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**“The Future of Marriage: Liberal Justice, Love, and the Law”**

*Draft ~ this is material draw from a book in progress which I hope to finish this summer. It provides an overview of the argument and covers a lot of ground fairly quickly. Those who find that there is too much to read can skip Section II, on the conservative opposition to same sex marriage. Comments and suggestions very welcome! sm*

1. ***Introduction: Why Marriage Matters***

Marriage, the family, and gender relations have change remarkably over the last 60 years, including greater gender equality -- which has included women working in far greater numbers, and greater reproductive freedom, including better access to contraception – delayed marriage, higher rates of divorce, more permissive attitudes to premarital sex, and many more children being raised by single parents. Half of marriages end in divorce and sexual activity, procreation and child-rearing increasingly take place outside marriage. But while Americans now marry later in life and half of those marriages will end in divorce, they still marry in impressive numbers. Virtually all American women – 95% -- will have been married at some point by ages 50-54, a figure that remained unchanged between 1975 and 1990.[[1]](#footnote-1) So, in spite of all the changes, Americans still aspire to marriage, and marriage still matters.

Consider Jacques Beaumont and Richard Townsend, 86 and 77 years old respectively, who, in August 2011, were featured in the Weddings/Celebrations section of *The New York Times*.[[2]](#footnote-2) Beaumont worked decades with a refugee organization and Townsend was a playwright who also taught play writing at the YMCA. They met 39 years ago and lived together for many years. Townsend developed Parkinson’s disease some time ago, and they spent much of their time caring for one another. At the time the story ran, Beaumont had recently been diagnosed with leukemia, and the prognosis was not good. A few days after celebrating the signing of New York State’s same-sex marriage legislation, they were forced to call an ambulance and together check into the Beth Israel Medical Center, where they insisted on sharing a room. There, in a patient lounge on August 2, they were wed. “When he got sick,” said Mr. Townsend, “it changed everything. We said we must get married. It’s vitally important.”

It is left to our imaginations to fill in the details. Townsend’s sense of marriage’s vital importance may have referred only to particular legal rights. But more likely he referred in part, at least, to the significance of the status of marriage as a way of declaring and solemnizing their loving commitment.

To Kristin Perry, the lead plaintiff in the constitutional challenge to California’s Proposition 8 (which overturned a California Supreme Court decision extending marriage rights to same sex couples[[3]](#footnote-3)), marriage would provide access to the language to describe her relationship with her partner: “I’m a 45-year-old woman. I have been in love with a woman for 10 years and I don’t have a word to tell anybody about that.” “Marriage would be a way to tell our friends, our family, our society, our community, our parents… and each other that this is a lifetime commitment… we are not girlfriends. We are not partners. We are married.”[[4]](#footnote-4)

In the Proposition 8 litigation in California last fall, a conservative justice noted that same sex couples in California have, as a matter of state law, domestic partnerships with nearly all of the same legal entitlements of marriage, so all this litigation, he said, is over the word “marriage.” Charles Cooper, a lawyer defending Proposition 8, responded: “the word is the institution.”[[5]](#footnote-5) That may be an overstatement, but it captures an important truth: the institution of marriage in the United States is freighted with social meaning and moral, cultural, and religious significance; these words and their public meanings, and the recognition “marriage” entails, is a crucial part of what is at stake. What does the recognition of same sex marriage – if and when it continues to spread – portend for the future of marriage as an institution?

I want to look over the horizon of same sex marriage and ask: *what’s next for marriage*?

- What sorts of relationships should count, and why? What sorts of people, and how many, should be allowed to marry? What is the principled argument for 2?

- How can we justify preserving a reformed legal institution of two-person marriage in light of the variety of very powerful criticisms, issuing from feminists, libertarians, advocates of cultural and religious diversity, and others?

- Which of the traditional legal privileges and obligations of marriage should be kept, which should be eliminated, and which should be made available on another basis, say, to unmarried couples or groups in various care giving relationships?

These questions are urgent. Conservatives have long warned that gay marriage would bring the demise of marriage as we know it, for once gays are included, there will be no “principled” basis to deny equal marriage rights to polygamous or “polyamorous” unions.[[6]](#footnote-6) Dozens of progressive academics, journalists and intellectuals have called for the end to the civil institution of marriage as we have known it.[[7]](#footnote-7) Nevertheless, the charge is ill-founded.

Marriage is one of our most complex social and legal institutions, with extensive economic, legal, political, moral, religious, and cultural dimensions and consequences. (I focus on the United States because the relevant social meanings are somewhat context specific, and differ across societies, though I think that much of what I argue has relevance beyond the US.) It shapes the most personal and intimate aspects of our lives, but via a declaration, ceremony, and system of law that are public. It is both a contract and a status relation: some considerable “personalization” is possible (via prenuptial agreements and by other means) but it is also a status relation with legal entitlements and entailments. And few couples take advantage of the opportunity to enter into prenups.[[8]](#footnote-8) The legal facets of marriage in the US – the “marriage bundle” -- include 1400 incidents in federal law, and others that vary somewhat across states. Marriage is also surrounded by powerful social meanings, seemingly more so in the US than in Western Europe.[[9]](#footnote-9) Carol Sanger seems to me on the mark when she observes that “only civil marriage offers the means for parties to present themselves publicly as partners to the full extent permitted by law. Civil marriage bestows status and respect precisely because it is created by law.”[[10]](#footnote-10) Marriage’s social meanings give rise to commensurate expectations about spouses’ behavior toward one another and others’ behavior toward them: these expectations are normative and can help support marital commitments. The social meanings, like the legal incidents, allow a fair degree of latitude: people’s marriages – their living and work arrangements, their attitudes toward children, sex, money, etc. -- differ in very many ways. There are, nevertheless, common patterns, aspirations, and expectations. The core of marriage in the US is complex and pluralistic, but discernible.

Many libertarians and liberals committed to strict doctrines of state neutrality argue that state sponsorship for marriage as status cannot be justified given vast diversity of religious and ethical ideals in America today. Marriage should be “disestablished” or privatized in favor of legal forms that recognize and support a wide variety of caring and care-giving relations.[[11]](#footnote-11) Many feminists argue that the magnetic power of marriage in our popular culture, along with the bundling of many benefits into this particular status relation, leads people to over-invest of one form of caring and care-giving relationship. It ill serves the real interests of most people to put all of their eggs in the one basket of marriage: an institution whose fragility dashes hopes of permanence.

So while conservatives despair at what they see as the weakening of marriage and the traditional family, many progressives also view same sex marriage is an unstable stopping point: a mere half-way house on the path to marriage abolition.

In what follows I defend marriage reform and preservation, not abolition. Justice requires the extension of marriage to same sex couples. It does not, however, require marriage privatization or the extension of marriage to groups of three or more. Justice sets the bounds, in this case fairly wide, and leaves considerable room for democratic law and policy to promote a variety of broad-based public goods related to marriage. I make the case for a reformed institution: expanded to include same sex couples and with some of its legal incidents unbundled and redistributed to support a variety of valuable non-marital care giving relationships

One final preliminary. My subject is the law of marriage, not the ideal of marriage. In a diverse democracy in which people’s understandings of marriage vary, often under the influence of their deepest religious and ethical beliefs, it would be unreasonable to expect our shared law of marriage to reflect a particular perfectionist ideal. There is no reason to see same sex marriage as the sort of cataclysm that conservatives claim to fear. With respect to other complex aspects of law pertaining to marriage and family relations, when issues of basic justice and the public good are unclear, consequences are uncertain, and very many people have come to rely upon, and build their lives around existing institutions and rules, the law should change slowly and incrementally.

1. ***The Collapse of Conservative Moralism***

The defense of “traditional marriage” has long been a keystone of cultural conservatism, and conservative moralists have been at the forefront of the opposition to contraception, divorce, and now, same sex marriage. I agree with conservative concerns about teen pregnancy, the plight of many children, and the coarsening of our popular culture. But we can and should address these concerns in ways that are consistent with the requirements of fairness and equal respect for persons and their reasonable choices.

The most philosophically elaborate and sophisticated argument in recent decades in support of the proposition that same sex relations are intrinsically immoral and essentially non-marital has been the “new natural law” arguments developed most frequently by (usually) Roman Catholic philosophers and legal scholars, such as Germaine Grisez, John Finnis, Robert George, Patrick Lee, and others.[[12]](#footnote-12)

On this “conjugal conception” of marriage, sexual relations gain their unique intelligibility, significance, and moral value as integral aspects of the comprehensive union of two persons that is marriage. Marriage is the relationship ordered to procreation; husband and wife form a complete biological unit with respect to the act of procreation. And that act, and the larger comprehensive marital union of which it forms a part, is what makes human sexual activity intelligibly, inherently valuable, as a feature of the multilevel good that is shared by husband and wife in marriage. Sexual activity gains its intelligibility and point from being procreative in type, within marriage, even if procreation is in fact impossible due to circumstances beyond the control of spouses.

Only heterosexual couples can have sexual relations that are *marital in type* because of their possession of complementary sexual organs appropriate for procreation: their sexual organs, when united, comprise an *organic and bodily unity* – a “two-in-one flesh communion” – that is the consummation of marriage even if the spouses are temporarily infertile or permanently sterile. Homosexual acts cannot be procreative in type, conjugal, or marital. The relevant claims here are ethical, but also apparently metaphysical. All non-marital sexual acts are essentially masturbatory, using the body as an instrument to pleasure the conscious self, all involve a mind-body dualism that damages the agent’s capacity to appreciate and participate in the great good of marriage, and other goods.[[13]](#footnote-13) The broad class of valueless and immoral sexual activity includes not only gay sex but all contracepted sex, including of married couples, all extramarital sex (fornication). The sexual acts of married couples when contracepted are essentially masturbatory and valueless, indeed, immoral since such acts damage the partners’ marriage and, ultimately, society’s capacity to support marriage properly understood. “Natural” birth control in the form of the “rhythm method” is permitted. The law ought to be mobilized to express disapproval of all of these forms of sexual immorality, and to support the correct understanding of sexual morality. Homosexual sexual activity is only distinctive in being an especially vivid departure from morally approved sex, according to these scholars, who also portray same sex marriage as the last nail in the coffin of “traditional” marriage.[[14]](#footnote-14)

The New Natural Law’s (or NNL’s) highly restrictive account of the ethics of sex and the law of marriage has a number of problems. For one, why does heterosexual intercourse have “procreative significance” when it is known that procreation is impossible due to sterility on the part of one of the spouses? The Natural Lawyers respond that heterosexual intercourse is behavior *suitable for procreation*, even if procreation is impossible, temporarily or permanently. Marriage “is sealed or consummated… in coitus, which is organic bodily union.”[[15]](#footnote-15) Only a couple with complementary sexual organs can have sexual relations that are *marital in type*, because their sexual organs, when united, comprise an *organic and bodily unity* – a “two-in-one flesh communion” – that permits the consummation of marriage *even if they are temporarily infertile or permanently sterile*. Critics such as Andrew Koppelman have asked whether pointing a gun at someone and pulling the trigger has “murderous significance” even when it is known that the gun is unloaded, or made of chocolate? Along with other critics of this New Natural Law I cannot understand why sterile and elderly heterosexual couples should be included in marriage but not loving same sex couples.[[16]](#footnote-16)

The NNL’s understanding of the nature and scope of valuable sexual relations is extremely narrow and decidedly philosophically sectarian. The categorical exclusion of gays is only one aspect of it. For these moralists, the sexual acts of married couples when contracepted deny marriage’s “essential dynamism toward children,” and are essentially masturbatory and valueless, indeed, immoral since such acts damage the partners’ marriage and, ultimately, marriage in general.[[17]](#footnote-17) The natural lawyers impose a set of interpretive constructions on sexual acts of different types and these are claimed to represent the essential nature of these different sexual acts. So all non-marital non-procreative sex is represented as mutual instrumentalization of one another’s (and one’s own) bodies, with no shared good in common. And it is not that sexual activity of these types has a tendency toward the character of mere mutual masturbation, but that it is necessarily and categorically of that type. Unless, of course, married couples seek to avoid actual procreation by practicing the rhythm method. This too strikes me, and others, as a marital loophole for recreational sex.

