

## Minimal Marriage Revisited

Elizabeth Brake, WPSA, March 30, 2012

Abstract: In *Minimizing Marriage* (OUP, 2012), I argue, on grounds of equality for *all* caring relationships, for ‘minimal marriage’, a form of marriage law which would support all caring relationships, of whatever nature or configuration. Two objections charge that this proposal would do unintended harm. One concerns symbolism: supporting any form of marriage may sustain harmful stigma against the unmarried, and calling polyamory, polygamy, or friendships “marriage” may devalue the recognition of same-sex marriage. A second objection is that retaining any state support for caring relationships illegitimately discriminates against ‘super-singles’ (adults who choose not to pursue caring relationships at all) or those in caring relationships who do not marry.

### 1. INTRODUCTION

*The Globe and Mail* recently reported that the American companion of a Canadian woman had been deported: “The elderly women, who have little money and no car, left Canada after Ms. Inferrera, a 73-year-old American, was deported – prompting a public outcry. She and her friend of three decades, Ms. Sanford, 83, are inseparable. In addition, Ms. Sanford suffers from a heart condition and dementia and Ms. Inferrera looks after her.” The American woman had been refused permanent residency despite numerous appeals.<sup>1</sup> Arguments for same-sex marriage often appeal to cases like this one, in which longstanding relationships are harmfully ignored by authorities. But these two women were not romantically involved. Why should their relationship lack recognition because they are ‘just’ friends – friends who have cohabited for decades and cared for one another materially?

I have argued, in *Minimizing Marriage*, that equal treatment requires expanding marriage entitlements. The reason for this is that monogamous, male-female, amorous marriage

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<sup>1</sup> <http://www.theglobeandmail.com/news/national/elderly-american-caregiver-of-elderly-canadian-deported-to-us/article5328771/>

unjustifiably privileges monogamous, male-female, amorous units over same-sex couples, polyamorous groupings, and friendships of a certain significance. To avoid such discrimination, marriage entitlements ought to be extended much more broadly if they are available to anyone. Other philosophers have argued that equality requires simply abolishing marriage. Equal treatment, on this view, requires extending marital privilege to no-one.

It would be possible simply to remove the many entitlements and obligations of marriage without replacing them, allowing people to use legal tools independently available in private contract to negotiate and enforce property arrangements, make wills, establish executorship, and so on. But as Ron den Otter has written, “No one other than the most libertarian of libertarians thinks that the disestablishment of marriage entails the end of state involvement.”<sup>2</sup> Marriage brings many entitlements not available in private contract and which arguably should not be made available through private contract. These include special tax categories for inheritance and transfer of property, entitlements to be on one another's health insurance and pension plans, special eligibility for immigration, residency, and bereavement and caretaking leave.

In what follows, I summarize my own proposal, minimal marriage. I'll then address two challenges. First, the problem of symbolism. Would any form of marriage sustain harmful stigma against the unmarried? Even if “marriage” is replaced with a name such as “domestic partnership,” will the new structure reinforce invidious distinctions between the partnered and unpartnered, or cohabitants and non-cohabitants? Will any legal recognition of caring relationships treat those outside of caring relationships unfairly? And would extending recognition to friends and polyamorists devalue the recognition of same-sex marriage?

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<sup>2</sup> Den Otter, “Review,” p. 133. Jeremy Garrett (2009), for one, seems to hold this “full contractualist” view.

Second, marital contractualists object that minimal marriage is not minimal enough – so long as the state privileges any relationships, it discriminates against some people. Since minimal marriage would support diverse caring relationships, those affected by such discrimination would be those who refrain from any caring relationships. I call these “super-singles.” Will providing benefits through a marriage-like framework discriminate unjustly against “super-singles”? Won't super-single taxpayers be subsidizing the married with no compensation, or, as employees, subsidizing healthcare plans for married employees' spouses? Conversely, if such benefits are capped for efficiency, in order to prevent the state or employers from subsidizing 10 spouses, will this discriminate against the polyamorous?

