a

89. See Adina Schwartz, "Moral Neutrality and Primary Goods," *Ethics* 83 (1973): 294–307; Thomas Nagel, "Rawls on Justice," *Philosophical Review* 82 (1973): 220–34; and Kymlicka, "Liberal Individualism."

90. Rawls, *Theory of Justice*, 62.

framework? Will not people enter into caring relationships whether or not the state supports them? Once again, the same might be said of self-respect. Self-respect can exist without institutional support, yet it is affected by social arrangements—and so are caring relationships. Caring relationships sometimes need support and protection which the state is uniquely able to provide. Maintaining such relationships normally (although not always) requires frequent contact and shared experiences. Thus, institutional design should attend to the social conditions for such access, that is, the social bases of caring relationships. In an ideal liberal egalitarian society, these social bases would be limited to status designation and facilitating day-to-day conduct of the relationship; in our actual society, they should also include benefit entitlements.

Above, I noted that some marital rights facilitate day-to-day maintenance of a relationship and enable spouses to play significant roles in one another's lives. These include entitlements to special consideration for immigration, eligibility for spousal employment and relocation assistance and preferential hiring (offered to U.S. military and civil service spouses), residency (where relevant for tuition, taxation, etc.), hospital and prison visiting rights, bereavement or spousal care leave, burial with one's spouse in a veterans' cemetery, spousal immunity from testifying, and status designation for the purpose of third parties offering private benefits (such as employment incentives and family rates). Some relationships depend for their continuance on such entitlements because they greatly facilitate spousal contact. In the modern world, caring relationships require practical support such as visiting rights, leave, immigration eligibility, and relocation assistance; individuals need a way to signal to the vast institutions shaping their lives which relationships should receive these protections.

The state and other large institutions shape our lives by determining geographic boundaries, permissions to work, and various types of institutional access. Many threats to relationships are in fact created by the state—immigration restrictions, relocation of civil servants and military personnel, and prisons. Others arise from circumstances of modern society, in which vast institutions (hospitals and workplaces) affect individual lives with little regard for particularity. Marital rights signal which relationships such institutions are required to recognize as relevant in visitation, caretaking leave, or spousal hiring and relocation. These entitlements are the social bases of caring relationships. They are not available within private contract; they exist to support relationships and can only be used in that capacity. Furthermore, they lie outside the contract paradigm because their content is shaped by the nature of caring relationships; they designate a status–that of being in a caring relationship–which must be treated as salient in institutional decisions with significant implications for individual lives.

Because caring relationships are primary goods, the provision of these entitlements should not be left to the marketplace; their legislation is a matter of justice. Practically, the state must play a large role in structuring these entitlements, for the state itself creates relationship-threatening geographical divisions, designs labor law (and is a major employer), and determines immigration eligibility. Moreover, because it is enduring, centralized, and not subject to market pressures, the state is in the best position to register marriages to prove eligibility for third-party benefits. The rationale for minimal marital entitlements is not, as in current marriage law, that the designee(s) is the only source of emotional and material support for the other, but that she is party to a caring relationship which deserves protection.

Further, as many conservative defenders of marriage have noted, marriage does not simply allow access to legal entitlements; it also allows partners to signal the importance of their relationship and to invoke social pressures on commitment. Feminists and political liberals are right to be wary of such designations because of their historical association with sexism and heterosexism. However, if marriage is extended to diverse relationships, its social use to convey the importance of a relationship could support the relationship while simultaneously combating heterosexism. Again as conservatives have noted, state recognition conveys a unique authority for such purposes.[91]

Another group of marital entitlements falls within the remit of non-ideal theory. These include eligibility for social security, health care, and other government or third-party benefits. Such entitlements would not be found in an ideal liberal egalitarian society (for cosmopolitans, this might extend to immigration rights) because in such a society health care, pension, and basic income would not depend on marriage. Thus, marriage rights in an ideal liberal egalitarian society would be limited to those designating status and facilitating the day-to-day conduct of the relationship. However, as I will suggest in the next section, entitlements to health care, pension, and so on should be retained for a transitional period. Once again, state designation and structuring of such entitlements is necessary for the state-provided entitlements and to prove eligibility for third-party providers.

Within the Rawlsian framework, minimal marriage would be derived as follows. Ideal legislators (behind a partial veil of ignorance) would choose to make the social bases of caring relationships, as social primary goods, available on an equal-opportunity basis for all caring relationships. The social conditions for relationships in a given society

91. See, e.g., Roger Scruton, *Sexual Desire* (London: Free Press, 1986), 358; or Robert George, "'Same-Sex Marriage' and 'Moral Neutrality'," in *Homosexuality and American Public Life*, ed. Christopher Wolfe (Dallas: Spence, 2000), 141–53.