Consider a marriage in which the spouses decide they do not want to have children: they commit to “have and to hold [or, to love and cherish], from this day forward, for better for worse, in sickness and in health, til death…” but they do not want to have children. Marrying couples are not required to profess a desire and plan to procreate. So if we consider a married couple who use contraceptives to avoid conceiving children, because they value their careers, and travel, say, or, they seek to devote their lives to some larger cause – treating infectious diseases in Africa -- which, for them, is not compatible with raising children. Or maybe they do not wish to have children now, but they do want to (and do) have sexual relations. On the natural law view, their sexual acts are immoral: valueless and damaging to themselves and society. It seems quite wrong to regard heterosexual marriages in which contraceptives are used to avoid conceiving children as, in those respects, necessarily and categorically immoral.

The New Natural Law would not gain much of a hearing if the focus of public discussion were on heterosexual couples. 93% of Americans, and 90% of Catholics, accept contraceptive use.[[18]](#footnote-18) As, evidently, do all of those married couples – apparently the great majority – who use contraceptives to postpone conception as a result of sexual activity.[[19]](#footnote-19)

Many same sex couples – including those who have adopted or conceived children somehow -- view their partnership as centrally about raising children together in a loving home environment. If we want to think of marriage as involving an “essential dynamism toward children,” it seems strange to exclude all married gay parents, but to include those heterosexual couples *who could* have children but *do not*. If we shift our attention away from the *sexual act itself*, to the nature of people’s marriages, then it seems clear that many heterosexual marriages are much less oriented toward the good of raising and nurturing children than those homosexual couples who are raising children.[[20]](#footnote-20)

When conservative bioethicist Leo Kass argues that “marriage, procreation, and especially child-rearing are at the heart of a serious and flourishing human life,” he is sensible enough to add, “if not for everyone then at least for the great majority.” He also observes that many people are denied these blessings, while others choose childlessness without regret, and he urges conservatives to “acknowledge that there will be no going back to the more traditional views and practices regarding sex and marriage.”[[21]](#footnote-21) He is right.

The New Natural Law viewpoint on these matters is not easy to articulate or understand. In the California trial court litigation, Judge Vaughn Walker asked the counsel for the supporters of Prop 8, if “the state’s interest in marriage is procreative,” how does “permitting same sex marriage impair or adversely affect that interest.” Counsel’s eventual response, when pressed: “Your honor, my answer is I don’t know. I don’t know.” He couldn’t articulate the reasons, because the reasons are not easy to make sense of. The arguments of the natural law scholars are highly abstract and speculative. The natural law framework includes an account of practical reason grounded in a list of self-evident basic goods, and pleasure is ruled out as a reason for action. All non-marital sexual acts are claimed to fall prey to a morally vicious mind-body dualism. The relevant assertions are often implausible in their own terms but also, due to their speculative and metaphysical character, an appropriate basis for shaping basic rights in a diverse democracy. The force of the reasons brought to bear in democratic deliberation to shape people’s basic rights and opportunities – including access to the legal status of marriage – ought not to depend upon the acceptance of a sectarian religious or philosophical framework.

On the other hand, the fairness argument for including gays in marriage is very clear, and it has been stated recently by no less a philosopher than Alec Baldwin, “Beyond any issues of infertility or illness, there are men and women who are married in the eyes of the state, enjoying all of the legal benefits, who have no intention of having children. They seek only companionship and all of the entitlements that come with marriage. Sex, joy, partnership, caring. All of that is theirs, even though they will never bear children and willfully so. If the state says they are free to do that, why aren't gay couples, as well?”[[22]](#footnote-22)

The evidence and common sense suggest that many of the same benefits of marriage to heterosexual couples are also available to homosexual couples. Numerous studies show that people in reasonably happy marriages have better physical and psychological health, lower mortality rate, and increased longevity compared to single people. The benefits of marriage seem to be especially great for men, and these benefits flow not only to them (in the form of greater longevity and better health), but to society in the form of lower rates of violence, drug and alcohol abuse, and crime. Far less work has been done on the health effects of same sex married couples, but early findings do suggest that married heterosexuals and homosexuals exhibit significantly less psychological distress. Many of these benefits may flow to same sex couples from registered domestic partnerships, but new evidence suggests that legal recognition of same sex marriage specifically helps reduce social stigma and psychological stress.[[23]](#footnote-23)

Americans’ changing attitudes toward gays are nothing short of astonishing in their rapidity. Millions of gay Americans have “come out” over the last three decades and that, along with much more extensive and sympathetic portrayals in the popular media and the humanizing effects of the AIDS crisis, has had enormous effect.[[24]](#footnote-24) Robert D. Putnam and David E. Campbell detail the astonishing generational shift that has occurred over the last twenty years.[[25]](#footnote-25) Americans have become much more supportive of the equal rights of gays and lesbians, and this is steadily extending to support for their open military service and marriage rights. Among 18-30 years olds generally, the percentage expressing approval of homosexuality rose from under 25% in 1990 to nearly 60% in 2010, and by 2008 half of young Americans supported gay marriage.[[26]](#footnote-26) The shift extends to the most religious young Americans (the most frequent churchgoers), who tend to be the most socially conservative and less tolerant of difference than more secular Americans.[[27]](#footnote-27) For these reasons, as I said above, the conservative opposition to same sex marriage rights that focuses on the intrinsic moral quality of same sex relations seems to me increasingly politically marginal.

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Other arguments from the political right against same sex marriage rights are more clearly consequentialist in nature: arguing that state recognition of same sex marriages would harm heterosexual marriage, and especially children. But it has not been easy for opponents of same sex marriage to identify and provide evidence for the alleged harms of same sex marriage to children.

The principal focus of Judge Walker’s opinion in the Prop 8 case in California was the question of whether evidence exists to support the contention that same sex marriage would impair the state’s interest in “encouraging parents to raise children in stable households.”[[28]](#footnote-28) Studies purporting to show that children on average do better when raised by opposite-sex couples instead of same sex couples actually don’t compare these couples. Instead, those studies compare married opposite sex biological parents with families headed by single parents, unmarried mothers, step families, and co-habiting families. The expert witness who testified for the proponents of Prop 8 was David Blankenhorn. “None of the studies Blankenhorn relied on isolates the genetic relationship between a parent and child as a variable to be tested.” These studies have “no bearing on families headed by same-sex couples.” Indeed, when questioned, Blankenhorn agreed that “adopted children or children conceived using sperm and egg donors are just as likely to be well-adjusted as children raised by their biological parents.” He even allowed that on some outcomes they do better.[[29]](#footnote-29)

Judge Walker acknowledged that, “An initiative measure adopted by the voters deserves great respect,” but insisted that, “When challenged… the voters’ determinations must find at least some support in evidence.”[[30]](#footnote-30) And this was found to be lacking. Sheer “moral disapprobation” is not enough, even if backed by religious convictions. And there was ample evidence of religiously based argument on behalf of Proposition 8: promotional and advocacy materials contained many references to “God’s plan for marriage” and the authority of the Bible. One of the lead defendant interveners, Hak-Shing William Tam, wrote to supporters of Prop 8 warning that if it were not approved, other states would also “fall into Satan’s hand.”[[31]](#footnote-31) A 2003 study of public opinion from the *Pew Forum on Religion and Public Life* found that “religious beliefs underpin opposition to homosexuality.[[32]](#footnote-32)

Some conservatives on marriage argue that Walker was too hasty, and challenge the thesis that same sex parenting makes no difference to children’s overall wellbeing and future prospects. A recent study by Mark Regnerus of the University of Texas, Austin, Sociology Department, concerns a random national sample of adults who turned 18 between 1990 and 2011 (18-39 year olds at the time of the study), who report that their mother or father (or both) had same sex relationships. These now-adult children of same sex parents experienced when growing up a higher level of family instability: time spent in foster care, or living with grandparents, or living on their own. They now experience higher levels of unemployment and psychological problems, including depression and greater instability in their own relationships. Regnerus acknowledges that the adults in his study are overwhelmingly from failed heterosexual relationships, not from “planned” same-sex families. Indeed, these former children of lesbian and gay parents come disproportionately from socially conservative parts of the country with low concentrations of gay and lesbian people and also disproportionately from racial minorities, all of which suggest that the families in question confronted an abundance of challenges and low levels of social support.[[33]](#footnote-33)

So what does the Regnerus study tell us about the prospects of children raised in the same sex families of the future? The nature of his sample suggests that the families in question faced the same challenges associated with divorce and single parenting, plus additional ones owing to considerable discrimination and prejudice against gays, likely in many instances from family members and not only much of the rest of society. The study does show, as William Saletan points out, that “kids from broken homes headed by gay people develop the same problems as kids from broken homes headed by straight people.” We need, no doubt, “fewer broken homes among gays, just as we do among straights.” Children need committed parents in a stable-low-conflict relationship and a stable home.

Regnerus’s main point seems to be that we should not exaggerate the amount of positive evidence we have about the experiences of same sex parenting so far. That may be true, however a wide variety of other studies paint more positive pictures. Denying rights to same sex persons will not stop them from having children but will likely degrade their children’s life prospects. Moving speedily toward greater acceptance of same sex persons and their relationships seems likely to decrease the number of people encouraged by circumstances to enter unhappy heterosexual marriages and relationships, in which unplanned for children are one possible consequence. Based on its extensive survey of relevant data, the American Academy of Pediatrics has just concluded that,

Lack of opportunity for same-gender couples to marry adds to families’ stress, which affects the health and welfare of all household members. Because marriage strengthens families and, in so doing, benefits children’s development, children should not be deprived of the opportunity for their parents to be married.[[34]](#footnote-34)

Regnerus suggests one inherent disadvantage of gay parenting: because the combined gametes of same sex couples cannot produce an offspring, children born to such unions are bound to confront “a diminished context of kin altruism.” Studies of adoption, stepfamilies, and cohabitation, suggest that this kinship deficit has “typically proven to be a risk setting, on average, for raising children when compared with married, biological parenting.” As Saletan points out in response, “homosexuals who want to have kids could emulate the biological model by using eggs or sperm from a sibling of the non-biological parent, though the effects of this practice on family dynamics are unknown.” He also points out that same sex couples have an inherent advantage over straight couples: their sexual acts cannot lead to unplanned pregnancies, so their families must be planned, and planned families are more successful.

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Conservatives charge that including gays in marriage will change the meaning of marriage for everyone, shifting the core concerns of marriage away from children for the good of some adults. Children’s wellbeing represents the rhetorical high ground for conservatives opposed to same sex marriage. But gay people did not cause the rise of single parenting: changing sexual mores, sex practices, and policies pertaining to heterosexuals did that. The reigning model of heterosexual marriage is widely described as “companionate”: married couples expect marriage to serve their happiness and wellbeing.[[35]](#footnote-35) In some range of not-especially-happy but reasonably low conflict marriages children’s interests in marital stability are likely to outweigh the spouses’ interest in finding a more personally fulfilling relationship.[[36]](#footnote-36)

The most profound changes in marital patterns in the West are have occurred as a consequence of gender equality and women’s entry into the workforce in large numbers. Greater equality of status and earning power, and also the easy availability of contraception, has helped women obtain greater control over their reproductive lives and greater freedom of exit from marriage. Nearly all Western societies have moved in the direction of “no fault” divorce. Premarital and extra-marital sex, single parenting, and divorce are all vastly more common than they were in the 1950’s and before, for reasons that have nothing to do with gays.