## 2. SUMMARY OF MY PROPOSAL

Political liberalism excludes from the public forum arguments that depend on comprehensive moral, religious, and philosophical doctrines. Some philosophers have invoked political liberalism to defend same-sex marriage, arguing that opponents of same-sex marriage rely illegitimately on comprehensive doctrines.<sup>3</sup> This reasoning is generally sound but does not go far enough in examining the implications for marriage. Other philosophers have argued that political liberalism requires abolishing legal marriage and relegating marital agreements to private contract.<sup>4</sup> They have shown that many defenses of marriage appeal illegitimately to comprehensive ethical claims about the value of relationships.

In my view, rather than abolishing marriage, the state should replace it with what I call “minimal marriage.” This is minimal in that it minimizes conditions for entry. It is not restricted

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<sup>3</sup> See Schaff, “Kant,” “Equal Protection”; Wedgwood, “Fundamental Argument”; Wellington, “Why Liberals”; cf. Buccola, “Finding Room.” Neutrality also underlies the debate between Jordan, “Is It Wrong,” Beyer, “Public Dilemmas,” and Boonin, “Same-Sex Marriage.”

<sup>4</sup>See Vanderheiden, “Why the State”; Torcello, “Is the State”; Metz, *Untying*. Also Garrett.

in terms of sex and number of parties, nor by the nature of the relationship – friendship or romantic love, sexual or not, dyadic or part of a care network. In my view, equal treatment requires that a liberal state should set no *principled* restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring. Moreover, the state cannot require exchanges of marital entitlements, powers, and obligations to be reciprocal and complete, as opposed to asymmetrical and divided. Minimal marriage allows individuals to select from the rights and obligations exchanged within marriage and exchange them with whomever they want, rather than exchanging a predefined bundle of rights and obligations with only one amatory partner. This ceases to privilege unjustifiably certain caring relationships. It allows individuals to 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. This proposal applies to marriage law, not to religious practice, although it would alter the implications of entitlements to third-party benefits on the basis of marital status.

In an ideal liberal egalitarian society, minimal marriage would consist *only* in rights that recognize and support caring relationships. These may include friendships, urban tribes, and care networks as well as polyamorous or monogamous different-sex or same-sex relationships. This avoids what I call *amatonormative* discrimination, that is, arbitrary privilege given to romantic sexual relationships as opposed to non-sexual, life-structuring friendships. While minimal marriage rights cannot be specified independent of a particular social context, the best candidates would include spousal eligibility for immigration, residency, 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 other benefits (such as employment incentives, relocation assistance, spousal hiring, or family rates). In an ideal liberal egalitarian society, the set of minimal marital rights would be relatively small. But in the actual, non-ideal, world, abolishing entitlements such as to healthcare and pensions would harm those already vulnerable.

Another feature of minimal marriage is that it 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, that 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. It thus supports the variety of relationships excluded by amatonormative discrimination: friendships, urban tribes, overlapping networks, and polyamory.

I argue that minimal marriage, and no more extensive or restrictive law, is consistent with political liberalism. Appeal to the special value of long-term dyadic sexual relationships violates the ban on arguments depending on comprehensive conceptions of the good, just as does appeal to the special value of different-sex or two-person relationships. Without such amatonormative appeal, restriction of marriage to such relationships cannot be justified.<sup>5</sup>

Current marriage promotes one form of caring relationship at the expense of many others. More broadly, our culture enshrines dyadic amorous relationships at the cost of recognizing friendships, care networks, urban tribes, and other intimate associations. Amatonormativity is my term for this attribution of special value to marital and amorous love relationships, and the concomitant assumptions that a central, exclusive, amorous relationship is normal for humans (a universally shared goal), and that such a relationship is normative, in that it *should* be aimed at in preference to other relationship types. These

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<sup>5</sup> Two political reasons have been given for restriction: children's welfare and women's equality. In *Minimizing Marriage*, I argue that these reasons on the whole do not succeed in justifying restrictions.

assumptions depend on comprehensive ethical views. Socially, amatonormativity results in devaluing friendships and other caring relationships, as recent manifestos by urban tribalists, quirkyalones, polyamorists, and asexuals have insisted; in law, it is a form of unjust discrimination.

