

## **Recognizing Care: The Case for Friendship and Polyamory**

Canada's *The Globe and Mail* recently reported that the American companion of a Canadian woman had been deported:

The elderly women, who have little money and no car, left Canada after Ms. Inferrera, a 73-year-old American, was deported – prompting a public outcry. She and her friend of three decades, Ms. Sanford, 83, are inseparable. In addition, Ms. Sanford suffers from a heart condition and dementia and Ms. Inferrera looks after her (Taber, 2012).

The American woman had been refused permanent residency despite numerous appeals, although eventually this decision was reversed (Taber, 2012). Arguments for same-sex marriage often appeal to cases like this, in which longstanding relationships are ignored by authorities, and this harms crucial interests of those involved. But these two women were not romantically involved, and so, presumably, did not consider marriage an option. Why should their relationship lack recognition and support because they are ‘just’ friends – friends who have cohabited for decades and cared for one another materially? In this article, I argue that friends such as these, and other non-traditional partnerships, deserve marriage-like entitlements.

“Mere friends” are not the only neglected category of caring relationships. Groups of more than two are another. Imagine that the two women had lived and shared their lives with a third friend for a similar duration and with a similar degree of interdependency. If there is an intuitive pull to the thought that the two women in the real-life case had a special claim to immigration eligibility, why would the addition of a third life partner weaken their claim to special consideration? In this case, their lives would have twined together in mutual interdependence as did the lives of Ms. Sanford and Inferrera. If the basis of such a claim (at least intuitively) is that the parties have demonstrated a deep commitment and depend upon one

another in daily life, a group of three people could demonstrate exactly the same characteristics.

It might be responded that recognizing more than one relationship is simply infeasible, opening the state to all sorts of ludicrous claims. However, immigration now recognizes multiple family members; if the women had been sisters, they could have received special consideration under Canada's Family Class Immigration, whether the sponsor had one sister or two. It might also be thought that while a sister-like relationship between unrelated women might deserve treatment as "family," the line should be drawn at sexual, polyamorous relationships. But if the nature of the three hypothetical women's relationship also had a romantic or sexual element – or if two of the women had such a relationship while the third was a non-sexual indispensable friend to both – how would that relevantly change their claim to possessing a deep commitment and mutual interdependence?

Here, as in previous work, I make the case that justice requires extending marriage-like entitlements much more broadly. Marriage – or a marriage-like legal framework – should have a legal future, but that future should not exclude friendships or committed polyamorous units. In the next section, I review my previous arguments for extending access to marriage-like rights more broadly (Brake, 2010, 2012). This argument proceeds within the philosophical framework of political liberalism. Those already familiar with my arguments for "minimal marriage" may wish to skip to section 3. In this section, I discuss general challenges to arguments for marriage reform, before proceeding in section 4 to the case for extending some current marital rights to friendship and polyamory.

### **Minimal Marriage**

I argued in *Minimizing Marriage* that equal treatment within political liberalism requires expanding access to a sub-set of current marriage entitlements to members of many different

kinds of caring relationships. The reason for this is that monogamous, male-female, amorous marriage unjustifiably privileges monogamous, male-female, amorous units over same-sex couples, polyamorous units, and friendships of a life-structuring significance. To avoid such discrimination, marriage entitlements ought to be extended much more broadly if they are available to anyone.

Another way to avoid such discrimination is simply to abolish legal recognition of marriage and marital entitlements, and I take marriage abolitionism to be the major competitor to my view. While there are competing visions of marriage reform, the deep dichotomy is between those who hold the state should simply privatize or contractualize marriage, and those like myself who argue for marriage-like legal frameworks replacing or reforming marriage such as same-sex marriage, polygamous marriage, or “civil unions for all.” For full contractualists, equal treatment requires extending marital privilege to no one. It would be possible simply to remove the many entitlements and obligations of marriage without replacing them, allowing people to use legal tools independently available in private contract to negotiate and enforce property arrangements, make wills, establish executorship, and so on. Ron den Otter has written, “No one other than the most libertarian of libertarians thinks that the disestablishment of marriage entails the end of state involvement” (Den Otter, 2011, p. 133). However, this position is defended by some, such as Jeremy Garrett (Garrett, 2009).

It is difficult to imagine how full contractualization could work, because marriage brings indispensable entitlements which are not available in private contract and which arguably should not be made available through private contract. These include special eligibility for immigration, special tax status for transfer of property, entitlements to be on one another's health insurance and pension plans, residency, and bereavement and caretaking leave. Marriage also brings

provisions regarding property on divorce which full contractualization would eliminate. But it is difficult to see how, in actual society (and not a utopia of global cosmopolitanism and fair equal opportunity for all) provisions such as immigration eligibility, eligibility for employer benefits, and so forth, could be eliminated without serious harm to the vital interests of many. This makes it imperative for reform proposals to address the question of eligibility for such indispensable legal powers.

In *Minimizing Marriage*, I argued for extending access to some marital rights on the grounds of equal treatment within political liberalism. The book sketched an ideal-theoretical model for marriage reform, not one intended to be applied in our actual, unequal society. I review here the ideal-theoretical version, while below I address briefly how, in our actual society and legal system, we could feasibly move closer to this ideal model.

Political liberalism, as articulated most famously by John Rawls, excludes from the public forum arguments that depend on comprehensive moral, religious, and philosophical doctrines. Some philosophers have invoked political liberalism to defend same-sex marriage or to argue for abolishing legal marriage and relegating marital agreements to private contract (Beyer, 2002; Boonin, 1999; Buccola, 2005; Garrett, 2009; Jordan, 1995; Metz, 2010; Schaff, 2001, 2004; Torcello, 2008; Vanderheiden, 1999; Wedgwood, 1999; Wellington, 1995). Those in favor of same-sex marriage have argued that defenses of ‘traditional’ marriage depend illegitimately on comprehensive ethical claims about the value of such relationships, and so different-sex-only marriage law cannot be publicly justified. Contractualists have taken this reasoning further to argue that defenses of marriage of any sort depend illegitimately on comprehensive ethical claims, and so marriage law cannot be publicly justified at all. I agree that political liberalism does require excluding from public justification contested views about

the value of certain relationships; but I argue that this does not entail marriage abolition or stopping at same-sex marriage. I argue that the value of caring relationships, broadly construed, is not a contested comprehensive ethical claim but can provide a public reason for law and policy.