(such as working conditions, borders, etc.), as revealed under the partial veil, would determine the content of these social bases. In societies like ours, they would consist in the designation and maintenance rights described. But because some relationships threaten autonomy, legislators would view incentives to remain in relationships or reduced exit rights with suspicion. The resulting framework would be minimal marriage, which makes marital rights supporting relationships available to the many possible configurations of caring relationships.

V. NON-IDEAL THEORY

So far, I have been considering what justice would imply in an ideally just society. But we do not live in one. In non-ideal circumstances, it may be unjust to implement the results of ideal theory. Sexism, racism, and heterosexism are powerful forces which must be addressed by any political philosophy aspiring to relevance.

This need not be a departure from Rawlsian liberalism.[92] Rawls requires non-ideal circumstances to be considered at the legislative stage. Legislators know "general facts about their society," presumably including facts about past and present oppression.[93] They must also take into account prospective inequities. In framing legislation to implement the difference principle, "the full range of economic and social facts are brought to bear."[94] While Rawls does not take rectification as a central topic of justice, there is no principled reason why a liberal egalitarian account of rectification could not be given.

But this does not tell us how to move from the actual to the ideal (how to implement the principles of justice is a matter of controversy). Although I cannot argue for this here, I believe it is a mistake to reject ideal theory completely. Instead, one can take the ideal as a guide and evaluate which steps toward it are just under current conditions. In this section, I briefly consider the justice of implementing minimal marriage.

It might be thought that minimal marriage, by promoting nontraditional arrangements, would exacerbate poverty. U.S. federal policy addresses the poverty of single mothers through marriage promotion.[95] 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 cage.

92. For discussion of the difficulties here, see Charles Mills, "'Ideal Theory' as Ideology," *Hypatia* 20 (2005): 165–84.

93. Rawls, *Theory of Justice*, 200.

94. Ibid., 199.

95. "State Policies to Promote Marriage," 1. See also the 1996 U.S. Personal Responsibility and Work Opportunity Reconciliation Act, Title I, Sec. 101 (findings and related congressional testimony asserting pressing public interest in maintaining our current understanding of marriage.)

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 antipoverty program, a point which is even more obvious when one considers that poorer families have less to divide on divorce.[96] In contrast, minimal marriage—assuming that for a period benefits such as health care will be available in it—would provide women with greater access to benefits. While current marriage promotion aims to increase women's economic dependence on men, and so may exacerbate abuse, minimal marriage allows women more marriage options.

Second, justice, as well as efficiency, demands that society address real sources of poverty, such as economic disadvantage to child carers, the drop in working-class men's real wages, racism and the legacy of slavery and Jim Crow, the lack of decent affordable housing, and the gendered division of labor. Marriage promotion policy exaggerates the role of marriage and ignores many real contributors to poverty. For example, the African American Healthy Marriage Initiative targets African American persons but seems to ignore the effects—and causes—of extraordinarily high incarceration rates for black males.[97] Minimal marriage is no more an antipoverty program than marriage promotion, but it would benefit the worst-off more by increasing access to benefits.

Among feminists, marriage reform is controversial. Claudia Card has argued that marriage is unjust and should be abolished because marital access rights and incentives to get or stay married facilitate abuse and because distribution of health care and other benefits through marriage unjustly excludes the unmarried. The minimal marriage of ideal theory meets these criticisms, but immediate abolition of marital health care benefits—with no alternative provision—would harm many. While such benefits unjustly exclude the unmarried, providing health care unjustly to some comes closer to the requirement of justice than unjustly providing it to far fewer people. And while these benefits can constrain the choice to stay married, removing the benefits actually reduces options. Thus, immediate abolition is problematic; a transitional stage in which minimal marriage continues to carry such benefits would continue to exclude some unjustly, but it would address abuse and constraints on choice by increasing women's options and hence their bargaining power. In contrast to the difficulties of abolishing health care benefits, it would be entirely helpful and just to remove legal access rights and sexual assault exemptions from marriage immediately.

96. Alstott, *No Exit*, 8; cf. Cave, "Harm Prevention."

97. See online documents at http://www.aahmi.net/.

Susan Moller Okin and Mary Lyndon Shanley have argued against contractualizing marriage on the grounds that comparatively restrictive marriage law can protect economically vulnerable women in "traditional," gender-structured marriages through property division on divorce.[98] Okin documented how women become economically vulnerable through marriage by giving up careers or doing more housework. Likewise, Carole Pateman argues that contractualization will legitimize oppressive forms of marriage.[99] Freedom of contract is compatible with women being pressured to make disadvantageous choices.