Adults whose lives do not fit the amatonormative norm face discrimination which benefits members of central, exclusive, sexual love relationships. Amatonormative discrimination against non-complying relationships and their members is widely practiced. Its existence is not controversial. What is controversial is the claim that it is wrongful discrimination and not simply justified differential treatment – that it is arbitrary and hence, at least in law, unjust. But insofar as it depends on comprehensive ethical claims, it cannot be justified within political liberalism.

Amatonormativity wrongly privileges the central, dyadic, exclusive, enduring amorous relationship associated with, but not limited to, marriage. Such amorous relationships are wrongly privileged over friendships, and their members wrongly privileged over ‘singles’ (the socially single or uncoupled). Friendships and adult care networks are not eligible for the legal benefits of marriage. However, for many people, friendships play a similar role in their lives, and have the same importance to them, as marriages or amorous relationships do for others. They structure their lives around these friendships. For some, these friendships are explicitly seen as replacing, and preferable to, amorous relationships. Sasha Cagen writes that for ‘quirkyalones’, “a community of like-minded souls is essential.... Instead of sacrificing our social constellation for the one all-consuming individual, we seek empathy from friends. We have significant *others*.”<sup>6</sup> Ethan Watters hypothesizes that the growing prevalence of small close-knit groups of

friends, which he calls urban tribes, reflects the fact that late-marrying urban professionals receive the support associated with marriage from friends. Cohabitation between friends is also increasing among Americans at or approaching retirement age.<sup>7</sup> Economic pressures also play a role in some friends' decision to cohabit family-style.

Such significant friendships, including groups of adults and shared child-rearing relationships, appear in the gay and lesbian community, African-American and Latin-American communities, among seniors, and unmarried urbanites. Recent demographic changes suggest that, increasingly, such friendships play the role associated with amorous relationships. Marriage rates have decreased; according to U.S. census data, in 2005, 51% of women were "living without a spouse," and in 2010, married couples were for the first time a minority. The shift away from marriage has been accompanied by a shift into new family forms, especially adult care networks, informal associations of friends or relatives who provide the reciprocal material and emotional support associated with marriage.

The relationships penalized by amatonormativity may or may not involve sex and romantic love. Polyamorous relationships fail to meet the norm just as groups of friends do. Polyamorists have multiple domestic or sexual partners, who in turn also typically have other partners, and these multiple relationships are typically characterized by affectionate bonds as well as sex.<sup>8</sup>

In marriage law, even if the two persons in the marriage may be of the same sex, so long as the contract is limited to two persons, the two-person relationship is privileged. And so long as the parties are required to have sex to consummate the marriage, or are expected to have a romantic love relationship, the sexual romantic relationship is privileged. Excluding non-

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<sup>6</sup> Cagen, *Quirkyalone*, p. 14.

<sup>7</sup> DePaulo, *Singled Out*, p. 209.

amorous relationships from the benefits of marriage is unjust unless a political reason can be given can be given for this exclusion. Equal treatment and non-discrimination require treating non-sexual friendships as legally on a par with sexual and amatory relationships, treating groups on a par with dyads, and treating same-sex relationships as on a par with male-female relationships. This can be done in two ways: either by relegating legal marriage arrangements to private contract, abolishing it as a legal category, or recognizing and supporting all forms of relationship, including polygamy, overlapping polyamorous families, friends, urban tribes, and adult care networks.