While appeals to the special value of different-sex relationships cannot be used to justify different-sex-only marriage law, appeal to the special value of romantic or sexual relationships, as opposed to ‘mere’ friendships, also violates the ban on arguments depending on comprehensive conceptions of the good. I argue that such appeals involve amatonormative discrimination – that is, unjustified privilege given to romantic sexual relationships as opposed to non-sexual, life-structuring friendships. Without such amatonormative appeal, restriction of marriage to such relationships cannot be justified (Brake, 2012).

Appeals to the special value of two-person relationships also violate the ban on appeals to comprehensive conceptions of the good. Polyamorous relationships, involving multiple sexual and romantic love bonds, are also discriminated against by current marriage law (Emens, 2004). Even if the two persons in a marriage may be of the same sex, so long as the contract is limited to two persons, the two-person relationship is privileged in law. And so long as the parties are required to have sex to consummate the marriage, or are expected to have a romantic love relationship, the sexual romantic relationship is privileged. Excluding non-amorous or polyamorous relationships from the benefits of marriage is unjust unless a political reason can be given for this exclusion. Equal treatment and non-discrimination require treating non-sexual friendships as legally on a par with sexual and amatory relationships, treating groups on a par with dyads, to the extent this is feasible, and treating same-sex relationships on par with male-female relationships. To repeat, such equal treatment can be achieved in two ways: either by

relegating legal marriage arrangements to private contract, thereby abolishing marriage as a legal category, or by recognizing and supporting all forms of life-structuring caring relationships, including polyamory, life-structuring friendships, urban tribes, and adult care networks.

There is a strong reason why the liberal state should recognize and support caring relationships rather than taking the abolitionist or privatizing route. Caring relationships are, I argue, primary goods. Within Rawlsian liberalism, primary goods specify citizens' needs "when questions of justice arise" (Rawls, 1993, p. 188). Because primary goods are bases for claims of justice, the state must distribute them according to the principles of justice (Rawls, 1999). Of course, the state cannot directly distribute caring relationships, but it can distribute their social bases, which just are the indispensable marriage rights described above – special consideration for immigration eligibility, bereavement and caretaking leave, and so on. These entitlements are social bases of caring relationships because, in certain urgent situations, they allow for the smooth maintenance of proximity or, in everyday situations, for pursuing a life together. The status of caring relationships as a primary good provides a publically justifiable rationale for a legal framework supporting them.

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

Caring relationships typically require parties to be able to spend time together. In certain institutional contexts, this proximity is threatened. While the state cannot create or distribute such relationships, it can provide a capacious and flexible legal framework protecting them with entitlements such as special immigration eligibility, hospital and prison visiting rights, and

evidentiary privilege. Minimal marriage, in the ideal liberal egalitarian society, is simply this framework, the set of social bases for this primary good. The core relationship-sustaining minimal marriage rights enable people to share lives; the criterion for entry is that they are in a caring relationship and want to share their lives (otherwise they would not need minimal marriage rights). The degree of passion they feel, their sexual activity, and the number of persons in the caring relationship – these aspects are beyond the remit of state concern.

Thus, political liberalism entails, rather, that the state should support what I call – as a working term for the ideal-theoretical model, and not a proposal for legal nomenclature – “minimal marriage.” This is a legal framework which would give legal support to the variety of central caring relationships in which people live. Minimal marriage is minimal first, in that it minimizes conditions for access to the legal status. Entry is not restricted by sex or number of parties, or by the nature of the caring relationship involved – friendship or romantic love, sexual or not, dyadic or part of a care network. Extending marital entitlements to friendships, urban tribes, care networks, and polyamorous relationships avoids amatonormative discrimination. In my view, equal treatment requires that a liberal state should set no *principled* restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring. In fact, given constraints of time, logistics, and human psychology, most people can maintain very few such central caring relationships simultaneously. So – outside of science fiction scenarios – there would be, *in practice*, a numerical limit.

Minimal marriage is also minimal in its legal framework. It would reduce the package of entitlements available through marriage, the current extent of which could not be justified within political liberalism. In an ideal liberal egalitarian society, minimal marriage would consist *only* in rights that recognize and support caring relationships. While such rights cannot be specified

independently of a particular social context, the best candidates would include spousal eligibility for immigration, residency, hospital and prison visiting rights, bereavement or spousal care leave, burial with one's spouse in a veterans' cemetery, spousal immunity from testifying, and status designation for the purpose of third parties offering other benefits (such as employment incentives, relocation assistance, spousal hiring, or family rates). In an ideal liberal egalitarian society, the set of minimal marital rights would be relatively small. But in the actual, non-ideal world, there is reason to retain more substantial entitlements such as to healthcare and pensions.

Finally, minimal marriage would not require exchanges of marital entitlements and powers to be reciprocal and complete, as opposed to asymmetrical and divided. Minimal marriage allows individuals to transfer entitlements and powers separately to partners in their life-structuring caring relationships, rather than exchanging a predefined bundle of rights and obligations with only one amatory partner. This disaggregation of marital entitlements supports the numerous relationships or adult care networks excluded by amatonormative discrimination: friendships, urban tribes, overlapping care networks, and polyamory.

### **General Problems for Marriage Reform**

Proposals, such as mine, for replacing marriage with other structures supporting diverse and multiparty family forms face a number of general problems. While I discuss some of these problems theoretically in *Minimizing Marriage*, their resolution within any particular context would require expertise drawn from many disciplines, and specific to relevant jurisdictions, to predict the social effects and other costs and benefits of marriage reform. These will depend on other social institutions in place. For example, if recognizing polygamy in a particular jurisdiction will inevitably result in severe harms to women and children, this is a strong political reason against it. Assessing the effect will also involve assessing the role and effectiveness of

child protective services, public education, and other relevant institutional frameworks. The following list of questions speaks to the complexity of revising marriage law.