These concerns may justify a transitional stage retaining alimony. But there are weaknesses to relying on alimony to protect the vulnerable. One concerns efficiency. The amount of money received and the percentage who receive it are particularly low for poor women. Also, mothers earn less than childless women. ("Mothers earn about 70 percent of the mean wages of men, and childless women earn 80 to 90 percent.")[100] Thus, pursuing policies such as Anne Alstott's "caretaker resource account" or raising the minimum wage stand to do more good than alimony. Still, given that it is already in place, an inefficient program is better than none.

There is also a problem regarding the grounds for interpersonal obligation in mandatory alimony.[101] Addressing background problems of systematic gender discrimination in employment, including lower wages for "women's work," through marriage risks injustice to individual men. If the supposed reason for alimony is equal opportunity, why should individual men be held responsible for the inequities of the social system? This is especially pertinent because the husbands of the neediest women are likely to be poor themselves. Mandatory alimony based on equal opportunity needs to be sensitive to the position of both parties. However, spousal support liability on grounds of opportunities forgone and contributions to the other's career might be justified by appeal to induced reliance and verbal contracts—mechanisms independently available in contract law. Moreover, provisions preventing contracts from eventuating in one party's impoverishment and the other's enrichment are compatible with liberal egalitarianism. Finally, in non-ideal circumstances, the injustice of burdening a well-off husband with the costs of his ex-wife's job training may be less than the injustice of allowing her to enter poverty. If overall justice does require such

98. Shanley, "Just Marriage."

99. See Carole Pateman, *The Sexual Contract* (Cambridge: Polity, 1988).

100. Alstott, *No Exit*, 24.

101. Lucinda Ferguson, "Interpersonal Obligation, Spousal Support, and the Social Nature of Intimacy," paper presented at the 2007 Applied Philosophy annual conference, Philosophy and the Family, Birmingham, June 29 to July 1.

transfers, then default rules governing property division on exit from intimate relationships can be enacted independently from marriage.[102]

I want to conclude by emphasizing the feminist attractions of minimal marriage. First, unlike current marriage, it involves informing prospective spouses of their rights, the terms of the agreement, and its implications. Basic principles of contract require that contractors understand terms. Arguably, equal opportunity and rectification for past discrimination require educating women about their potential economic vulnerability. Information about the likely consequences of their choices might lead women to resist exploitative relationships.

Second, and more distinctively, minimal marriage gives women more marriage options, increasing their bargaining power. Along these lines, economists who study "marriage markets" argue that polygamy, in a context of liberal rights, increases women's bargaining power.[103] Such ideal models do not speak to the real problems of exploitation of women and children in closed polygynous communities, and, once again, a liberal egalitarian state may be justified in enacting targeted measures to deal with these problems in context. However, even in unequal contexts, legal marital rights would benefit multiple wives. More generally, the increased marriage options of minimal marriage would open alternative, potentially more egalitarian, relationship models to women.

Finally, minimal marriage denormalizes heterosexual monogamy as a way of life. In this respect, I consider my position responsive and sympathetic to lesbian and queer critiques of marriage such as Claudia Card's, Paula Ettelbrick's, and Drucilla Cornell's. By extending marriage to all caring relationships, minimal marriage really does affirm difference. Minimal marriage does not mark some relationships as "legitimate." Its rationale is to support the caring relationships individuals choose, not to distinguish 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 article has obliquely drawn attention

102. Cass Sunstein and Richard Thaler, "Privatizing Marriage," *Monist* 91 (2008): 377–87, at 384.

103. See Gary Becker, "Polygamy and Monogamy in Marriage Markets," in his *A Treatise on the Family*, enlarged ed. (Cambridge, MA: Harvard University Press, 1993), 80–107.

to how state marriage promotion reinforces those social pressures and how political liberalism, properly implemented, might combat them.

The viability of a liberal feminist position on marriage is important because of the concerns of many feminists that liberal feminism is untenable, one reason being that liberal "neutrality" masks a nonneutral, gender-biased state. Such criticism of liberal neutrality (e.g., MacKinnon's) shows that the actual state is nonneutral and that "neutrality" has served bias. However, it is possible that, despite its biased implementation, the proper implementation of neutrality would benefit women. This article is one step toward showing that taking political liberalism seriously in light of feminist social theory has far-reaching implications often unrecognized by liberals and feminists. It requires the state to root out its own sexist and heterosexist assumptions. Minimal marriage is one example of the extensive change which that would require.