There is evidence that children do less well in single parent homes and homes that have experienced marital disruption. A considerable portion of these effects seems to stem from lack of resources, so directing greater resources toward single parents, and providing better child care services and schooling, would seem helpful.[[37]](#footnote-37) There is little or no evidence connecting any of these phenomena with same sex parenting.

Conservatives are far from alone in recognizing that adding children to the equation changes the moral stakes regarding marriage. Bertrand Russell observed that, “where there are children the stability of marriage is… a matter of considerable importance.”[[38]](#footnote-38) Denying same sex marriage rights does nothing, so far as I can see, to either encourage more responsible parenting or to promote children’s wellbeing. It seems a singularly misguided way to seek to help children.

So how might gay marriage change the meaning of marriage for all? It may strengthen the norms that surround marriage by extending them to parts of the population long excluded.[[39]](#footnote-39) Gay marriage will certainly make marriage fairer and more widely available, and it may make marriage stronger and better by further dissociating it from norms of gender hierarchy.[[40]](#footnote-40)

It is conceivable that greater acceptance of gay people and their relationships could contribute to more permissive attitudes toward pre-marital and extra-marital sex, and the weakening of marital norms of fidelity. However, these sorts of effects are not only speculative, but very likely to be complex and perhaps unpredictable. Lesbian couples seem to be quite stable, and also quite egalitarian; *they* might have a good influence on heterosexuals, as the late Susan Moller Okin observed.[[41]](#footnote-41) On the other hand, it has frequently been observed that gay males seem to have more frequent sexual partners, and even those living in committed relationships are sometimes (or often?) less sexually exclusive than is the case with heterosexuals. So gay marriage could, via a kind of “demonstration effect” (gay married men setting a bad example) contribute to the further loosening of heterosexual marital fidelity.[[42]](#footnote-42)

Well, it could happen, but for four decades the divorce rate has hovered around 50%[[43]](#footnote-43) and heterosexual extra-marital sexual activity of all sorts fills popular music, daytime “soap operas,” movies, and the tabloid media. It is comparatively easy to avoid exposure to gay male promiscuity. Gays in the popular media tend to be portrayed as upstanding citizens and decent people: men (and women) acting well, not badly. And, if we want to do more to shield children from exposure to explicit sexual content – which strikes me as a good idea – the main obstacles are the popular media and corporate America, not gays.

A fallback ground on which to oppose gay rights involves one or another “slippery slope.” One such imagined slope is that acceptance of same sex rights will lead to more permissive attitudes toward sex generally, and a “breakdown” of sexual morality. The facts seem otherwise. More liberal attitudes toward same sex persons and their relationships does not seem to be associated with higher rates of the phenomena (out-of-wedlock births, single parenting, etc.) that most worry conservatives. The youngest American adults (18-30 year olds – including the very religiously observant in this cohort) have become markedly more tolerant with respect to homosexuality over the last two decades, however they have *not embraced* more “liberal” attitudes toward pre-marital sex and abortion. To the contrary, Americans generally (including this age group) have become considerably more concerned (and conservative) about pre-marital sex since the early 70’s, and the youngest American adults have recently become somewhat less accepting of abortion.[[44]](#footnote-44) Moreover, as Ross Douthat has noted, “socially conservative states have more family instability than the culturally liberal Northeast. If you’re looking for solid marriages, head to Massachusetts, not Alabama.” [[45]](#footnote-45) Recent polls show surging support for same sex marriage rights but no comparable move to more permissive attitudes toward sex generally.

Another imagined slippery slope leads in the direction of polygamy and polyamory. A superficial look at human experience suggests that gay rights and polygamy are on completely different trajectories. Polygamy was common in most of recorded human history, and is acknowledged in the Old Testament. It remains common in the Muslim world and in Africa. Where polygamy flourishes, same sex rights are non-existent, and vice versa. Charles Krauthammer at least acknowledges what he calls the historical oddity that “as gay marriage is gaining acceptance, the resistance to polygamy is much more powerful.”[[46]](#footnote-46) I say more about this below.

The most powerful arguments advanced by conservatives concern the welfare of children. There is no doubt that this is something we all care about. We can and should promote more responsible sexual behavior and parenting. The presence of children is the most substantial reason for society to care about the stability of healthy marriages. But exactly how same sex marriage will make marriage less stable remains a mystery. The clearest effects of same sex marriage will be the positive effects for the children of same sex couples, and also those children destined to be gay or lesbian or transgender, whose vulnerability to teasing and abuse is fed by the denial of equal rights to them and their parents.

There are many things we can and should do, consistent with respect for the equal rights of all, to promote a decent family life, and a good start in life for all children. Current conservative opposition to same sex marriage distracts us from a long overdue focus on support for responsible parenting and children’s wellbeing.

1. ***Is Marriage Defensible? Public Goods, Neutrality, and the Liberal State***

If we accept same sex marriage, then what? Is there a public, principled stopping point short of polygamy? And what would be wrong with that? What form, if any, of marriage as a civil status institution should be preserved? Why not simply privatize marriage and leave it to churches and associations, and to free individuals to fashion their own partnership contracts?

Political liberals are united against the conservatives but increasingly divided on marriage. Liberal marriage preservationists, argue for preserving [monogamous] marriage and extending it to same sex couples. They typically think that justice requires equal treatment of same sex couples, that a variety of personal and policy considerations argue in favor of marriage preservation, and that these reasons in favor of marriage do not run afoul of more basic requirements of neutrality. But “marriage” as a status in law is increasingly being shunned by liberals.

There are a growing number of liberals who argue for the abolition or radical reform of marriage as a status in law on the ground of a strict conception of state neutrality. Anti-marriage liberals (or marriage minimalists) argue that the same commitment to ethical neutrality that argues against New Natural Law conservatism, also argues against preserving marriage as a “special status” in law.[[47]](#footnote-47) It is not simply heterosexual marriage but marriage as such that must be swept away in the name of ethical neutrality in politics. Indeed, Sonu Bedi says that pro-marrriage liberals (such as the author) espouse “natural law with a gay spin.” (Bedi ms 282) Lawrence G. Torcello argues that preserving marriage and extending it to gays is both “unstable and unjust in that” it “inevitably favors” some among the variety of competing conceptions of the good life.[[48]](#footnote-48) The conservative defenders of conjugal marriage heartily agree that liberal marriage preservationists occupy an “unprincipled” and unstable middle ground.

It is precisely that ground that I want to defend here as neither unprincipled nor necessarily unstable.

Those who insist that a political principle of state ethical and religious neutrality, or the political liberal idea of public reason, require marriage disestablishment rest their case on needlessly controversial conceptions of “marriage as special,” (Metz 43, Brake, Bedi) and also fail to appreciate that there are good and broadly public reasons to support marriage as a status relation. The broad-based public case for marriage rests on its potential to advance widely valued aspects of individual and social wellbeing; anti-marriage liberals advance an excessively broad and strict conception of state neutrality. Governments and public agencies in the US routinely use tax dollars and advocacy to promote appreciation of, and to honor excellence in, the arts, sports, and scientific and intellectual endeavor. We restrict development in places of great natural beauty, and around places of historical significance, out of appreciation for that beauty or the historical significance. The relevant value judgments are all contested and not universally shared. But, subject to certain conditions I lay out below, there is nothing wrong with this. The broad-based defense of marriage does not, I argue, run afoul of any weighty principle of state ethical neutrality. Let us take up these arguments in turn, and then turn to the issues of polygamy and polyamory.

The principle of neutrality, defended in some form by very many liberals, holds that the state must be neutral among citizens’ different and competing conceptions of religious and personal ethical ideals. Steven Wall nicely defines a strict doctrine of state neutrality advocated by many liberals: “It is impermissible for the state to intend to favor or promote any permissible ideal of a good human life over any other permissible ideal of a good human life, or to give greater assistance to those who pursue it.”[[49]](#footnote-49) Debates around public reason and political liberalism are also relevant here. Increasing numbers of scholars argue, under the banner of political liberalism and public reason that the state ought to “disestablish” the “special status” in law that marriage enjoys. I want to push back against these claims: liberal justice permits the state to maintain marriage as a status in law. We can satisfy a sensible principle of neutrality and maintain marriage as a status in law by extending due recognition and public support to other kinds of non-marital relationships. With defenders of neutrality, I agree that the state should respect and protect citizens’ equal liberty to make choices reflecting their different conceptions of what is true and good in religious and ethical life, and that it should not arbitrarily favor particular religious or ethical ideals and preferences. However, fairness among citizens with varying preferences and ideals does not require a strict conception of neutrality.

The liberal democratic state is non-confessional: citizens with many faiths and conceptions of what is good in life enjoy not only equal freedom but equal standing. A corollary that many draw is that the state must remain neutral with respect to value of the various options that citizens may freely choose. John Rawls holds that 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.” (Rawls PL 192-3) Ronald Dworkin similarly held that, “Political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.” (Dworkin, Matter of Principle, 191)

An important and much-debated question of law and public policy is how stringently to interpret the principle of state neutrality among religious and ethical ideals. Both Dworkin and Rawls seem to press this principle very hard and very far. For example, Rawls argued that, “the principles of justice do not permit subsidizing universities and institutes, or opera and the theater, on the grounds that these institutions are intrinsically valuable.” (TJ sect. 50) And elsewhere he said that, “There is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for private expenses.” (TJ section 43) Dworkin issues similar pronouncements but also argues that state subsidies for “high culture,” the arts, and universities can be justified. And indeed, Rawls’s quoted statements do not rule out public support if the justification is to advance broadly, even if not unanimously, valued public goods. I argue that we should offer a relaxed rather than a strict version of state neutrality, and permit subsidies for high culture and the arts are indeed permissible, as are state endorsements for the value of particular choices.

A core commitment to some form of religious and ethical neutrality seems justified and well established in America, and other advanced liberal democracies. But it would obviously be wrong to say that our government rests on a completely general principle of moral neutrality: the idea of equal rights for all, and equal treatment of different religious beliefs, is a moral commitment. Democracy is a moral view, and one that many have rejected across human history. So our deepest public commitments are also moral and the task is to distinguish appropriately public moral values from those that are appropriately relegated to the private sphere.

There are a number of different ways of interpreting and applying the commitment to state neutrality. One common distinction is between neutrality of effects and intentions. The claim that laws should be *neutral in their effects* on competing religious and ethical doctrines seems far too strong a principle, since many well-justified liberal and democratic principles, policies and commitments will have non-neutral effects on, for example, the religious doctrines that tend to prosper and gain adherents. Requiring children to become scientifically literate may tend to undermine the belief in the literal truth of the Book of Genesis, making it harder to propagate some versions of Biblical literalism, and the faiths associated with them.

An alternative proposal is that the *intentions* behind laws ought to be neutral with respect to differing religious doctrines or conceptions of the good seems more plausible. Ronald Dworkin, among others, has held that “the liberal theory of equality rules out… appeal[s] to the inherent value of one theory of what is good in life.”[[50]](#footnote-50) Alan Patten notes, however, that this claim is too weak, for it could allow for the political establishment of one official faith, not because we regard it is true or inherently superior, but for the sake of public peace: a neutral and broad-based public good.