First, there is the problem of symbolism. Does legal recognition of any form of marriage sustain harmful stigma against the unmarried and their children? Even if the term “marriage” is replaced with a name such as “civil union” or “domestic partnership,” will the new structure reinforce invidious distinctions between unified and un-unified, partnered and un-partnered, cohabitants and non-cohabitants, or whatever it may be? As minimal marriage would support all caring relationships, those affected by such discrimination would be those who refrain from any significant caring relationships and whose conception of the good does not include such relationships. I will call these “super-singles.”

Second, providing any benefits more substantial than the basic minimal marriage entitlements could provoke charges of unfairness. Thus, marital contractualists would object that minimal marriage is not minimal enough – providing economic and material benefits through a marriage-like framework will discriminate unjustly against super-singles or others not in caring relationships who receive no benefits. Wouldn't super-single taxpayers, or those currently outside caring relationships, be subsidizing the married with no compensation? As employees, wouldn't they be subsidizing healthcare plans for married employees' spouses? Conversely, if such benefits are capped for efficiency, in order to prevent the state or employers from subsidizing multiple spouses, wouldn't this discriminate against the polyamorous or polygamous? After all, even if it is expensive to supply benefits such as healthcare entitlements on a per-spouse basis, isn't it unjust to multiple spouses not to do so? Shouldn't each of their relationships receive as much support as dyadic partnerships do?

Third, there is the problem of potential abuse; if restrictions to enter marriage are relaxed,

especially if multiparty access to certain goods is granted (such as immigration rights for multiple spouses), won't this lead to abuse of the system?

Fourth, how will property division on divorce be handled? Will marital property be contractualized, or will there be mandatory property division? If marital property is contractualized, how will dependent spouses and children be protected against poverty? But if the rationale is protecting dependents, shouldn't property division be mandatory in all dependent relationships, and not just for those who choose to marry? But do such mandatory rules restrict liberty?

Fifth, what should the relationship be between a framework for parenting and adult relationships? Should parenting frameworks allow greater flexibility for multiple social parents to hold legal rights and obligations? Should parenting rights or guardianship be more insular and exclusive to solve coordination problems and to protect the special intimacy of the parent-child relationship?

Finally – and the focus of the rest of this paper – do polyamorous groups or care networks really qualify for equal treatment with marriages? Are they inherently hierarchical or unstable? Will they in practice mainly involve oppressive relations and harm to children? And aren't there insurmountable legal and practical hurdles to network marriage? Moreover, won't extending recognition to polyamorists devalue the recognition of same-sex marriage?

### **Problems With Polyamory**

One of the most common responses to minimal marriage is that polyamorous groupings or care networks are too different in some important respect from dyadic caring relationships to deserve equal recognition in law. Here, I want to set aside one of the major challenges to recognizing group relationships, that is, the problem of polygyny in patriarchal communities with

a host of endemic problems such as child abuse and expulsion of boys. Since women's equality and preventing harm to children are public reasons, these values could militate against recognizing such practices. In *Minimizing Marriage*, I suggested that discriminating against polygamy on these grounds faces two charges of inconsistency unless these values are pursued through other means as well. First, monogamous marriages in similarly closed communities may involve similar levels of hierarchy and abuse. Criminalizing or failing to recognize polygamy for this reason without addressing similar problems in monogamous marriage, where they exist, therefore seems arbitrary. Second, child abuse, failure to educate children, and exploitation of women should be addressed through institutions such as child protective services and public schools. Failure to do so leaves the root of the problems unaddressed; failing to recognize polygamy does not improve conditions in small, closed communities rife with child abuse and lacking exit options (Brake, 2010; Calhoun, 2005). Indeed, some advocates argue that recognizing polygamy would actually empower women, giving wives property rights and exit options, and forcing the practice out of secrecy so that abuses can be addressed (Calhoun 2005; Goldfeder, 2013).

Setting aside these difficult questions of harm and consequences, I want to focus on polyamory, the best-case scenario, I believe, for group marriage rights, in order to make the case *in theory* for its recognition. The in-practice case depends, among other things, on the practical ability to distinguish consensual polyamory from harmful practices involving exploitation and abuse. Polyamory, unlike much polygyny, is typically egalitarian in aim; it may involve same-sex relationships, hence avoiding gender-structured roles. Polyamory tends to lack disturbing features associated with contemporary forms of polygyny – practice within a closed community, within which young girls are pressured into marriage and from which young boys are expelled.

Polyamory tends to be chosen by adults who have not been “groomed” for entry as children; researcher Elisabeth Sheff found that the majority of polyamorists in her surveys were college-educated professionals of high socioeconomic status (Sheff, 2011).

Polyamory is simply the practice of having multiple love and sexual relationships. As opposed to promiscuity, “swinging,” or casual sex, polyamory focuses on cultivating relationships, not brief encounters (Tweedy, 2011). Thus it is a mistake to conflate it with promiscuity or “hyper-sexualization,” as a group of three people, for instance, could be lifelong poly-faithful. Polyamory includes both polyfidelity – sexual exclusivity within the group – and open relationships in which primary partners have secondary relationships with other(s). Polyamory can take many forms: a central dyadic relationship in which one or both partners has a secondary relationship(s); triads or quads of three or four cohabitants, who may or may not all be sexually involved with one another; or network forms of three or more non-cohabitants. By focusing on polyamory, as opposed to polygamy, we can ask whether there are insuperable obstacles to recognizing group relationships other than the alleged harms to women and children of polygyny. I will focus on polyamorous relationships entered into freely by consenting adults in order to ask whether there is reason to discriminate against such relationships when they involve no harms to women and children (Stevens, 2013).

