

# Is Civil Marriage Illiberal?<sup>1</sup>

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## 1. Liberal criticisms of marriage

In the last few years, after decades of campaigning, the cause of same-sex marriage has finally scored a string of successes. By the end of 2014, same-sex marriage was legal in the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, Uruguay, Brazil, France, New Zealand, England and Wales, and Scotland – and also in 36 states of the U.S.A.

At the same time, the institution of civil marriage has recently come under intense scrutiny from political philosophers who work within a broadly liberal tradition. These philosophers agree with the advocates of same-sex marriage that it is unjust to make civil marriage available to opposite-sex couples while excluding same-sex couples. But many of these philosophers give only heavily-qualified support to the same-sex marriage campaigners' fundamental goal – which is to give same-sex couples access to something that closely approximates to the current institution of marriage. On the contrary, according to these political philosophers, civil marriage itself, in anything approximating to its current form, is incompatible with liberal principles of justice. In their view, marriage should ideally be either completely abolished or radically reformed, virtually beyond recognition; making civil marriage in anything like its current form available to same-sex couples is supportable only if these more radical reforms are unavailable.

In this essay, I shall defend the goal of the same-sex marriage campaigners against the arguments of these liberal political philosophers. I shall principally focus on the arguments of Elizabeth Brake, although I shall also touch on some of the arguments of Cheshire Calhoun, Clare Chambers, and Tamara Metz.<sup>2</sup> That is, I shall argue that, while making civil marriage compatible with justice does indeed require legalizing same-sex marriage, it does not require the much more radical reforms that these political philosophers call for.

In particular, I shall focus on the central argument that Brake makes for the conclusion that unless marriage is radically reformed (by being, as she puts it, “minimized”), marriage is “incompatible with political liberalism.”<sup>3</sup> By “political liberalism”, she means the principle, which was famously defended by John Rawls, that the state’s exercise of its authority must be justifiable on grounds that are acceptable to all reasonable citizens; the state must not exercise its authority in ways that can be justified only by appeal to controversial religious or philosophical doctrine or ideal that some reasonable citizens reject.<sup>4</sup>

To make an argument of this kind, one would have to rely on the claim that marriage, in anything like its current form, can *only* be justified by appeal to such a controversial doctrine or ideal. As Brake puts it, existing marriage law “favors one contested conception of the good and thereby fails to respect public reason and reasonable pluralism.”<sup>5</sup> Strictly speaking, however, political liberalism does not prohibit exercises of political authority that are somehow more *favourable* to some contested conceptions of the good than to others; it prohibits exercises of political authority that can only be *justified* by appeal to such contested conceptions.<sup>6</sup> On the face of it, the claim that there is *no* adequate justification of marriage, in anything like its current form, which does not rely on some such controversial doctrine or ideal, seems debatable and in need of being defended. Defending this claim would involve “proving a negative”: in principle, it

would require surveying *all possible* justifications of marriage, and showing that every possible justification conflicts with liberalism (or else is inadequate in some other way). This would require surveying many more possible justifications of marriage than Brake actually considers.

In fact, in some of my own earlier work, I offered a justification of marriage that was intended to be compatible with liberalism.<sup>7</sup> Specifically, my justification was designed to be consistent with the principle of political liberalism that we have just discussed – the principle that the state should not exercise its authority in ways that can only be justified by appeal to controversial ideals or doctrines that some reasonable citizens reject. Moreover, it was also designed to be consistent with the classical liberal principle (which was most famously defended in J. S. Mill's *On Liberty*) that the state must respect individual autonomy, and so refrain from treating people paternalistically – that is, from undermining their autonomy for the sake of their own good.

It is because my justification of marriage was designed to be compatible with these two liberal principles that it may seem to some readers surprisingly *thin* – in the sense that there are many important facts about marriage that my justification, quite deliberately, does not take account of. The principle of political liberalism implies that the state should not justify its involvement in the institution of marriage by appeal to any of the contested conceptions of marriage that are held within the various religious traditions or subcultures of the society; this is why my justification of marriage ignores all the details of these contested conceptions. The principle of autonomy implies that the state should not pressurize people to get married – the choice of whether or not to marry should be left up to the individuals concerned; this is why my justification of marriage was not based on a detailed assessment of the various benefits and burdens that marriage confers on married couples – it is up to the individuals concerned to assess

these benefits and burdens for themselves. In general, marriage undoubtedly plays a rich and complex role in our society; but the state, in justifying its involvement in the institution of marriage, does not need to take account of all these complex details.

In this essay, I shall restate my justification of marriage, and I shall try to show that this justification is not vulnerable to the objections that have been raised by Brake; in doing so, I shall also try to answer some of the other liberal critics of marriage. In this way, I hope to make it plausible that marriage – even in something approximating to its current form – is quite consistent with liberal principles of justice.

## 2. What is marriage?

The political philosophers who discuss marriage all agree about one thing: marriage essentially involves the *law*. More precisely, every society that has an institution of marriage must have some system of authoritative social rules, which play the role for that society that the law plays for us, and marriage is an institution that involves those social rules. Crucially, marriage is a *legal relationship*: the question “Was Chris married to Joe at such-and-such a time?” is a question that can be settled by a court of law.