Patten offers a revised and improved account of liberal neutrality. First of all, he points out correctly that many proponents of neutrality defend it against perfectionist state policies. Perfectionist political proposals are those that are designed to promote particular controversial ethical ideals, or aspects of the human good, on the basis of their inherent value, and not (presumably) as a means to securing those basic public goods (such as national defense) that are uncontroversial and valued by all. Against both neutrality of effects and neutrality of intentions, Patten defends “neutrality of treatment,” which is violated not only by perfectionist policies, but also when state policies are more or less accommodating (or supportive), “of some conceptions of the good than they are of others.”[[51]](#footnote-51) State violations of neutrality occur “when the state pursues legitimate, non-perfectionist public goals in a manner that is unequally accommodating of rival conceptions of the good,” or, “when, with *no* particularly strong rationale, the stateʼs policies are unequally accommodating of different conceptions of the good.”[[52]](#footnote-52)

In addition, Patten treats neutrality not as a “strict prohibition” but rather as an important consideration -- a “significant *pro tanto* constraint.” That is, neutrality has “genuine weight and reflects significant liberal values,” but it sometimes “gives way to other considerations,”[[53]](#footnote-53) and the state is not flatly prohibited from promoting particular aspects of the human good. Patten uses the example of a community in which the majority prefers baseball but a minority prefers soccer, and a decision must be made about the construction of public recreational facilities. It would violate neutral treatment to allow the majority to decide politically to construct only baseball fields: assuming that the relevant resources are divisible, the minority should also be accommodated and given a proportionate share of resources, in this case, playing fields. Equality requires that the state respect citizens’ equal opportunity to be self-determining, and this requires that it must not enact policies that have the effect of favoring the success of some conceptions as compared with their rivals.[[54]](#footnote-54)

A final distinctive feature of Patten’s account is that it’s “guiding normative idea is that persons should have a fair opportunity to be self-determining” according to their own conception of meaning and value in life, so long as their conception is consistent with the equal freedom of others.[[55]](#footnote-55) The idea of an equal right to self-determination brings into play the values associated with autonomy. But both the idea of a “fair opportunity to be self-determining,” and the idea of neutrality as a significant *pro tanto* constraint suggest a somewhat relaxed rather than strict understanding of neutrality as fair treatment. Neutrality this understood is not a very basic commitment, but a more mid-level principle that may help us make good on the deeper commitments, including the state’s duty to express equal concern and fairness among citizens.[[56]](#footnote-56)

Neutrality thus understood appears is a bar on arbitrary state preferences for some over others. The state belongs to citizens equally, who of course differ in their religious and ethical ideals and aims. And Patten’s particular concern is the equal right to be self-determining of minority cultures. The freedom and equality of citizens, the state’s duty to be fair among them, and the rights of minority cultures in particular, must all be kept in mind.

Neutrality thus understood is treated as a significant consideration that is especially relevant when it is clear that unequal treatment is unfair and reasonably perceived as unfair: a sign of unequal concern or a badge of second-class status. The state ought not to enact policies that hamper some while helping others, without good reason. This certainly occurs when, as Patten suggests, equivalent or very similar activities or opportunities are treated differently for no good reason.[[57]](#footnote-57)

Steven Wall makes a similar point, but from an avowedly “perfectionist” point of view: “It is impermissible for the state to intend to favor or promote any permissible ideal of a good human life over any other permissible ideal of a good human life, or to give greater assistance to those who pursue it.” Permissible ideals are, here again, those consistent with the equal rights of liberal democratic justice. Wall calls this “restricted state neutrality.”

Sometimes there are good reasons for favoring or disfavoring particular conceptions of the human good, and for supporting some activities and opportunities representing valuable aspects of the human good that are apt to be neglected, or that may be especially difficult to cultivate. Special support for particular activities that some value more than others need not express an offensive devaluation of anyone, nor relegate anyone to second class status: the reason for support is not that some value them more than others but that a good case can be made for their inherent value, and background systems of resource allocation – private ownership and economic markets – do not adequately recognize and/or support the relevant values and activities. Nor do modest subsidies obviously interfere with people’s autonomy in any way: indeed, state support may enhance the options available to people and in that way increase the value of their freedom.[[58]](#footnote-58)

I broadly agree with Patten and Wall, but suspect that the “neutralism” label brings more confusion than it is worth. I will refer to the preferred ideal of neutrality as fair treatment. As I hope to suggest, we should understand it as allowing greater flexibility than defenders of strict state neutrality allow: the state is permitted to promote a broad and inclusive range of aspects of the human good, so long as it does so in a way that is reasonably fair among citizens preferred conceptions.

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Many of us will share the intuition that some forms of state neutrality as applied are in some contexts important aspect of liberal justice. But we must also reckon with another set of common political practices that most of us find generally unobjectionable and frequently benign, which cast doubt on the strictness of our commitment to neutrality.

We have a long tradition of promoting a wide range of public goods loosely conceived, via modest tax subsidies and official recognition and encouragement. The list will be familiar. We promote appreciation for and access to natural beauty, of many different kinds, via the support of a national park system, local parks, gardens and arboretums, and we preserve against commercial development unspoiled areas of natural beauty. We promote excellence in and broad access to the fine arts, broadly conceived, via the National Endowment for the Arts (an independent agency of the federal government), and state and local arts organizations and museums that are partially publicly funded. The National Medal of Arts is awarded by the President of the United States to individuals or groups who "...are deserving of special recognition by reason of their outstanding contributions to the excellence, growth, support and availability of the arts in the United States."[[59]](#footnote-59) Many people decry the decline of art and music education in our public schools. Our governments have long supported intellectual endeavor and inquiry in a wide variety of fields, and not only because of the expected benefits to our economy or neutral indices of human wellbeing, but because we regard the pursuit of truth as intrinsically valuable. In addition, we promote and recognize athletic excellence and competition: public schools and state universities have active athletics programs, and state and local governments subsidize sports stadiums.

Many of the goods that are treated routinely as public goods are impure public goods, or public goods in the loose rather than strict sense: users of national parks or concert halls could be charged on an individual basis. The sorts of “high-brow” programming that makes up some of public television could be left to seek commercial sponsorship (a public case could more easily be made for public television and radio’s news and public affairs programming). Not everyone values the opportunities thus made available or values them equally. Does it violate neutrality for our governments to single out some activities for special recognition and modest support, while not giving prizes and support in areas that some other citizens value, such as professional wrestling? Each of these activities represents fields of human endeavor that many of us, but not every single last one of us value and prize. Should we worry about the cumulative fairness of these modest forms of encouragement and subsidy to a taxpaying citizens whose sole form of entertainment is commercial television?

Well, yes, we should worry, but not on the basis of a very strict commitment to state neutrality. I would say, rather, that we do better to revert directly to the value of fairness that underlies the more flexible version of liberal neutrality that Patten advances. There are various strategies for making government promotion of particular aspects of the human good as fair as possible. The best overall package of these does not amount to the enactment of strict state neutrality.

The status quo in the US might best be described as pluralistic promotion of a wide variety of human goods and pursuits, including forms of human excellence widely though not universally value, subject to ongoing democratic deliberation and rough principles of fairness. We can, within the bounds of liberal justice, reject or at least qualify Dworkin’s apparently strict requirement that “Political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.” So stated, neutrality seems to require that the state to adhere to a strictly negative strategy of refraining from promoting any controversial or non-unanimous aspects of the human good. But the negative strategy is only one recipe for achieving neutrality as fair treatment. An alternative strategy is for the state to provide roughly equivalent positive support to a wide variety of broad human goods and values, in a way that seems reasonably pluralistic, inclusive, and fair. Governments may facilitate or even promote particular aspects of the human good, so long as they do not unfairly or arbitrarily favor some people’s conceptions at the expense of others.

Pluralistic promotionism (which is similar to Wall’s “pluralistic perfectionism”[[60]](#footnote-60)) takes place non-coercively, and within the bounds of justice: small sums of money are at stake within the overall national budget: no one is being forced to attend performances of Hamlet, except maybe in our school-aged years, when we are required to do many things in the name of our education. Policies are generally framed to advance relatively broad-based rather than narrowly based goods: goods and values that many people with differing religious and ethical conceptions value, even if not everyone values each to the same degree and in the same way. Finally, liberal governments should support a broad and inclusive array of such goods, and within each category, likewise take a broad and inclusive view of the range of genres, traditions and schools of thought and practice that merit support, with a special concern to include representatives of those genres favored by societal minorities.[[61]](#footnote-61)

It is important to emphasize, in addition, that the background baseline for public interventions promoting particular aspects of human wellbeing is not some neutral discursive utopia – an ideal speech situation in which we deliberate disinterestedly on the merits of the different components of the good life. Nor do we live in the ideally just society that forms the context for Rawls’s claims about state neutrality. In our non-ideal environment, public deliberation on a variety of broad-based goods may be help us appreciate and preserve a variety of values and activities that cannot be rationalized in economic terms.

We live in a commercial society saturated with corporate advertising, in which individuals are subject to interested appeals encouraging them to choose and value those things that earn profits for the purveyors of these messages. Dworkin does recognize that market institutions are “not neutral amongst competing idea of the good life,” (Lib 76) and so he allows that citizens and public officials may act to preserve natural resources on the ground that “conquest of unspoilt terrain by the consumer economy is self-fulfilling and irreversible, and this process will make a way of life that has been desired and found satisfying in the past unavailable to future generations.” (State 76)

Deliberative political institutions may be better at expressing certain kinds of valuations than market institutions. Mark Sagoff has developed this important point at length and convincingly: “I love my car; I hate the bus. Yet I vote for candidates who promise to tax gasoline to pay for public transportation…. I applaud the Endangered Species Act, although I have no early use for the Colorado squaw fish or the Indiana bat.” As Musgrave put it, “the individual voter dealing with political issues has a frame of reference quite distinct from that which underlies his allocation of income as a consumer.”[[62]](#footnote-62) This at least means that we cannot conclude from the fact that people exercise their private choices in one particular direction that they are opposed to enacting laws that encourage them to behave differently. Similarly, we cannot conclude from the high divorce rate that people do not value marriage as an institution.

Note that, as Steven Wall has argued, perfectionist policies may have “expressive harms”: “if citizens judge with warrant that state action is offensive because it expresses the message that their way of life is not worthwhile, then the consequence may be that their sense of self-worth is damaged.” Expressive harms may argue for refraining from some otherwise justified policies.

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The pluralistic and fair promotionism that I have defended is consistent with Rawls’s principle of liberal neutrality, “Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” (*PL*, 137) Justice requires that equal rights to participate in marriage and other institutions should be extended to gays, but it does not require the abolition of marriage, so long as appropriate recognition and support are also extended to other forms of caregiving that provide a supplement or alternative to marriage.

This section has largely left behind the specific issue of marriage to make a point: we should avoid embracing too readily a very strict and broad requirement of neutrality in public policy. There are reasonably fair ways of using public policy and law non-coercively to promote a variety of goods that are widely if not universally valued. Let’s return to marriage.

**IV. The Public Case for Marriage as Status in Law**

As noted above, many regard marriage as a problematically “special” status relation in law. Critics argue that marriage violates principles of state neutrality because it is a “morally special status” (Bedi, 262) that has “special value” (Brake, book, 82); meaning, presumably that the law regards it as especially honored, distinctly excellent and choice-worthy. Tamara Metz refers to “the mysterious and troublesome special value of marriage.” (33)

Obviously, public officials sometimes do refer to marriage as morally and spiritually special. The very fact that the word “marriage” denotes both a sacrament and a civil status defined by law can be a source of confusion. Nevertheless, Americans understand that “marriage” is a status relation in law, that differs in its meaning and import from the sacrament of marriage in different religious traditions. We can defend marriage as a status relation in law without ascribing a “special” status to it: the public case for marriage in civil law does not require, and may not benefit, from being associated with honorifics.