“Recognizing polyamory” may, for some polyamorists, be unwelcome. Like free lovers such as Emma Goldman, many polyamorists wish to avoid the regulation of sexuality associated with marriage; one study found that the majority of polyamorists interviewed “did not see plural marriage as a desirable or attainable goal” (Sheff, 2011, p. 501). Some practitioners may see it as an alternative to marriage, not a form of it. However, reforms more modest – and more welcome – than extending full marital recognition are possible: decriminalizing bigamous

cohabitation, ending discrimination in zoning, employment, and custody against polyamorists, recognizing parental status and property division or alimony for multiple partners, and extending access to certain marital entitlements such as bereavement leave, special eligibility for immigration, evidentiary privilege, and the other core, relationship-supporting, “minimal marriage” rights. Even such a modest proposal may spark a number of objections. I address, in turn, the questions of whether polyamory is sufficiently prevalent and well-documented to demand legislative attention, whether polyamorous orientation marks a distinctive class of individuals with a claim to equal treatment, whether polyamory is inherently unstable, harmful to children, inegalitarian, or legislatively infeasible, and whether polyamorous rights devalue same-sex marriage gains.

The arguments below should be taken, where they are relevant, to extend to group friendships or care networks as well as polyamorous relationships. Because committed dyadic friendships – such as that of Ms. Sanford and Ms. Inferrera – are in many ways similar to traditional marriage, the argument for extending minimal marriage rights to them typically generates much less opposition than the argument for rights for groups or networks. In what follows, I set aside questions of whether marriage rights should require sexual consummation (Barry, 2014) to focus on the more often pressed objections to recognizing polyamory or group relationships. On the questions of stability, equality, feasibility, and protecting the value of same-sex marriage, these responses will also apply to friendships, or groups of friends.

### **Numbers: Are There Enough Polyamorists to Matter?**

One response to the argument for polyamorist rights is that the majority of those seeking recognition for relationships of more than two are actually polygamists (Brooks, 2009). Polyamorists, it may be asserted, are a tiny percentage of those in non-monogamous

relationships, and so their relationships, and even discriminatory treatment they face, do not deserve attention. A handful of cases does not constitute a movement deserving serious consideration, at least for law and policy purposes. Moreover, given how rare and multiform such practices are, and how little research exists on their effects, it would be ill-advised to proceed to legislative recognition; we have too little evidence about the likely consequences of such reform.

This response resembles certain objections to same-sex marriage. Opponents to same-sex marriage raise questions about effects on children and society, pointing out that same-sex marriage is a social experiment with unknown consequences. But this line of argument sets an impossible standard for legal reform, as research cannot be carried out – except in other jurisdictions – until reform has taken place. We cannot know the effects of same-sex marriage, or recognized polyamory, until reform has taken place. Additionally, same-sex marriage activists respond to such arguments that the rights claim to equal treatment in law sets a high bar for evidence of harm. Evidence of harm must be strong enough to override equality rights, and the simple absence of evidence does not meet this high bar.

Similar responses can be made regarding polyamory. There is indeed not much academic research on polyamorists, yet (Scheff, 2011, p. 490). Many are closeted, as polyamorists can hide their non-traditional relationships more easily than gays and lesbians, and they face social and legal penalties for disclosure. For example, Scheff recounts the story of Tom, a member of a triad with both a male and a female partner. Tom was rejected by his parents as no longer their son, and they cut off contact with him; while they were unhappy with his same-sex relationship, their deep objection was to the number of relationships he had (Scheff, 2011). Ann Tweedy writes that “employment discrimination is ... a potential consequence of openly espousing

polyamory.... [I]n one survey, polyamorists identified ‘employment nondiscrimination as one of their three highest priority legal issues’ (Tweedy, 2011, p. 1489-90). Elizabeth Emens recounts the story of a Tennessee woman with two “husbands” (one a legal husband) who lost custody of her child to the paternal grandmother; the judge cited her “alternative lifestyle” and failure to set a “correct example” for the child in his decision (Emens, 2004, p. 310, 312). The website of the Polyamory Society warns: “The Polyamory Society advises Polyamorists against making contact with the media due to past negative experiences that have occurred [sic] with coming out in this way. These experiences include loss of children, jobs, loss of extended family support and relationship complications.”<sup>1</sup> Penalties – or the apprehension of penalties – likely accounts for the relative invisibility of polyamorists.

But this invisibility may conceal large numbers. The British Columbia Supreme Court decision on polygamy notes: “There is limited data with respect to the number of people who engage in polyamory.” In fact, the court turned to data from the U.S. since no statistical data was available for Canada. The decision continues: “In 2009, *Newsweek* did a profile on the practice.... It notes that an online polyamory magazine called *Loving More* has 15,000 regular readers. The article further notes that some researchers estimate that openly polyamorous families in the United States number more than half a million. In *Polyamory in the Twenty-First Century*, Deborah Anapol refers to data collected by *Loving More* and, extrapolating from that data, estimates that one out of every 500 adults in the United States is polyamorous (Anapol, 2010, p. 44). She says that others have speculated that a number in the range of 3.5% of the adult

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<sup>1</sup> Website accessed at: < [http://www.polyamorysociety.org/Reporter%27s\\_Contact.html](http://www.polyamorysociety.org/Reporter%27s_Contact.html)>; cited in Bennett, “Polyamory.”

population prefer polyamorous relationships, which would put the figure at about 10 million people.”<sup>2</sup>

Another recent literature survey cites even higher numbers:

Page (2004) found that 33% of her bisexual sample of 217 participants were involved in a polyamorous relationship, and 54% considered this type of relationship ideal. West (1996) reported that 20% of her lesbian respondents were polyamorous, while Blumstein and Schwartz (1983) found that 28% of the lesbian couples in their sample were. Blumstein and Schwartz found 65% of the gay male couples in their study were polyamorous, and that 15-28% of their heterosexual couples had ‘an understanding that allows nonmonogamy under some circumstances (Weitzman 2006, p. 312).