In my view, there is a reason why the liberal state should recognize and support caring relationships, rather than privatizing marriage. Caring relationships, I argue, are primary goods. Within Rawlsian liberalism, primary goods specify citizens' needs "when questions of justice arise." Because they are bases for claims of justice, the state must distribute them according to the principles of justice.<sup>9</sup> Of course, the state cannot distribute caring relationships, but it can distribute their social bases, which just are the minimal marriage rights. The status of caring relationships as a primary good provides a publically justifiable rationale for a capacious, flexible legal framework supporting them.

By "caring relationships," I do not mean only caregiving relationships, such as the parent-child relationship, where extensive unilateral material caregiving takes place. I mean relationships involving attitudinal care; such relationships exist between parties who know one another, take an interest in one another as persons, share some history, and care for one another.

One reason that caring relationships are primary goods is that they are essential to developing and exercising the moral powers. Caring relationships are almost universally a

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<sup>8</sup> See Emens, "Monogamy's Law," for discussion.

<sup>9</sup> Rawls, *Political Liberalism*, pp. 188, 180, 190.



context in which individuals do this. Most people do not and cannot develop and exercise those powers in isolation, but do so in relationships with other people.

Further, caring relationships are “all-purpose means normally needed” in the pursuit of different conceptions of the good. They are comparable to the good of self-respect: they provide psychological, emotional, and even health benefits which enable parties to pursue their goals. They are “crucial to our well-being.”<sup>10</sup> Like self-respect, caring relationships are an essential, for many or most irreplaceable, support in the pursuit of projects. Of course, individual needs for care differ, which is one reason the social bases of such relationships should be flexible. And a cautionary note must be sounded: some relationships are oppressive, exploitative, and abusive. What this implies is the need for the legal framework to include easy exit options; the state should not pressure or incentivize people to remain in relationships. Its role is limited to protecting them and facilitating their existence when necessary.

Caring relationships typically require parties to be able to spend time together. In certain institutional contexts, this proximity is threatened. While the state cannot create or distribute such relationships, it can provide a capacious and flexible legal framework protecting them with entitlements such as special immigration eligibility, hospital and prison visiting rights, and evidentiary privilege. Minimal marriage, in the ideal liberal egalitarian society, is simply this framework, the set of social bases for this primary good. The core, relationship-sustaining minimal marriage rights enable people to share lives; the criterion for entry is that they are in a caring relationship and want to share their lives (otherwise they would not need minimal marriage rights). The degree of passionate intensity they feel, their sexual activity, the number of

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<sup>10</sup> Perlman, “The Best,” p. 11; Baumeister and Leary, “Need.”

persons in the caring relationship – these aspects are beyond the remit of state concern.<sup>11</sup>

### 3. THE PROBLEM OF SYMBOLISM

Marriage law does not simply allow access to legal entitlements but lends the state's symbolic authority to marriage. Feminists and political liberals are rightly wary of such use of authority because of its historical association in marriage law with racism (stamping out Native marriage practices, prohibiting marriage for enslaved persons, anti-miscegenation law, racist rhetoric against polygamy), sexism (coverture, gender-structured legal obligations, and marital rape exemptions), heterosexism, and amatonormativity.<sup>12</sup> One objection to minimal marriage is that any relationship status designation, particularly one called "marriage," will sustain discrimination against the unmarried. I have argued that legal recognition extended to diverse relationships can combat amatonormativity by making alternatives more familiar and signaling their equality under the law. But does this outweigh concerns about unintended effects of retaining a status called "marriage"?

There is a reason to provide a status designation for such relationships, as opposed to making available an array of contractual tools. Status designation for third parties who provide incentives and benefits is a crucial function of marriage law. Without a status designating relevant relationships, third parties might discriminate unjustly. For instance, they might offer benefits only to different-sex couples or amatory partners. Marital status guarantees that benefits offered on the basis of marriage will be offered without discrimination. This is significant because many benefits derive from employers.