Let us back up a step and consider the public uses of marriage as a status relationship.

The core of the case for marriage, according to Ralph Wedgwood, recognizes that marriage here and now has widely understood social meanings.[[63]](#footnote-63) The legal form of marriage is widely understood, not just by members of my church or subgroup, but across my society. Very many Americans have a serious desire to get married, and they want to do that not simply as a matter of personal desire or preference but as a matter of *common knowledge*. Marriage is very public: once people know you are married, all sorts of presumptions follow. People know that married spouses have made a special and extensive commitment to one another, typically involving sharing a household or households. Social invitations will naturally include both spouses. A train of legal entitlements follows as well, many of which we all have some sense of: hospital visitation rights, and right to information from doctors, decision-making authority in the event of incapacitation.

The existence of the *legal form* of marriage facilitates the fulfillment of people’s serious desire to get married as a matter of common, public knowledge: that is, in the eyes of one’s whole society, not just the eyes of one’s church or social circle.[[64]](#footnote-64) As Wedgwood emphasizes, the legal status brings with it certain mutual legal obligations and duties, but also a core of social meaning. The law of marriage helps provide the assurance that the social meaning of marriage will be well understood.[[65]](#footnote-65) No other status has the same social meaning: domestic partnerships, civil unions, and other options have comparatively unclear implications and meanings, and that could be exacerbated if we introduce a great deal of variety of marital and partnership forms.

Marriage facilitates spouses desire to make their relationship and commitment known as a matter of common knowledge in their society as a whole because it is a public status relation defined by law. Status relations are public and legible and defined in advance of our entering into them: the whole point is that the nature of the relationship is importantly defined by law for the whole community in advance and so, by entering it, individuals can undertake a commitment of a particular sort, albeit one permitting a significant range of variation. People understand traditional marriage as (generally) an exclusive and long-term commitment between two people who love one another and share a household. Spouses are expected to care for one another and be there in time of need. The commitments of marriage, once entered into, become social expectations and bases for normative judgment. Partners’ agree to limit their freedom of action in some directions by entering upon a socially understood commitment, but the opportunity to enter into a socially legible commitment can be and often is a valuable option and therefore freedom enabling. (This is not the case insofar as someone feels constrained to marry another for the sake of securing benefits that answer to their basic needs, whether health care benefits, resources needed for child support, or what have you. This means that healthy marriages benefit from a system of social provision that helps guard against marriage-induced dependence and domination).

Most couples in the West, nowadays, get married based on romantic love and sexual intimacy, a hope for permanence, and the expectation of mutual fidelity, a violation of which would be a very serious matter (even if not necessarily a “deal-breaker”), domestic cooperation, an expectation of mutual care “in sickness and in health,” and mutual commitment to sustaining the relationship. For younger couples, children are typically expected to be very central, but many older couples, additional children are typically not part of the equation. This is, as already mentioned, the modern “companionate” conception of marriage.[[66]](#footnote-66) As Vice President Biden put it, discussing same sex marriage: “this is all about is a simple proposition. Who do you love? Who do you love and will you be loyal to the person you love? And that’s what people are finding out what all marriages at their root are about.”[[67]](#footnote-67) If we take the baseline as what marriage has become – this companionate conception – then same sex marriage does not look like a fundamental revision, except in the direction of greater fairness and perhaps greater equality within the relationship.

Many same sex couples share with heterosexual couples the wish to be married in the eyes of society: they want access to the public status of being married and they can benefit from marriage in the same ways as straights. The exclusion of gay and lesbian couples from marriage is an invidious form of discrimination, a badge of second-class status, and a serious injustice that cries out for correction. Justice requires their inclusion, and it permits the retention of marriage as a status category in law, so long as there are other reasonable options for those who wish to enter into non-marital relationships.

The civil case for marriage rests on its capacity to serve a variety of broad based and important human interests that do not depend upon the acceptance of some peculiar metaphysical and philosophical framework, such as that deployed by the New Natural Law. These broad-based goods include the good of sharing one’s life with another, the special forms of friendship and intimacy, love and mutual assistance, shared by spouses, strengthened by a public mutual commitment, and supported by social understandings. In addition there are the expected benefits (to the individual and society) of enhanced health, wellbeing, and happiness.

So, we need not understand the social meanings that a law of marriage helps to sustain as constituting public endorsement of a “special” moral ideal: a uniquely valuable or worthwhile status. We need only suppose that people want it to be publicly known that they are married, and that that mutual desire, shared by very many though not all couples, is something that the law can facilitate, without harming others. Marriage does not require, and I doubt that it benefits from, any social stigma being attached to those who are single or couples who choose not to marry. In addition to generating common knowledge marriage does generate common expectations and social norms: infidelity is widely recognized as a form of betrayal even now, knowing as we do that rates of marital infidelity are high. (Lying, envy and other vices are also common, but people are not proud of them.) The common expectations and norms are typically also valuable: they help sustain individuals’ commitment to the common expectations about their marriages.

What, then, would be lost if we pursued one of the variety of proposals for privatizing marriage and moving to a contractual model, emphasizing personalization, contractual negotiation and agreement by the parties? For one thing, privatization risks attenuating the kind of public legibility and clarity I have already discussed: the fact that very many people have a serious desire, as Wedgewood observes, to be known to be married in the eyes of the rest of society as a whole. And with the decline of those social meanings would also come the decline of the norms and expectations that go with them, which some may experience as constraints, but many others may wish to embrace.

There are other reasons as well to suspect that the advantages of the contractual model may be more apparent than real. The contract model invites bargaining, and bargaining can disadvantage the weaker or less calculating party. Status relations defined in advance can anticipate vulnerabilities and dangers attendant to marriage that individuals entering into it may be unable to foresee. Contracts require disclosure in advance, whereas the current model encourages partners to accept and get used to the other’s faults, up to a point.[[68]](#footnote-68)

Libertarians and others argue that a regime of private contracts would be superior, but in fact, a common template for marriage may offer unique benefits, precisely because it does not admit, or at least encourage, a great deal of bargaining. As Carol Sanger puts it, civil marriage “offers a system of sanctioned commitment from which more inventive arrangements may veer but to which they seem to return for certain basics, such things as shared resources, support obligations, and a system for dividing children and property upon dissolution.”[[69]](#footnote-69) So the status model may have decisive advantages over the contractual one, especially given predictable inequalities in bargaining power, and asymmetrical vulnerabilities to exploitation, especially when contracting takes place in the blinding influence of romantic love, and the benefits of status may be more important for the weaker and less calculating party.

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Interestingly, while Tamara Metz criticizes traditional marriage as a “special status,” she also seeks to recruit the resources of status relations on behalf of her revised and preferred domestic partnership designation of “Intimate Caregiving Units” (ICGU). These would be open to persons who commit to ongoing relations of mutual care, without the other romantic and sexual expectations of marriage, and without regard to the number or gender of the parties. In this context, she recognizes that status relations can play important protective roles. Children and other dependents who need care are also often “vulnerable to non-care” and abuse. (61) Even among equals, the “unmonitored, unpredictable and often incommensurable nature of caregiving” means that it involves “serious material and physical risk.” (61) Caregivers also often give “without promise of like return.” Therefore, reasonably well-understood social roles that amount to a status (mother, father, caretaker) can help third parties set and enforce public standards and social expectations that define appropriate standards and minimal expectations on the performance of responsibilities. “Status—a publicly defined and defended identity that carries (and invites enforcement of) a bundle of rights and responsibilities—is… well-suited to the challenges of outside involvement in relationships of intimate care.” (61-2) Persons in unequal or non-reciprocal caregiving relationships may be especially vulnerable in the absence of well-understood social roles and expectations associated with the giving of care.

I think that Metz is correct to point to the benefits of status relations. Like Elizabeth Brake, she wants to reconstruct the law of personal commitment on a broader and more inclusive base than traditional monogamous marriage (I address Brake’s proposal below). I agree with her push toward inclusion, and her insistence that we recognize and support a wide range of intimate caregiving relations. I think, however, that this is better done not in place of marriage but rather in addition to it.

The public meaning and associated norms of marriage constitutes a resource to which many citizens want access. The institutions of marriage and the family are incredibly basic to our social lives. The meaning and the norms associated with marriage are not creations of law alone but of centuries of evolving practice. Marriage figures prominently in our culture and literature, and it gains some further backup from its parallel recognition in communities of faith. I agree that that providing greater support and recognition to many forms of caregiving is a vitally important issue of public policy, and justice. But these other relationships seem typically quite different from marriage. It would be a mistake to put too much emphasis on marriage – or a marriage substitute – as the solution to all of our problems regarding care. In addition, the law on its own cannot easily create new social norms and new set of social meanings, nor will deleting the word “marriage” from the federal register of laws, in favor of an arguably more neutral and less ethically freighted term, like civil union or social pact, do anything in itself to assist care-givers and receivers in non-marital relationships.

**V. *Why Two? Polygamy, Polyamory, and Beyond***

Let us take it for now that an important part of the case for a law of marriage is its capacity to facilitate the availability of a status relation to couples whom desire it, with reasonably well-understood social meanings. The question then arises, why should we – indeed, may we legitimately – confine the availability of this status relation to two persons only? For surely, there will be some married couples who wish, by mutual consent, to bring a third or even a fourth adult into their marriage, and have this known as a matter of common knowledge.

Can we justify excluding polygamous marriages as such, or should we instead prohibit all marriages – of whatever number -- involving coercion or subordination? This is one of the most important and least examined questions. Metz, Brake, Andrew March and many others argue that multi-person relationships should be accepted and embraced in law. Sonu Bedi argues that current state non-recognition of same sex marriage,

rests on the intrinsic moral superiority of one set of couplings (a heterosexual conception of an appropriate or good relationship) over another (a homosexual one). And in a similar fashion, limitations on adult incestuous or plural marriage privilege one conception of the good—a two, non-blood related union—over another—a three person or a blood-related union. In fact, by conferring the status of marriage, the state takes sides in a very personal decision about what constitutes the good life. (book ms 246)

And Ralph Wedgewood argues that the core meaning of marriage nowadays – he defines the core as sexual intimacy, “domestic and economic cooperation,” which typically includes shared finances, place of residence, and often (but not always) raising children together, and a “voluntary mutual commitment to sustaining this relationship”– is broad and flexible enough to include some forms of polygamy.[[70]](#footnote-70)

At the outset we should distinguish between the legal permission to live in a polygamous or polyamorous household, and the extension of the status of marriage from dyads to tryads and beyond. It seems clear that we should not criminally prosecute people living in consenting polyamorous households: consenting adults should be able to sleep with, eat breakfast with, and maintain a household with whom they want, so long as there is not a distinct harm to others.

However, while it seems to me that justice permits the legal recognition of polygamous unions that are voluntary and non-oppressive, it does not require recognizing such unions as marriages under law. Recognizing marriage as a relationship of two and only two persons – opposite sex or same sex -- seems to me consistent with the requirements of justice, and also the best policy for us here and now. The reasons in support of this claim are many, and several were cited in the recent British Columbia Supreme Court decision upholding that Canada’s ban on polygamy as constitutional.[[71]](#footnote-71)

First, preferences for polygamy are not equivalent to same-sex orientations. The history of the struggle for gay rights has demonstrated that a large class of people has deep-seated and stable same sex orientations. In contrast, a desire to enter into polygamous or polyamorous relations is not an equivalently deep-seated and limiting feature of human personality, in that respect it is unlike same-sex orientation. Any of us might at some point wish to include a third of fourth spouse in our marriage,[[72]](#footnote-72) but there is no class of people who, by nature or deep-seated nurture, are “oriented” toward only loving multiple persons (no one has the “orientation” of only falling in love with two or more people at a time). It’s a preference. Moreover, in Western societies there is no broad movement for “polyamorous rights” equivalent to the decades-long push for the rights of gay and lesbian and transgendered citizens.