These studies are, admittedly, small; the extrapolation of data to larger populations may be problematic if the samples are not representative. Even so, the figures do suggest that polyamory goes beyond a handful of cases. Once again, while some research is now emerging, there are good reasons why polyamorists have chosen to keep their relationships hidden – the threat of children being removed from polyamorous families, job discrimination, and social stigma – and hence are relatively invisible. But, requiring extensive documentation of a new (or newly visible) social form before considering its practitioners’ rights claims will always incorporate a strong bias against change, reinforcing existing discrimination. The numbers are high enough, and reports of discrimination troubling enough, to urge consideration of anti-discrimination measures and other incremental steps.<sup>3</sup>

### **A Protected Class: Isn’t Everyone Polyamorous?**

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<sup>2</sup> British Columbia Supreme Court, “Reference re: Section 293,” at 439-440.

<sup>3</sup> For a detailed case that discrimination is sufficient to warrant response, see Tweedy, “Polyamory,” 1498-1508.

One reason for resistance to polyamory is the suspicion that we are all polyamorous. If so, two concerns arise: that it cannot be a distinctive protected category, or that recognizing it will start an epidemic of polyamorous relationships. As Emens writes, “the threat of polyamory stems from its apparent prevalence” (Emens 2004, p. 330).<sup>4</sup> In a sense, almost everyone who experiences sexual desire experiences non-monogamous desire, if they are attracted to more than one person in the same time period. The capacity to carry on sexual and love relationships with more than one person may be a closer psychological possibility for many people than experiencing same-sex desire. But because many people attempt – some successfully – to carry out monogamous relationships despite this possibility, polyamory might seem like weakness of will or indulgence, the inability to overcome temptations with which the monogamous struggle. As Emens writes, “Gay identity is viewed by many to be a deeply rooted element of identity; poly identity is seen to be so superficial as to be frivolous” (Emens 2004, p. 342).

For instance, the British Columbia Supreme Court, in rejecting the argument for polygamy on grounds of equal treatment of a class of persons subject to discrimination, distinguished between persons with characteristics which are either unchangeable or which “the government has no legitimate interest in expecting us to change to receive equal treatment under the law” and those, on the other hand, engaging in changeable, harmful behavior.<sup>5</sup> The Court writes: “As for the submission that polygamy is an immutable characteristic, the Attorneys General again disagree. 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. Further, if willingness to

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<sup>4</sup>; See 340-354 for discussion of whether polyamorous desire is best understood as universal or a minority orientation.

<sup>5</sup> British Columbia Supreme Court, “Reference re: Section 293,” at 1245, 1247, citing the Supreme Court of Canada.

pursue behaviour in the face of criminal prohibition constitutes immutability for s. 15 purposes, then a breach of equality would be found any time the state maintained a prohibition in the face of defiance.”<sup>6</sup>

The question of harm is crucial here. After all, pedophilic desire may be immutable and urgent, but that does not legitimate acting on it, nor does it imply that bans on pedophilic behavior discriminate against pedophiles. Immutable urges and identities should be constrained if acting on them will violate rights or cause harm. Tweedy makes a similar point: the “definition of ‘sexual orientation’ in an anti-discrimination statute would ... have to exclude harmful sexual preferences” (Tweedy 2011, p. 1478). However, recall that the strategy of this paper is to focus on polyamorous relationships between consenting adults, without the alleged harms attributed to polygamy (the next section will attend to alleged harms to children in polyamorous families). Is there any case for the immutability of polyamorous desire, or its role as a “deeply rooted identity,” analogous to sexual orientation?

First, if gendered desire is understood as an essential part of identity, bisexuals may have a strong claim for polyamorous orientation (Tweedy 2011; Vernallis, 2013).<sup>7</sup> Because bisexuals are attracted to both men and women, expressing their sexual identity fully might require simultaneous relationships – or so Kayley Vernallis has argued in “Bisexual Marriage.” One might respond that bisexuals have no stronger a claim to an essentially polyamorous orientation than anyone else – just as bisexuals are attracted to members of both sexes or genders, non-bisexuals might be attracted to members of different races or ethnic groups, or people with brown eyes and people with blue eyes, and so on. However, many people see gendered

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<sup>6</sup> British Columbia Supreme Court, “Reference re: Section 293,” at 1258.

<sup>7</sup> I set aside here legal and philosophical discussion about the concept of sexual orientation.

attraction as importantly different than attraction on the basis of skin, hair, or eye color. Gendered attraction is often seen as an essential aspect of identity, the expression of which should not be the basis of discrimination (barring harmful behavior). If Vernallis is correct – which depends on her controversial view that action partly constitutes one’s sexual identity – then bisexuals could claim that polyamory is essential to their sexual identity.

Second, some polyamorists understand themselves as “hard-wired” not to feel jealousy (Emens 2004).<sup>8</sup> They understand their sexual identity as essential, distinctive, and different at the neuro-physiological level, and they see it as a deeply rooted part of their identity. While not all polyamorists see polyamorous desire as essential or fixed, Tweedy argues that there is reason to think it is at least “moderately embedded”: not only do some polyamorists see it as essential, it reflects, for many, distinctive values such as radical honesty and non-possessiveness (Tweedy 2011, 1484). Moreover, the fact that people act on polyamorous desire in the face of severe social and legal penalties suggest that it is not merely frivolous or superficial. (Tweedy 2011, 1489-91).

Some case can be made, therefore, that polyamorous desire is a deep part of some people’s identities, the expression of which is subject to discrimination. However, from the perspective of the ideal-theoretical argument for minimal marriage, the question of hard-wiring, essentialism, or identity is less important. The argument is that the state should support caring relationships because they are a non-fungible good of the sort subject to claims of justice, that in certain institutional contexts these goods depend on legal supports, and that there is no political reason for the state to discriminate between different non-harmful caring relationships. Equality applies here to the distribution of social bases, not to the treatment of different classes or

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<sup>8</sup> On this topic see 349-352.

categories of people. Individuals may choose, or be oriented to, different kinds of caring relationships; it is the fact of belonging to caring relationships which matters, from the political perspective, not their configuration. The same state supports may not be feasible or appropriate for every configuration, but some individuals in polyamorous groups or friend networks may need legal supports to protect their relationships. What is crucial to the political liberal argument is not that there is a specific class or category of persons discriminated against by marriage law, but that members of caring relationships of different kinds should be able to access legal supports, or social bases, for their relationships.