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<sup>11</sup> This proposal faces problems I cannot address here but discuss in my book. For one, it seems to require contractualizing marital property. Mandatory property division seems to assume that spouses have a particular relationship type, involving economic dependency. But this would harm dependent spouses. Second, what should the relationship be between frameworks for parenting and for adult relationships?

But should such a status be called “marriage”? Will using the symbolism of marriage reinforce discrimination against those who do not marry? Claudia Card wrote that distinguishing relationships as “legitimate” and “illegitimate” is just as wrong as distinguishing “legitimate” and “illegitimate” children. But part of the point of “minimal marriage” is to weaken the distinction between legitimate and illegitimate relationships. Minimal marriage should not convey legitimacy in any substantive sense. One can say that a birth certificate is legitimate in the sense that it was correctly filled out, witnessed, and so on. But this is different from categorizing the *infant* as legitimate or illegitimate. In the same way, minimal marriage rights may be held legitimately without their marking the relationship as “legitimate.”

There is symbolic reason for the term “minimal *marriage*.” Political resistance to calling same-sex unions “marriages” is often an attempt to deny them full legitimacy and retain a privileged status for male-female couples. Extending the application of “marriage” is a way of rectifying past discrimination against same-sex partners, the nonmonogamous, and ‘mere’ friends. Abolishing marriage would cede control of this still socially powerful institution to the churches and other private-sector groups. State involvement makes equal access to marriage as a social status more likely. Abolition would allow private-sector providers to deny entry, whereas reform would send an unequivocal message of equal citizenship.<sup>13</sup> Analogously, imagine that instead of asserting a right to interracial marriage in 1967, the U.S. Supreme Court had abolished it instead, allowing private interracial marriage while doing away with legal marriage. This would have sent a very different message than the actual decision in *Loving v. Virginia*. Calling it “marriage” allows the state to lend its authority against private-sphere discrimination—a

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<sup>12</sup> On this history, see Cott, *Public Vows*.

<sup>13</sup> On this point, see Wedgwood, “Fundamental”; Hartley and Watson, “Political.”

correction that is politically justified because the state has sustained this very discrimination through law reinforcing heterosexism and amatonormativity.

However, rectification of past state discrimination could be carried out by other means (such as public apology). In this case, there would be no reason of rectification to retain the term “marriage,” and there are reasons not to label all relationships “minimal *marriages*.” Calling a diverse array of relationships “marriage” has epistemic or informational costs – what Stephen Macedo has called the “legibility” of the institution. Moreover, some people, objecting to the connotations of the term, might object to calling their relationship “marriage.”

However, if the term “marriage” is not legally applied to all relationships (as in “minimal marriage”) it should not be applied to any. It might be claimed that a two-stream system, with one stream called “marriage” and another more generically titled, could respect equality while preserving the informational aspect of “marriage” as a legal status. But the informational consideration is not in itself weighty, as couples may choose to call themselves “married” whatever the legal status is named. Moreover, concerns of justice trump this informational consideration. Driving a legal wedge between the two streams suggests a hierarchy; “marriage” still connotes a relationship of value, one socially more deserving of respect. Thus the two streams would provide a legal basis for social discrimination, where the message should be one of equality.

It may be objected that a reason for legally distinguishing polyamory, polygamy, and friendships from marriage is to preserve the symbolic worth of the recognition of same-sex marriage. But if this assumes that monogamous marriage-type relationships are more valuable than other types of relationships, it relies on an amatonormative distinction which I have argued is mistaken. In brief, why should the relationship between the long-term companions described

at the outset be less valuable than if they were romantically involved? Even if the objection does not itself rest on amatonormative premises (but instead on how the nomenclature will be received), it concedes that the ‘marriage’ label has greater symbolic worth than an alternative – and hence concedes that the two-stream solution is a step away from equal treatment.