Of course, the world is a big place and many unusual things are possible. Marriage is a status relation and a social and legal institution: it is supposed to provide off-the-shelf legal and social scaffolding for the lives together of large numbers people whose aspirations fall within a typical range. There will always be people whose arrangements are unusual. Consenting adults may live in polyamorous households unmolested, with their various legal and civil rights should remain intact. There are other sorts of contractual arrangements, powers of attorney, and joint property arrangements which people ion non-marital relationships can avail themselves of. This allows for “experiments in living,” of the sort that John Stuart Mill advocated. In addition, once again, democracy matters: as people fashion lives in conditions of freedom over time we should learn more about what are the reasonable, stable, and healthy forms of human relationship.[[73]](#footnote-73)

Second, normative polygamy is associated in the historical, anthropological, and contemporary empirical record with women’s inequality and subordination, higher crime rates and rates of violence in the home, and less investment in the education and human capital of children. The most recent and best surveys of a wide variety of evidence and theory suggests that the relationships are causal not merely correlational. One reason is that polygamy (multiple spouses) has overwhelmingly taken the form of “polygyny,” which is to say, one husband with multiple wives. Historically, this has been the most prevalent marital form: comprising 85% of the societies recorded by ethnographers.[[74]](#footnote-74) A leading expert on the anthropological record concludes: “The question of polygamy is a question of polygyny.”[[75]](#footnote-75) Polygyny is still very extensively practiced in Africa and the Muslim world, and it is associated with gender, economic, and social hierarchies (among higher and lower status men), for reasons explained below. “Polyandry,” one wife with multiple husbands, is “quite rare,” and in those few instances where it has existed, sometimes involved two brothers sharing a single wife, that has been for reasons of economic necessity (the inability to support more than one wife if the inherited family plot were broken up).[[76]](#footnote-76)

In practice, polygamy increases the competition by men for women and tends to reduce the supply of unmarried women and subsequently, women’s age at marriage. In practice, Henrich, Boyd, and Richerson report that this has had the effect of increasing men’s efforts to control women. Historical and anthropological evidence suggests that polygamy increases “intrasexual competition” among men, inducing “low-status men” to “discount the future and more readily engage in risky status-elevating and sex-seeking behaviours.” The result is “higher rates of murder, theft, rape, social disruption, kidnapping (especially of females), sexual slavery and prostitution,” and “probably” more substance abuse. Even “a small increase in polygyny,” they argue, “leads to a substantial increase in men without mates,” and higher proportions of unmarried men are associated with higher crime rates. Polygamy lowers the average relatedness within families, and that is conducive to more violence within the family. In addition, polygamy tends to reduce the average investment per child. Societies in which “normative monogamy” prevails over polygamy have lower rates of crime in society and violence in the home, and higher rates of investment in the education and human capital of the next generation.[[77]](#footnote-77)

Justice Robert Baumann, in the British Columbia decision, argued that “The prevention of [the] collective harms associated with polygamy” — to women and children, especially — “is clearly an objective that is pressing and substantial.” I agree. Of course, if polygamy were recognized in law, few in the US would take advantage of it. However, there would be every reason to expect that the effects would be malign in any communities in which it became a substantial presence. In many of the countries where it does exist, it is increasingly surrounded by considerable controversy, embarrassment, and disapproval. It is increasingly discouraged as at odds with democratic values.[[78]](#footnote-78)

Finally, it is worth noting that the inegalitarianism is inherent in the nature of traditional polygamy, and not merely historically contingent. Gregg Strauss does a nice job of laying out the ways in which the “hub and spoke” nature of the relations involved in traditional polygamy always provide unequal rights to the central spouse.[[79]](#footnote-79) He allows that there could in theory be forms of plural marriage that would furnish equal rights to all of the spouses to either conclude new marriages or to veto the additional marriages of any member of the marital unit. It is worth pointing out that stable social forms along these lines are unknown to human history, so far as I can tell.

A third set of considerations that counts in favor of the “two-ness” of marriage has to do with practical common sense aspects of stability and flourishing in human relations. Marriage nowadays is not just an alliance for the pooling of property and other resources, it is unique (or nearly so) in the depth and breadth of its commitments.[[80]](#footnote-80) Two people come to depend upon each other very deeply and across wide segments of their lives, making each other uniquely and deeply vulnerable to loss and betrayal. Anyone who has been married or in a long-term relationship similar to marriage knows how difficult it is to get to know and accept another person across a wide swath of private and public settings. Life partners and spouses must negotiate ways of living together and planning for the future, coordinating their actions and plans across very extensive parts of their lives, from the trivial to the profound: from their preferences for food and drink to their deepest moral and religious beliefs, their choices of occupations and friends, their taste in entertainment and politics (but I repeat myself…). Bringing in a third person – making the dyad a triad – compounds the complexity of all of these negotiations, and seems a recipe for trouble. Given the depth and breadth of the mutual commitments associated with marriage, it is hardly surprising that threesomes or larger multiples are less stable, at least if they aspire to protect and promote all the spouses interests equally (I’m sure that where wives are highly dependent on their husband, polygamy can be quite stable). The classic social theory account of dyads and triads is George Simmel’s: only in dyads do we get a perfect symmetry of reciprocal dependence.[[81]](#footnote-81) It seems to me no mystery that the twoness of marriage makes sense in egalitarian societies: in other contexts, where rich and powerful men rule over others and enjoy special privileges for example, it is not surprising that marriage will also be arranged to their liking.

A fourth consideration in favor of one-spouse-per-person is distributive justice. If marriage is a great good, it should be distributed widely. The opportunity for multiple spouses will tend to be to the advantage of relatively rich men, as discussed above. Indeed, polygamy may be a reasonable option for women in desperately poor places where it is better to be the second or third wife of a well-off farmer than to starve with a poor husband of one’s own. But ample evidence suggests that where those circumstances have been left behind we should say: good riddance to polygamy.[[82]](#footnote-82)

Andrew March has jokingly likened this argument for limiting everyone to one spouse at a time to the Lockean proviso: with spouses as with property, we must leave “enough and as good” in common for others.[[83]](#footnote-83) Very funny. But the evidence supports my claims. Henrich concludes that “legalizing all forms of polygamy will principally result in an increase in polygynous marriages by wealthy, prestigious men. … Nothing of what we know about our species’ evolved psychology or from anthropological diversity indicates that either polyandry or forms of group marriage will spread beyond trivial frequencies.”[[84]](#footnote-84) In communities in which polygamy becomes a significant presence, such as the polygynous community of Bountiful in British Columbia, young men are expelled by older men who see them as competitors for younger wives.

Now, one reaction to this evidence is that it is mainly derived from historical and social contexts and circumstances that wealthier societies have left behind. Our norms have changed and gender equality is well established. Religious beliefs have changed in many instances as well. Polygamy of the future could look very different. It might well take the form of those more complex arrangements known as “polyamory”: horizontal, non-dominating network relations involving multiple partners of various genders.

An important fact about oft-mentioned “polyamorous” relationships is that we know very little about them, and they do not seem to exist in large numbers. The British Columbia court observed that it had a dearth of information about the social forms of polyamorous households, remarking that, as best it could tell, there may be only around 120 such households in Canada.

Conservatives and some progressives like to cite a *Newsweek* magazine story that claimed that there are 500,000 polyamorous households in the US. *Time* magazine has also cited similar figures, and cites as its source, Deborah Taj Anapol, author of *Polyamory in the 21st Century*, who puts the percentage of polyamorists at 0.5% to 3.5% of the population.[[85]](#footnote-85) From what I can tell, Anapol has no scientific basis for these claims. She is a kind of spiritual sex therapist. Her web site is called, “Love without Limits.” Her online biography, at International School of Temple Arts, describes her as “an explorer of the spaces where sex, spirit, sustainability, love and ecology meet. Her Tantric journey through inner and outer space is an ongoing process of discovery.” She advocates “pelvic heart integration.”[[86]](#footnote-86)

And then of course there are the recently popular TV shows about polygamy: the fictional “Big Love,” and the “reality” television show, “Sister Wives.” In both, each of the wives has her own big house, and for the real life family of Kody Brown, the whole arrangement seems to constitute a lucrative career. But these are both the traditional “hub and spoke” forms of traditional polygamy, and in Big Love the husband, while remarkably patient and decent, is nevertheless the center of authority.

One of the best known pieces of scholarship defending legal recognition of polyamory is “Monogamy’s Law,” by Columbia law professor Elizabeth Emens.[[87]](#footnote-87) It is an interesting and provocative exploratory piece, but its basis in evidence consists mainly of four or five vignettes about people involved in complicated relationships: love triangles leading to shared parenting responsibilities and child custody disputes, for example. One of her cases emerged via an ill-considered appearance on the Jerry Springer Show (an extremely low-brow television program that often consists of confrontational interviews with “ordinary people” grappling with bizarre or outlandish problems). To her credit, Emens allows that agreements to have open sexual relations beyond the bounds of monogamy have a strong tendency to be undone by jealousy.

Elizabeth Brake, whose work on “minimal marriage” provides a variation on marriage privatization and pluralization, also argues for recognizing polyamorous marriages. In order to muster some evidence about polyamory, Brake draws on the work of a popular writer, Ethan Waters, who wrote a thoughtful account of the household he shared in San Francisco for several years with some other 20- and 30-somethings, under the title *Urban Tribes.* Brake adapts the term “urban tribalists” to denote an emerging form of egalitarian polyamory. Waters’ book tells the story of a shifting group of friends from reasonably well-off backgrounds, spending some years after college living in a communal setting, and hanging out together. It is true of course that these friends become “like family” in some important respects, as friends are liable to do. Brake takes all this as a harbinger of a new form of family life, and a possible model for a form of poly-union not (necessarily) involving sexual intimacy among all participants, which is consistent with equality. The fly in the ointment is that Waters, by his own account, settled down with one person and eventually got married. He looks back on his experience as a stage of life: a sort of extended young adulthood.

So what should we make of polyamory? Conservatives want us to see this it as a way station on the slippery slide from same sex marriage to sexual anarchy. For progressives, polyamory is meant to signal new and egalitarian forms of polygamy, crying out for equal treatment in law. It seems to me, however, that we have no basis for concluding anything. Everything we know about polyamory is based on anecdote, speculation, free-love advocacy, and fantasy. I know of no scientific studies of polyamorous households. It seems a phantom, conjured for political purposes.

Decisions about law and public policy ought to be based on socially reliable knowledge: reasons and evidence that are widely accessible forming an appropriate basis for social reliable lawmaking. As citizens acting on behalf of our common interests as members of a political community we are entitled to judge the likely consequences of extending marriage beyond monogamy on the basis of the best evidence we have. I would submit that what we know about polyamory is scant indeed: we have no clear picture of a new and stable social form emerging. And, on the other hand, pretty much everything we know about polygamy as a stable social form is not encouraging.

I have been chided for presenting “monogamy at its best and polygamy at its worst,” but where is polygamy at its best? As a social practice, that is, not a mere collection of instances? Why is there no broad social movement for polygamy in any advanced Western society?