Finally, let us return to the threat of the supposed universality of polyamorous desire – the concern that, if polyamory becomes socially acceptable, many more people will choose to pursue it. However, why exactly is this problematic? Monogamists may be concerned that they will be unable to find monogamous mates. However, given the propensity toward jealousy and the bargaining power of promising mutual sexual exclusivity, it is plausible that many people will choose to be monogamous in return for their partner’s sexual exclusivity. Polyamory also has many burdens that make it not for everyone – demands on time, energy, and coordination skills, as well as the threat of jealousy.

### **Stability: Can Polyamory Provide A Stable Family Unit?**

While the politically liberal state should not discriminate amongst relationships on ethical grounds, it might be argued that the state does have an interest in encouraging stable relationships precisely because of the care such relationships provide to dependents, including children, and that polyamorous groups are inherently unstable. It might be thought that greater numbers of people or competition from additional relationships will undermine the stability of the unit (Emens, 2004). While sexual competition might be a threat, it is difficult to see why numbers alone, in the absence of sexual jealousy, pose a threat; we generally think of groups as

becoming stronger as they increase in size. While introducing a third person would increase the sources of possible conflict by introducing another set of preferences and interests, a third person could also serve as buffer, peacemaker, or safety valve when the other two find themselves in conflict.

Sexual competition and attendant jealousy might suggest that a polyamorous unit would likely be less stable than a group of three friends. However, the same point could be made against monogamous sexual relationships as opposed to committed dyadic friendships – if the worry is that polyamorous relationships will be torn apart by jealousy, then all sexual relationships, on this reasoning, are more vulnerable than non-sexual friendships, which are presumably immune from sexual jealousy.

Indeed, polyamory might be more stable than monogamy because polyamorists do not face the same pressures to repress their sexual desires – or to conceal failures to do so. Polyamory, unlike adultery, does not involve secrecy or deception, nor does it take extra-relationship sex as reason for dissolving the partnership. For these reasons Bertrand Russell argued that socially condoning extramarital sex would make marriage more, not less, stable:

The psychology of adultery has been falsified by conventional morals, which assume, in monogamous countries, that attraction to one person cannot coexist with a serious affection for another. Everybody knows that this is untrue, yet everybody is liable, under the influence of jealousy to fall back upon this untrue theory, and make mountains out of molehills (Russell, 1959, p. 155-56).

One may suspect Russell to be somewhat self-interested here, but it is also plausible that parties who have reached an agreement on extramarital sex at the outset of their relationship will be better able to weather an outside relationship than parties who are blindsided and shocked by

it. Polyamorous partners also often have rules to protect the existing relationship, such as veto power of primary partners over secondary partners, or not engaging in new relationships with people seeking to undermine the existing relationship. Such rules might also work to protect a new relationship from ending an existing one.

Such arguments against polyamory can be deflected by pointing out that similar arguments can be made against monogamy. If polyamory is unstable, is it more unstable than monogamy? Divorce rates and rates of adultery suggest that monogamous marriage is an unstable, and often unsuccessful, institution (Emens, 2004). Furthermore, legal recognition and support would likely make existing polyamorous units more, not less, stable. Pressures to remain closeted due to fear of losing one's job or one's children must take a toll on relationships, and recognition for immigration purposes would allow polyamorists (or friends, such as Ms. Sanford and Inferrera) to remain together.

In some respects, polyamorous families resemble step-families or blended families; it would be plausible to think their effects on children would be similar. The polyamorous movement argues that "multiple parenting" is actually potentially beneficial to children, providing extended family support, love, and care, as well as meeting practical needs (Goldfeder & Sheff, 2013). Little research exists on children in polyamorous families. However, a recent study, which the authors characterize as "the first attempt at constructing an actual data set for both legal and social scientific reference, as opposed to allowing courts and counselors to continue to rely on hearsay or outdated assumptions," found "that some polyamorous families can and in fact do provide positive and enriching environments for children" (Goldfeder & Sheff, 2013, p. 160, 195).<sup>9</sup> Indeed:

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<sup>9</sup>This is a 15-year longitudinal study of 22 children.

[O]verall the children seemed remarkably well adjusted, articulate, intelligent, and self-confident. While they dealt with the usual issues of childhood – from the frustration of having to share toys to the adolescent awkwardness of middle school social machinations – these respondents appeared to be thriving with the abundant resources and adult attention their families provided (Goldfeder & Sheff, 2013, p. 199).

While data is scarce, as of yet, this first study suggests reason for cautious optimism.

### **Equality: Isn't Polyamory Essentially Inegalitarian?**

It might also be thought that polyamorous groups are inherently less egalitarian than dyads. Kant makes precisely this point against polygamy – each woman will surrender herself fully but receive only part of a man in return (Kant, 1996). However, this assumes a gendered hierarchy; once such an assumption is removed, we can see that each member of a group can have equal power within the unit. While Thom Brooks suggests that polyamory will essentially devolve into polygyny, the high numbers among gays, lesbians, and bisexuals suggest that there will be a fair proportion of non-polygynous polyamory (Brooks, 2009; Weitzman, 2006).

There is no reason to think that polyamory is structurally unequal, independent of concerns about gender inequality. Brooks suggests that in polygamy, for instance, there is a structural inequality or asymmetry in that a husband can choose whom to marry and divorce, whereas the wives cannot choose (Brooks, 2004). However, in polyamory, many different arrangements are possible, including groups in which each member has voting rights or veto power over the admission of new members, or in which two partners each have an independent relationship with another party (Strauss, 2012).