#### 4. HOW CAN A POLITICAL LIBERAL JUSTIFY MARITAL BENEFITS?

A second problem for marriage reform is whether the state can avoid discriminating unjustly against super-singles by providing benefits, even if the benefits are made accessible to diverse relationships and so do not discriminate on the basis of sexual orientation, number, or relationship type. Recall that in an ideal liberal egalitarian society, minimal marriage would consist only in rights that recognize and support caring relationships, such as special eligibility for immigration, residency, 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 third party benefits. Because these rights are justified by the status of caring relationships as a primary good, they are grounded in a public reason. While super-singles might dispute the status of caring relationships, they would be in a comparable position to people denying the value of self-respect; once again, this poses a wider challenge for the account of primary goods. In my view, the appropriate response is to admit that primary goods are almost, but not universally, needed for plans of the good.

There is another reason why minimal marriage in the ideal liberal egalitarian society would not unjustly discriminate against super-singles. In such a society, the small set of minimal marital rights would provide legal contractual and status tools as opposed to distributing economic benefits. The state enforces a variety of legal mechanisms (for instance, in family law,

power-of-attorney, real estate, and business) which many people will never need or want to use. Given the relatively small cost of any such mechanism, the diverse plans of life they support, and the fact that there are reasons for the state to enforce them (its unique ability to do so, considerations of public interest such as efficiency), there is no basis for a charge that the state is unjustly favoring certain groups in providing an array of contractual tools and statuses. But when it comes to the distribution of material benefits, there is greater cause for concern.

Abolishing current marital entitlements such as healthcare and pensions would harm those already vulnerable. However, Card and others have argued that providing such benefits through marriage is itself unjust: healthcare should be distributed universally, not on the basis of marriage. Objectors to minimal marriage might charge that making benefits available through it would unjustly force single taxpayers and employees to subsidize spousal benefits. Why should spouses receive such transfers of wealth? After all, these goods are not social bases of caring relationships. This seems to pose a dilemma between harming those already vulnerable and treating super-singles unjustly.

An unsatisfactorily consequentialist response is that while such benefits unjustly exclude the unmarried, providing health care or pensions unjustly to *some* comes closer to universal provision than not providing them at all.<sup>14</sup> But this permits an injustice. A more satisfactory answer acknowledges that the benefits *were* unjustly given, but argues that they should be continued because the state has induced reliance on them. People have made choices on this basis. However, super-singles might respond: “You are continuing an entitlement to those who have already unjustly benefited; imagine if Jim Crow-era privileges of whites were continued, on

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<sup>14</sup> See, e.g., Mayo and Gunderson, 2000.

the grounds of induced reliance, although the injustice of their having been granted in the first place was acknowledged!”<sup>15</sup>

To avoid this problem, the justification can apply only to dependent parties in gender-structured relationships.<sup>16</sup> Their choices to rely on marital benefits have been shaped in a system of amatonormative, patriarchal, *state-sponsored* oppression. Protecting them against the effects of these choices is a matter of rectification. Given that the state has incentivized and promoted spouses into dependent marriage, it owes them compensation. As late as 2001, some abstinence-education curricula have taught gender-structured domestic roles in public schools. Compensation offsets the effects of state-sponsored gender hierarchy.

These reasons also justify extending benefits to minimal marriages. Imagine that Anna is a dependent wife who receives health care entitlements through marriage. If she cannot receive them in a minimal marriage with members of her care network, her choice to leave her current marriage is unduly restricted—unduly in light of the state’s role in shaping her choices.<sup>17</sup> Had she not been induced to rely on marriage to provide this benefit, she might have sought to be able to provide it for herself, and hence be able to enter the new marriage without losing health care. These are reasons of justice to extend benefits throughout minimal marriage, not only to current recipients like Anna, but to the next generation, who have begun to form their preferences in light of abstinence-until-marriage education.

Another kind of problem arises in extending marital benefits to groups, particularly with evidentiary privilege, immigration, and tax breaks for jointly owned homes.<sup>18</sup> These

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<sup>15</sup> Thanks to Elizabeth Emens for pressing this point.