But finally on the question of two-ness: we must acknowledge some contingency. Who knows what the future holds and what we might learn? My guess is that the constitution of our evolved human nature leads to twoness making sense for marital commitment, but who knows for sure? We should respect the ongoing progress of democratic deliberation and social learning. Human beings are endlessly surprising (though also frequently quite predictable). I am sure that “Big Love” scenarios are not unknown. So far a consenting adults living in situations that do not involve child abuse or neglect, the dominant rule is: live and let live.[[88]](#footnote-88)

***VI. Fairness to those Outside of Marriage***

If there are good public grounds for resisting marriage reforms that head in the direction of legal recognition of polygamy, the matter is quite different with proposals to extend greater support and recognition to caring and care giving relations broadly. However, contrary to those who promote greater support for care in competition with marriage, I would support it in addition to marriage.

Elizabeth Brake has developed an intriguing line of thought under the rubric “Minimal Marriage” in an important article and book (Tamara Metz and Martha Fineman, among others, have similar proposals). She would redefine and broaden the state’s interest in marital relationships by using marriage to recognize and support everyone’s basic interest in caring and care giving relationships. Brake draws on social scientific evidence to support the proposition that caring relationships matter a great deal to people’s wellbeing.[[89]](#footnote-89) She argues that such relationships are a “primary good” and that our political institutions should secure for all the “social bases” of this good of care. This yields a thinner understanding of marriage, as including all non-dependent care giving relations between or among adults of any number and gender. She argues that the law of marriage should recognize and support caregiving relationships of all sorts, including those that do not involve sexual intimacy. So, the legitimate public interest in marriage is specified as care giving relationships of all sorts: any thicker and narrower definition in law (involving romantic connection, for example) violates liberal neutrality by failing to respect the diversity of people’s preferences concerning their lives and relationships, selecting out and privileging some care giving relationships over others.

Brake would limit state involvement to securing for all the social bases for enjoying caring and caregiving relationships, irrespective of number, gender, and the presence of absence of sexual or other features. Greatly broadening our understanding of marriage in this way could, as feminists have long sought, help break down the gendered norms that surround (and are sustained by) traditional marriage. We would attempt in this way to retain and change the meaning of marriage. One benefit that Brake argues for is that this could undermine our unhelpful fetishization of one particular caring relationship to the exclusion and detriment of others.[[90]](#footnote-90)

And of course, Brake’s proposal seems to have one advantage over Metz’s: by retaining the word “marriage” for the new legal arrangements, we would avoid offering gays and others a “leveled down” form of equality.

In response: Brake, Metz, and others, are right that we should recognize the value of many care-giving relationships and support and promote them through appropriate legal forms and public policies. This is required by the sort of pluralistic promotionism that I described earlier, and is a condition of just marriage. However, these wider forms of care giving can be given their due without calling them “marriage.” As Linda McClain argues, public policy should recognize and promote caring and care-giving relations in addition to, but not as, “marriage.”[[91]](#footnote-91)

Indeed, applying the label of “marriage” to non-marital forms of caring relationship would be a positive (and powerful) dis-incentive for many people considering entering into relationships involving commitments between (for example) younger adults and their elderly relatives, older friends, or just close friends. (Who on earth wants to say that “I am marrying my grandmother?”) We can both provide appropriate recognition and support to these other caregiving relations while also preserving marriage as a relationship of two people involving commitments of a distinctive and extensive sort, typically including romantic love.[[92]](#footnote-92)

Insofar as liberal neutralists seeks to widen and diversify the scope of our public concerns, that seems to me all to the good. The place of marriage in our public life ought not to blind us or prejudice us with respect to the importance and value of other kinds of caring and care-giving relations. But it would be ironic if this salutary concern for the diversity of human types and needs required our public policy to adopt a more reductive, singular and homogenizing model for care. We need not respond to the call for inclusion in this way: justice permits a wider variety of alternatives. We would do better to provide fair support for a proliferated variety of caring and care-giving relations.

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A further important issue (which I cannot address here) is to specify which of the various traditional legal incidents of marriage ought to be untied from the marital bundle and made available to persons in other relationships. Some privileges of marriage may appropriately compensate for the specific commitments that marriage entails. It is clear that some or many of the traditional legal incidents of marriage ought to be made more widely available to persons in non-marital relationships, in part to support and recognize wider forms of caring and care giving relationships. This process is already well underway: people are using contractual relations to allocate legal powers often associate with marriage to persons other than spouses, including powers of attorney, hospital visitation rights, next of kin privileges, etc.

Here I can only flag these as among the issues that need to be addressed. As I have said, we should try to make sure that those who do not wish to marry are treated fairly, that we promote their interests. Providing appropriate support and recognition for other care giving relations should strengthen the case for marriage, and is required by fairness.

*What About Those Who Are Left Out of Marriage?* Is state recognition and support for marriage unfair for those who are single by choice, as Bella dePaulo and others argue? The single by choice are owed complete respect and appropriate recognition and support for non-marital caring and caregiving relationships. And in addition, we all need a far more robust system of social provision than exists in the United States. A condition of just marriage is support for non-marital caregiving relations, and for all persons, regardless of relationship status. Those forms of support also help underwrite individual freedom of exit from relationships (including marriages) that go bad.

Those who prefer to be single have a right to fair treatment and are owed equal concern and respect, but I do not believe that these require the elimination of legal recognition of marriage. Those who make a virtue of being single ought to accept the authenticity of others’ choices, and also allow that most people not only want to be married, but seem to benefit from being married. I don’t see that anyone has a right to the abolition of marriage as a status in law, or that any principle of justice requires it. Reform, yes: of marriage and the wider context policy concerning care.

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1. ### Norton and Miller, *Marriage, Divorce, and Remarriage in the 1990’s*, p. 3, table B; cited in Joanna L. Grossman & Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America* (Princeton University Press, 2011) 53.

   [↑](#footnote-ref-1)
2. Anemona Hartocollis, “Jacques Beaumont and Richard Townsend,” Sunday, August 14, 2011, P. 13 [↑](#footnote-ref-2)
3. By adding to the California State Constitution the words: “only marriage between a man and a woman is valid or recognized in California." [↑](#footnote-ref-3)
4. Perry, v. Schwarzenegger, 8, J. Walker quoting Transcript 154:20-23, 172:8-12. [↑](#footnote-ref-4)
5. Need cite; reported on public radio late November or early December, 2010. [↑](#footnote-ref-5)
6. George and his co-authors repeatedly advance the contention that principle is all on the side of same sex marriage opponents, see GGA and Reply to Koppelman. [↑](#footnote-ref-6)
7. See “BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS,” July 26, 2006, a statement signed by hundreds of prominent progressive academics, writers, and intellectuals. [↑](#footnote-ref-7)
8. Cite to Grossman and Friedman*, Inside the Castle*. [↑](#footnote-ref-8)
9. Around half of the heterosexual couples marrying in France opt for “social pacts” rather than “marriage.” Same sex rights activists in the UK and elsewhere seem far less concerned than their American counterparts with securing marriage rights. Need evidence and citations here. [↑](#footnote-ref-9)
10. Carol Sanger, “For Civil Marriage,” in Symposium, Privatizing Marriage, Cardozo Law Journal, 1993. [↑](#footnote-ref-10)
11. See Thaler and Sunstein, “Privatizing Marriage,” in *Nudge*. [↑](#footnote-ref-11)
12. Grisez, *The Way of the Lord Jesus* (xxxx). Need to add cites to Finnis and George, xxx. For the most recent iteration see, Sherif Girgis, Robert P. George, and Ryan T. Anderson, “What is Marriage?” *Harvard Journal of Law and Public Policy*, v. 34 no. 1 (2010), 245-287. I wrote a number of pieces in response to, and in dialogue with, the proponents of this position, though not recently. These include brief discussions in *Liberal Virtues* (1990), and longer treatments in "Homosexuality and the Conservative Mind," and "Reply to Critics" (Robert George and Gerard Bradley, and Hadley Arkes), Georgetown Law Journal, v. 84 (December 1995), pp. 261-300, 329-338; "Against the Old Sexual Morality of the New Natural Law," in Natural Law, Liberalism, and Morality, ed. Robert George (Oxford University Press, 1996); "Sexuality and Liberty: Making Room for Nature and Tradition?," in Sex, Preference, and Family: Essays on Law and Nature, ed. David Estlund and Martha Nussbaum (Oxford University Press, 1997). [↑](#footnote-ref-12)
13. See George and Lee, Mind Body Dualism in Contemporary Ethics (xxx). [↑](#footnote-ref-13)
14. See GGA [↑](#footnote-ref-14)
15. Girgis, George, and Anderson, “What is Marriage?” 267-8. [↑](#footnote-ref-15)
16. Cites to Koppelman. I’ve taken up some of the relevant claims elsewhere, in dialogue with Finnis, George, Bradley, Arkes, and others, see "Homosexuality and the Conservative Mind," and "Reply to Critics" (Robert George and Gerard Bradley, and Hadley Arkes), Georgetown Law Journal, v. 84 (December 1995), pp. 261-300, 329-338; "Sexuality and Liberty: Making Room for Nature and Tradition?," in Sex, Preference, and Family: Essays on Law and Nature, ed. David Estlund and Martha Nussbaum (Oxford University Press, 1997); "Against the Old Sexual Morality of the New Natural Law," in Natural Law, Liberalism, and Morality, ed. Robert George (Oxford University Press, 1996). [↑](#footnote-ref-16)
17. Cites to Grisez, Finnis. And also George, *Making Men Moral*. [↑](#footnote-ref-17)
18. New Harris Poll Finds Different Religious Groups Have Very Different Attitudes To Some Health Policies and Programs, Harris Poll #78, October 20, 2005, available at http://www.harrisinteractive.com/harris\_poll/index.asp?PID=608 (visited July 29, 2009). [↑](#footnote-ref-18)
19. One source suggests that 73% of married women use “modern” (presumably artificial) contraceptive techniques, see Population Reference Bureau, <http://www.prb.org/DataFinder/Topic/Rankings.aspx?ind=42> Moreover, surveys suggest that a third to 40% of younger (under 45) heterosexual couples have had anal sex, and 75-80% have had oral sex (presumably not always as a warm-up for unprotected intercourse). “Prevalence and Correlates of Heterosexual Anal and Oral Sex in Adolescents and Adults in the United States,” Jami S. Leichliter, Anjani Chandra, Nicole Liddon, Kevin A. Fenton and Sevgi O. Aral; J Infect Dis. (2007) 196 (12): 1852-1859. [↑](#footnote-ref-19)
20. These observations shift the focus away from the *form of sex* acts performed by partners’ to the partners’ intentions and orientation *vis a vis* the raising of children. [↑](#footnote-ref-20)
21. Ibid. 8-9. [↑](#footnote-ref-21)
22. On line blog post, http://www.huffingtonpost.com/alec-baldwin/why-childless-straight-co\_b\_208457.html [↑](#footnote-ref-22)
23. See Henrich, Boyd, and Richerson, “Puzzle of Monogamy,” for research on behavior of unmarried men: “unmarried men gather in groups, engage in personally risky behaviour (gambling, illegal drugs, alcohol abuse) and commit more seriouscrimes than married men,” 661. For the other claims about the effects of marriage on spousal health and wellbeing, see Michael King and Annie Bartlett, “What same sex civil partnerships may mean for health” Epidemiology of Community Health 2006; 60: 188–191. For recent evidence, see *Same-Sex Legal Marriage and Psychological Well-Being: Findings From the California Health Interview Survey* – Richard G. Wight, PhD, MPH, Allen J. LeBlanc, PhD, and M.V. Lee Badgett, PhD (2013), see: <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2012.301113> I am indebted to research assistance by Karen Ku and Thompson Huang. [↑](#footnote-ref-23)
24. See “New Numbers, and Geography, for Gay Couples,” New York Times, Thursday August 25th, A1 and A4. [↑](#footnote-ref-24)
25. Simon and Schuster, 2010. [↑](#footnote-ref-25)
26. See American Grace, 128. [↑](#footnote-ref-26)
27. There has been no comparable shift on attitudes among the young toward premarital sex, and their attitudes on abortion have become slightly more conservative, American Grace 128-32, 403-14. [↑](#footnote-ref-27)
28. Perry v. Schwarzenegger, Opinion of Judge Walker, 10. [↑](#footnote-ref-28)
29. Perry v. Schwarzenegger, Opinion of Judge Walker, pp. 17-19. Further controversy spured by recent work of Mark Regnerus. [↑](#footnote-ref-29)
30. Walker, in *Perry*, 24. [↑](#footnote-ref-30)
31. Ibid., 102, 106. [↑](#footnote-ref-31)
32. The quotation is the name of the study and it can be found online: <http://pewforum.org/docs/print.php?DocID=37> Downloaded 11/21/2003 [↑](#footnote-ref-32)
33. For an overview of his findings see Does It Really Make No Difference If Your Parents Are Straight or Gay?