Another reason for concern about equality in group relationships might be the thought that decision-making between two people will be more fair, or successful, than decision-making in a group of three or more. It might be thought that when only two people are negotiating, they

are more likely to reach an agreement that satisfies both their interests than when three or more are making a decision. It might seem that, in a group of three, two members could simply out-vote the other, who would then be subject to the majority rule. However, this seems far-fetched. Groups of friends or business associates negotiate three-way (or more) agreements all the time; the process may be more cumbersome, but it is certainly not impossible to reach agreements satisfying all parties. Furthermore, this portrays an idealized view of dyadic marriage, in which documented inequalities in power and decision-making typically exist between men and women (Okin, 1989).

The charge of inegalitarianism against polyamory once again speaks against monogamy. The complaint of inegalitarianism can be brought against many monogamous marriages in which spouses accept power inequality as God's will or as their traditional role. If inegalitarianism is a reason against recognizing certain forms of marriage, it would apply to many gender-structured monogamous marriages. It might be responded that such inequality is merely contingent, whereas the purported inequality in polyamory is structural (a point I have just rejected). However, the significant economic effects of such contingent power inequalities should be of concern to liberal egalitarians.

One other equality-related concern should be addressed, that of distributive justice in mates. Expert testimony in the British Columbia case predicted large numbers of unmarried men producing social unrest as a result of spreading polygyny (British Columbia Supreme Court, 2013). For one thing, this worry stands in tension with the worry about gender equality; it supports Gary Becker's prediction that in a society permitting polygamy women will have more bargaining power since they will have more marital options (Becker, 1993). If the practice of polyamory can be distinguished in law from exploitative polygyny, this outcome may be less

likely. But if such predictions were accurate, it might be thought that resulting distributive inequalities in mates would be unjust. If caring relationships are a primary good, then it might seem to be unfair if some people have none, some have one, and others have more. However, people – mates – are not subject to distributive principles; all that society can do is provide the social bases for a multiplicity of forms of caring relationships. And polyamory would be less exclusive than monogamy, since an unmated person would have the option of joining a group. Finally, this concern about fairness might give some reason to limit numbers of entitlements for polyamorous people, where such entitlements are a drain on social resources. Such a limit might also be required from the standpoint of feasibility.

### **Practicalities: Isn't Legislating Network Marriage Simply Infeasible?**

Even if the above responses have removed some worries about polyamory, it might be thought that there are insurmountable legal hurdles to legislating network marriage. Difficulties arise with extending marital benefits, such as evidentiary privilege, immigration eligibility, and tax breaks for jointly owned homes, to groups.<sup>10</sup> Such entitlements would be core minimal marriage rights, as they help spouses maintain relationships. But would immigration eligibility extend to as many multiple spouses as someone could maintain caring relationships with? Would evidentiary privilege extend to groups? Where social resources (or criminal prosecutions) are involved, numbers pose a challenge, although immigration law now grants special eligibility to multiple siblings or children so, at least in immigration, this is not a unique problem.<sup>11</sup> But network marriages create complex cases.

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<sup>10</sup> Thanks to Elizabeth Emens for these points.

<sup>11</sup> Thanks to Laurie Shrage for this point.

While I cannot address all such problems, let me address two general worries. One is that marital rights cannot be disaggregated. Either the rights will come into conflict, or transfers of rights among group members will wrongly unilaterally impose obligations on a non-consenting spouse.<sup>12</sup> However, conflicts cannot arise with transfers of core minimal marriage rights, such as visiting rights. A's relationship with C might reduce the amount of time A has for B, just as, in marriages now, one spouse's work or hobby might reduce the time s/he has for the other spouse. This is not a conflict among rights. If the entitlements at issue were exclusive (such as primary beneficiary of life insurance), then B would lose them when A transfers them to C – but this is possible now in divorce or, depending on the benefit, even within marriage.

The objection regarding unilateral obligations imposed on a non-consenting spouse concerns financial obligations. For example, if A and B jointly owned property, and A became obligated to pay alimony to C, then B might be obligated to C. However, terms of liability could be defined to protect third parties – as they must be for any co-owner of property, such as a business partner, with A. Rights can be specified so that they are not transitive.<sup>13</sup> The more urgent problem is that if A owes money to C, this reduces the amount of money available for A to give B – if, for instance, A ended up owing both spouses alimony. Allowing multiple spouses will exacerbate the problem of individuals unable to pay alimony (and child support).

There are a number of considerations regarding this problem. First, as defenders of polygamy have argued, multiple wives will be better off if they have legal marital rights; legal marriage rights for multiple spouses might actually discourage male-headed polygyny rather than exacerbating it. Second, multiple obligations can arise in serial monogamy; a man with two

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<sup>12</sup> Thanks to Helga Varden for this objection.

<sup>13</sup> As Laurie Shrage pointed out to me.

wives at once would be in the same position as a divorced man who remarries. Third, policies other than banning group marriage would effectively target the problem: the state could discourage dependent spouses, or at least *multiple* dependent spouses (as well as serial monogamy, to be consistent? Wouldn't this reasoning require that a man owing child support, or alimony, should be prevented from procreation or remarriage?).<sup>14</sup>

A second general worry concerns abuse. Recognizing group relationships might be thought to open the door to all sorts of fraudulent marriage claims.<sup>15</sup> But recall that the core minimal marriage rights are those whose purpose is to support relationships. For rights which cost little and which there is little incentive to abuse, such as visitation and caretaking leave, self-designation is appropriate.<sup>16</sup> As I wrote in *Minimizing Marriage*, more costly entitlements such as immigration eligibility could be subject to investigations such as those currently employed in spousal immigration cases.