<sup>16</sup> Primarily “traditional wives,” but also including same-sex partners who take on gendered roles.

<sup>17</sup> My point is not that Anna’s choice was politically unfree due to such pressures, but that the state owes her compensation for having unjustly sponsored these pressures. It ought not to have interfered with her choices in this way.

<sup>18</sup> Thanks to Elizabeth Emens for these points.

entitlements fall under minimal marriage law, as they help spouses maintain relationships. But would immigration rights extend to as many multiple spouses as someone could maintain caring relationships with? Would evidentiary privilege extend to groups? One problem is that of numbers, although immigration law now grants special eligibility to multiple siblings or children so, at least in immigration, this is not a unique problem.<sup>19</sup> But network marriages could create complex cases.

While I cannot address all such problems, let me address two general worries. One is that marital rights cannot be disaggregated. Either the rights will come into conflict, or transfers of rights among group members will wrongly unilaterally impose obligations on an un-consenting spouse.<sup>20</sup> However, conflicts cannot arise with transfers of core minimal marriage rights, such as visiting rights. A's relationship with C might reduce the amount of time A has for B, just as, in marriages now, spouses can put their time and energy into non-marital activities. This is not a conflict among rights. If the entitlements were exclusive, then B would lose them when A transfers them to C – but this is possible now in divorce.

The objection regarding unilateral obligations imposed on a nonconsenting spouse concerns financial obligations. For example, if A and B jointly owned property, and A became obligated to pay alimony to C, then B might be obligated to C. However, terms of liability could be defined to protect third parties – as they must be for any co-owner of property, such as a business partner, with A. Rights can be specified so that they are not transitive.<sup>21</sup> The more plausible problem is that if A owes money to C, this reduces the amount of money available for A to give B – if, for instance, A ended up owing both spouses alimony. Allowing multiple spouses will exacerbate the problem of individuals unable to pay alimony (and child support).

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<sup>19</sup> Thanks to Laurie Shrage for this point.

<sup>20</sup> Thanks to Helga Varden for this objection.



There are a number of considerations regarding this important problem. First, feminists defenders of legal polygamy such as Cheshire Calhoun sometimes point out that multiple wives will be better off if they have legal marital rights; legal marriage rights for multiple spouses might actually discourage male-headed polygyny rather than exacerbating it. Second, multiple obligations can arise in serial monogamy; a man with two wives at once would be in the same position as a divorced man who remarries. Third, policies other than banning group marriage would effectively target the problem: the state could discourage dependent spouses, or at least *multiple* dependent spouses (as well as serial monogamy?).

A second general worry concerns abuse. It might be thought too difficult to police minimal marriage by determining whether a caring relationship exists, and that this would encourage marriage fraud. But this objection assumes that marriage comes with the extensive entitlements which it brings now. For most relationship-maintaining rights, self-designation is appropriate.<sup>22</sup> For entitlements which burden the state little and whose primary function is to support a relationship – for example, visitation rights – self-designation is feasible. In such cases fraud would cost little, and there is little motivation for it. Other rights – such as immigration eligibility – might be more ripe for fraud, and hence would require greater scrutiny. In such cases, bureaucratic oversight, such as an interview to determine that parties do actually know and care for one another may be appropriate. But this would differ little from investigations in spousal immigration cases now.

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<sup>21</sup> As Laurie Shrage pointed out to me.

<sup>22</sup> See “Beyond Conjugalities: Recognizing and supporting close personal adult relationships,” a 2001 publication of the Law Commission of Canada. Online. Available: [http://www.samesexmarriage.ca/docs/beyond\\_conjugalities.pdf](http://www.samesexmarriage.ca/docs/beyond_conjugalities.pdf).

While I have tried to sketch responses to the problems raised by minimal marriage, the discussion should suggest the difficulty of equal treatment for all in designing any substantive marriage (or marriage-like) law.

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