    By Mark Regnerus | SLATE Posted Monday, June 11, 2012, at 6:02 AM; and for the study itself: M. Regnerus / Social Science Research 41 (2012) 752–770, note the quoted remarks on 757: ‘‘States and large metropolitan areas with relatively low concentrations of gay and lesbian couples in the population tend to be areas where same-sex couples are more likely to have children in the household.’’ A recent updated brief by Gates (2011, p. F3) reinforces this: ‘‘Geographically, same-sex couples are most likely to have children in many of the most socially conservative parts of the country.’’ Moreover, Gates notes that racial minorities are disproportionately more likely (among same-sex households) to report having children; whites, on the other hand, are disproportionately less likely to have children.” [↑](#footnote-ref-33)
34. “Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian,” THE AMERICAN ACADEMY OF PEDIATRICS. Downloaded from pediatrics.aappublications.org; from the abstract, p. 1. See also the Cambridge University report on same sex adoptions: <http://www.cambridge-news.co.uk/News/Children-as-happy-with-gay-adopted-parents-says-report-05032013.htm> [↑](#footnote-ref-34)
35. See Stephanie Coontz, Marriage: A Short History; also Richard N. Posner, Sex and Reason; etc. [↑](#footnote-ref-35)
36. Cite evidence on effects of marriage on children: benefits to children of “cold” marriages. [↑](#footnote-ref-36)
37. Sun and Li: “Effects of Family Structure Type and Stability on Children’s Academic Performance Trajectories,” “The negative effects of growing up in most alternative and disrupted families, however, are largely attributable to the shortage of family resources in such families**,**” p.555. McClain, 128, citing McClanahan and Sandefur, and Ricciuti studies. MORE [↑](#footnote-ref-37)
38. Marriage and Morals (NY: Liveright, 1970, orig. 1929), 142. [↑](#footnote-ref-38)
39. For more on this see Jonathan Rauch, Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America. [↑](#footnote-ref-39)
40. As Susan Okin suggested, see the footnote on lesbian marriage in Gender, Justice, and the Family. [↑](#footnote-ref-40)
41. In her influential book, *Justice, Gender, and the Family* (xxx). Consider also the joke: “Q: What does a Lesbian bring to her second date? A: A moving truck.” [↑](#footnote-ref-41)
42. One imagines the errant heterosexual husband’s whine, “if they can do it, why can’t I…”. [↑](#footnote-ref-42)
43. check [↑](#footnote-ref-43)
44. See *American Grace*. [↑](#footnote-ref-44)
45. “Red Families, Blue Families,” *New York Times*, May 9, 2010, and citing Naomi Cahn and June Carbone, *Red Families vs. Blue Families: Legal Polarization and the Creation of Cultur*e (Oxford, 2010). [↑](#footnote-ref-45)
46. Charles Krauthammer, “Pandora and Polygam*y*,” *Washington Post*, Friday, March 17, 2006: “…it is utterly logical for polygamy rights to follow gay rights. After all, if traditional marriage is defined as the union of (1) two people of (2) opposite gender, and if, as advocates of gay marriage insist, the gender requirement is nothing but prejudice, exclusion and an arbitrary denial of one's autonomous choices in love, then the first requirement -- the number restriction (two…) -- is a similarly arbitrary, discriminatory and indefensible denial of individual choice.” “What is historically odd is that as gay marriage is gaining acceptance, the resistance to polygamy is much more powerful. Yet until this generation, gay marriage had been sanctioned by no society that we know of, anywhere at any time in history. On the other hand, polygamy was sanctioned, indeed common, in large parts of the world through large swaths of history, most notably the biblical Middle East and through much of the Islamic world.” “Marriage has needed no help in managing its own long, slow suicide, thank you. Astronomical rates of divorce and of single parenthood (the deliberate creation of fatherless families) existed before there was a single gay marriage or any talk of sanctioning polygamy. The minting of these new forms of marriage is a symptom of our culture's contemporary radical individualism -- as is the decline of traditional marriage -- and not its cause.” http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031601312.html [↑](#footnote-ref-46)
47. (Brake 135-9, Metz, March, Bedi, Estlund) [↑](#footnote-ref-47)
48. Lawrence G. Torcello, “Is the State Endorsement of Any Marriage Justifiable? Same-Sex Marriage, CXivil Unions, and the Marriage Privatization Model,” Public Affairs Quarterly, v. 22, no. 1 (Jan. 2008), 43-61. [↑](#footnote-ref-48)
49. Steven Wall, “Neutralism for Perfectionists: The Case of Restricted State Neutrality,” *Ethics*, Vol. 120, No. 2 (January 2010), pp. 232-256. [↑](#footnote-ref-49)
50. Dworkin, “Liberalism,” 68. [↑](#footnote-ref-50)
51. Alan Patten, “Liberal Neutrality: A Reinterpretation and Defense,” Journal of Political Philosophy xxxx, p. 9. [↑](#footnote-ref-51)
52. Patten, ch. 4 of book manuscript (ms) p. 9. [↑](#footnote-ref-52)
53. Patten, Reinterpretation, p. 2. [↑](#footnote-ref-53)
54. So interpreted, Patten’s version bears some similarity to neutrality of effects. See his revised chapter. [↑](#footnote-ref-54)
55. Patten ch4 ms6. [↑](#footnote-ref-55)
56. Waldron, Sher, and Patten refer to neutrality as a “downstream” rather than an “upstream” value, see Patten ms 193-4. [↑](#footnote-ref-56)
57. Patten here draws on Steven Wall, who argues that [↑](#footnote-ref-57)
58. Similar points are made by patten and Arneson, “Liberal Neutrality on the Good: An Autopsy,” xxx. [↑](#footnote-ref-58)
59. http://www.nea.gov/honors/medals/ [↑](#footnote-ref-59)
60. See Restricted State Neutrality. [↑](#footnote-ref-60)
61. A further worry is that while political institutions *can* do this, there is little evidence that they *reliably will* do this. [↑](#footnote-ref-61)
62. Sagoff, The Economy of the Earth: Philosophy, Law, and the Environment, 2nd (Cambridge U. Pr., 2008), both from p. 48. [↑](#footnote-ref-62)
63. Wedgwood, “The Core of the Case for Marriage.” [↑](#footnote-ref-63)
64. Wedgwood, “Core of the Case for Marriage.” [↑](#footnote-ref-64)
65. Wedgwood, “Core,” 232. [↑](#footnote-ref-65)
66. See Stephanie Coontz, A Short History of Marriage. [↑](#footnote-ref-66)
67. Meet the Press, with David Gregory. Sunday 5/6 [↑](#footnote-ref-67)
68. Sanger, “For Civil Marriage.” [↑](#footnote-ref-68)
69. Sanger, “For Civil Marriage.” [↑](#footnote-ref-69)
70. Core of the Case for Marriage, 229. [↑](#footnote-ref-70)
71. Reference Case Concerning the Constitutionality of S. 293 of the Criminal Code of Canada, decided Nov. 22, 2011, opinion by B.C. Supreme Court Chief Justice Robert Bauman. [↑](#footnote-ref-71)
72. As Justice Baumann held, par. 1258: “There is no evidence that a predisposition toward polygamous marriage is anything more than how the expert psychologists described it, an advantageous strategy available to those with the inclination and resources to pursue it.” [↑](#footnote-ref-72)
73. I owe this point to Rob Reich. [↑](#footnote-ref-73)
74. “Polygyny in Cross-Cultural Perspective: Theory and Implications,” Joseph Henrich, Canada Research Chair in Culture, Cognition, and Coevolution, University of British Columbia, sworn expert testimony submitted in the British Columbia reference case on polygamy, July 15th, 2010. [↑](#footnote-ref-74)
75. Henrich, Polygyny, p. 60. [↑](#footnote-ref-75)
76. Henrich, p. 60. [↑](#footnote-ref-76)
77. Henrich, Boyd, and Richerson, “The Puzzle of Monogamy,” 660-1, 664-6. [↑](#footnote-ref-77)
78. I need to say more about this, no doubt, including concerning the Mormon experience. The current President of South Africa is polygamous. [↑](#footnote-ref-78)
79. Gregg Strauss, “Is Polygamy Inherently Unequal?” Ethics 122 (April 2012): 516–544. [↑](#footnote-ref-79)
80. Joining a religious order comes to mind as a parallel. [↑](#footnote-ref-80)
81. Need cites to Amer Jrnl of Soc, articles by Simmel. [↑](#footnote-ref-81)
82. George Gilder says “Monogamy is egalitarianism in the realm of love,” *Men and Marriage*, 58 ; perhaps this is the last realm in which conservatives believe in egalitarianism. [↑](#footnote-ref-82)
83. Andrew F. March, “Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification,” *Journal of Moral Philosophy* 8 (2011) 246–272. [↑](#footnote-ref-83)
84. Henrich, 59. [↑](#footnote-ref-84)
85. Belinda Luscombe, “I Do, I Do, I Do, I Do,” *TIME MAGAZINE* Monday, Aug. 06, 2012

    <http://www.time.com/time/magazine/article/0,9171,2120495,00.html> [↑](#footnote-ref-85)
86. See <http://schooloftemplearts.org/deborahtajanapol> [↑](#footnote-ref-86)
87. Emens, “MONOGAMY'S LAW: COMPULSORY MONOGAMY AND POLYAMOROUS EXISTENCE,” 29 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE, 2004. [↑](#footnote-ref-87)
88. It is worth pointing out that the court in British Columbia let stand that province’s criminal prohibition on polygamy, presumably for its expressive value as an under-enforced prohibition. I sympathize with that stance. [↑](#footnote-ref-88)
89. Brake, “Minimal Marriage,” *Ethics*, January 2010; fn 87. [↑](#footnote-ref-89)
90. I don’t have the space to do justice to Brake’s argument: she argues that as a background matter her proposal requires that a basic income and health benefits should be universally provided and not depend on marriage. [↑](#footnote-ref-90)
91. See McClain’s The Place of Families. [↑](#footnote-ref-91)
92. It need not be quite comprehensive. Indeed, spouses participation in distinct workplaces during a very significant part of their waking hours, along with other distinct activities, may be crucial to making work the extent to which they do share their lives. [↑](#footnote-ref-92)