Peter Brian Barry, responding to this point, has suggested that such tests will be simply unworkable for the political liberal. He writes that “the possibility of ludicrously large marriages cannot be ruled out: if a large number of people can genuinely sustain caring relationships with one another, then there is no principled reason to disallow their minimal marriage. Given Brake’s success in demonstrating just how multiform caring is, the proponent of minimal marriage may have to reluctantly endorse the possibility that a smallish Midwestern city could marry its beloved sports team, a result that will strike some as fatal” (Barry, 2013, p. 352). Moreover, he worries that the liberal neutral between different conceptions of caring will have to

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<sup>14</sup> See also Goldfeder and Sheff, “Children,” 170-172.

<sup>15</sup> I discuss this in more detail in Chapter 7.i of *Minimizing Marriage*, and this paragraph reproduces ideas in that chapter.

<sup>16</sup> See “Beyond Conjuality: Recognizing and supporting close personal adult relationships,” a 2001 publication of the Law Commission of Canada. Online. Available: [http://www.samesexmarriage.ca/docs/beyond\\_conjuality.pdf](http://www.samesexmarriage.ca/docs/beyond_conjuality.pdf).

treat Hugh Hefner's relationship with a Playboy bunny, a patriarch's relationship with his subservient wife, and even minimal conceptions of caring evenhandedly.

However, what rules out ludicrously large marriages, or, perhaps, the Playboy bunny, are the psychological limits on the number of relationships we can sustain. In *Minimizing Marriage*, I refer to psychological survey articles demonstrating the importance of relationships to our mental health and self-esteem (Baumeister and Leary, 1995). This literature makes reference to "strong, stable interpersonal relationships" and "frequent, non-aversive interactions with an ongoing relational bond"(Baumeister and Leary, 1995, 497). Watching a sports team, or interacting occasionally with a Playboy bunny one does not know personally, will not constitute such a relationship. What needs to be shown (and can feasibly be shown to authorities) is that the parties know one another well, share a history of interaction, and stand in a non-fungible relationship with one another. While degrees of caring and its content and expression may differ, caring relationships do require, minimally, some degree of intimacy, commitment towards the future, and non-fungibility. The other party in a relationship is not simply replaceable with a similar person; this is what it means for a relationship to exist between persons. This minimal conception will rule out the city marrying its sports team, and casual or superficial interactions; beyond that, it will permit a wide variety of kinds of interaction.

### **Protecting Same-Sex Marriage: the Two-Stream System**

The slippery slope to polygamy is sometimes adduced as an argument against same-sex marriage. For this reason, it might seem that, politically, the argument for minimal marriage plays into the hands of conservative opponents of same-sex marriage. Thus, it might seem most prudent – and most respectful of hard-won same-sex marriage gains – to advocate a two-stream

system: marriage for sexual couples, and limited friendship or group rights, without the banner of marriage, for others.

But there are reasons for equal treatment. From the standpoint of social change, I have argued that legal recognition extended to diverse relationships can combat amatonormativity by signaling their equality under the law. Practically, providing a status designation for such relationships prevents third parties, such as employers, from discriminating unjustly. Marital status guarantees that benefits offered on the basis of marriage will be offered without discrimination. Symbolically, calling such a status ‘marriage’ is a way of rectifying past discrimination against same-sex partners, the non-monogamous, and ‘mere’ friends. Extending marriage would send an unequivocal message of equal citizenship (Brake, 2012; Hartley and Watson, 2012; Wedgwood, 1999). Analogously, imagine that instead of asserting a right to interracial marriage in 1967, the U.S. Supreme Court had abolished marriage, allowing private interracial marriage while doing away with legal marriage. This would have sent a very different message than the actual decision in *Loving v. Virginia*.

However, rectification of past state discrimination could be carried out by other means, and there are also reasons not to label all relationships ‘marriages’. For one, some people, objecting to the connotations of the term, might object to calling their relationship ‘marriage’ (Easton & Liszt, 1997). Second, calling a diverse array of relationships ‘marriage’ has epistemic or informational costs – diminishing what Stephen Macedo has called the “legibility” of the institution.

However, if the term ‘marriage’ is not legally applied to *all* relationships (as in “minimal marriage”) it should not be applied to any. It might be thought that a two-stream system, with ‘marriage’ for some and a more generically titled status for others, can respect equality while

preserving the informational aspect of ‘marriage’. But concerns of justice trump this informational consideration. Legally separating the two streams suggests a hierarchy; ‘marriage’ still connotes a relationship of value, one socially more deserving of respect. Thus, the two streams would provide a legal basis for social discrimination, where the message should be one of equality.

It may be objected that a reason for legally distinguishing polyamory, polygamy, and friendships from marriage is to preserve the symbolic worth of the recognition of same-sex marriage. But if this assumes that monogamous marriage-type relationships are more valuable than other types of relationships, it relies on an amatonormative distinction which I have argued is mistaken. Why would the relationship between the long-term companions described at the outset be more valuable or worth recognizing if they were romantically involved? Even if the objection does not itself rest on amatonormative premises (but instead on how the nomenclature will be received), it concedes that the ‘marriage’ label has greater symbolic worth than an alternative – and hence concedes that the two-stream solution is a step away from equal treatment.

## **Conclusion**

While I have tried to sketch responses to the problems raised by minimal marriage, the discussion suggests the difficulty in designing any substantive marriage (or marriage-like) law. Any substantive law will leave some groups out, prompting further claims of injustice. And treating networks, friendships, and groups on par, risks devaluing hard-won same-sex marriage rights. Moreover, at many points, theory requires extensive empirical supplementation, so that the best policy may well differ from society to society: for example, will polyamory unavoidably

devolve into harmful polygyny? Can law distinguish, in practice, polyamory from harmful or exploitative practices? And so on.

However, in defending the extension of recognition and support to friends and the polyamorous I would emphasize three themes. First, many criticisms of polyamory – instability, power inequality – can equally be made against contemporary marriage itself. Second, attempts to drive a wedge between monogamy and polyamory, or friendship and sexual relationships, will likely end up resorting to amatonormative ethical views. Finally, if caring relationships are, as I have argued, a good whose support is a matter of justice, such relationships deserve support in all their forms. And I know of no good reason to think that friendships, or groups, cannot be just as caring as dyadic marriage.

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