Besides being a legal relationship in this sense, what other aspects of marriage law are most fundamental to the institution of marriage? Many theorists, including Brake,<sup>8</sup> seem to think that the most fundamental legal components of marriage are the *entitlements* that marriage confers to *third-party benefits* – that is, to benefits that a married person receives, not from their spouse, but from third parties such as the state, or from various private organizations such as their spouse’s employer. These entitlements to third-party benefits include: health insurance benefits; tax breaks; hospital visitation rights; prison visitation rights; privileged immigration

treatment for foreign spouses of citizens; the right not to be compelled to testify against one's spouse (and in general to claim an evidentiary privilege for spousal communications); and so on.

However, it seems doubtful to me whether these legal entitlements to third-party benefits are fundamental elements of marriage. These entitlements vary widely between different jurisdictions and different time periods: for example, the tax regimes for married couples are completely different in different jurisdictions; and in countries (like Britain and Canada) that have a national health service, any health insurance benefits that are attached to marriage are clearly a much less important element of marriage than in countries where access to health care depends on private health insurance. In general, it seems to me that these entitlements to third-party benefits could be detached from marriage, and provided on a different basis, without radically changing the nature of marriage.

Indeed, I am sympathetic to the proposal that many if not all of these entitlements *should* be detached from marriage, and made available to any demonstrable caring relationship. At all events, in what follows I shall set these entitlements to third-party benefits aside. In offering a justification for marriage, I shall not argue for the thesis that all of these entitlements should always be attached to marriage; and I shall certainly not argue that any of these entitlements should be withheld from other relationships. The question of exactly how these entitlements to third-party benefits should be distributed will have to be deferred for a later discussion.

According to the account of marriage that I gave in my earlier work, marriage has three fundamental elements: (i) as I have already noted, it is a *legal relationship*; (ii) it has a generally-understood *social meaning* – that is, there is a body of common knowledge and general expectations about marriage that is shared among practically all members of society;<sup>9</sup> and (iii)

spouses have *legal powers and obligations* towards each other, where these legal powers and obligations broadly reflect this social meaning.

The way in which these mutual legal powers and obligations “reflect” the social meaning of marriage is simply that these powers and obligations empower and oblige spouses to treat each other in some of the ways in which, according to this social meaning, it is generally *expected* that spouses will typically treat each other. Thus, since it is part of the social meaning of marriage that spouses are expected typically to cooperate in coping with the material necessities of life, many of the legal powers and obligations of marriage concern *property*. For example, in so-called “community property” jurisdictions (like California), property acquired during the marriage is presumed to belong jointly to both spouses; and spouses owe each other a fiduciary duty of care, good faith, and full disclosure, in the management of this community property. In virtually all jurisdictions, spouses are obliged to agree to an equitable division of property in the event of divorce; and in the absence of a will, a spouse will inherit all of the other spouse’s property on their death. Similarly, since it is part of the social meaning of marriage that spouses are expected typically to know each well and to care for each other, if you are married, you will normally have priority in being recognized as having legal authority to make decisions on behalf on your spouse if your spouse is incapacitated.

In involving these three fundamental elements, marriage is broadly similar to the legal relationship of *parenthood*, which is also (i) a *legal relationship* that has (ii) a *generally-understood social meaning*, and (iii) gives the parent certain *legal obligations* towards the child, as well as a degree of *legal authority* over the child. Again, the legal rights and obligations of parents reflect this social meaning because these rights and obligations oblige and empower parents to treat their children in some of the ways in which according to this social meaning,

parents are expected to treat their children. The key difference between marriage and parenthood lies in the profoundly different social meanings of the two relationships, and in the profoundly different legal rights and obligations associated with these two relationships, which reflect these different social meanings.

In fact, for the purposes of my present argument, it does not matter exactly what the social meaning of marriage is. All that matters is that marriage has a social meaning, which consists in a body of common knowledge and general expectations about marriage that is shared among virtually all members of society, and which is reflected in the legal powers and obligations that spouses have towards each other.

Admittedly, in my earlier work, which focused on defending same-sex marriage, I argued for the following two points about marriage's social meaning. First, even though it was – until quite recently – part of the social meaning of marriage that marriage was the union of one man and one woman (back in 1990, if anyone said “Chris is married,” it would immediately be inferred that Chris was married to someone of the opposite sex), this exclusion of same-sex couples was never a *fundamental* aspect of marriage's social meaning (in the sense of being an aspect of marriage's social meaning that could not be changed without radically transforming the institution of marriage). The reason for this is that (as I shall explain below) the most important effects that the social meaning of marriage has on the lives of opposite-sex married couples do not in any way depend on this exclusion of same-sex couples. Secondly, if same-sex couples were allowed to marry, all of the important aspects of the social meaning of marriage could remain in place, as a feature of an institution that both same-sex couples and opposite-sex couples could have access to.

To make these two points plausible, my earlier work included some speculations about the precise *content* of the social meaning of marriage. This may have been a tactical mistake, since it has led to my argument's being misinterpreted. But at all events, in my earlier work, I speculated that the social meaning of marriage most centrally involves a body of generally-shared expectations about what is *typical of most* (though not all) marriages. Specifically, I suggested, it is generally expected that typically, most marriages have the following three features: (a) *sexual intimacy* between the spouses, at least at some point in the history of their relationship; (b) *economic and domestic cooperation* – the spouses work together in coping with the necessities of life; and (c) a *mutual commitment* to sustaining the relationship, at least at the beginning of the marriage. By contrast, I suggested, it is not plausible that the content of this social meaning includes any specific conjugal ideal – or any specific conception of the kind of value that married life can have – since there seems not to be any such specific ideal that is generally shared throughout society today.

These speculations still seem plausible to me, although it must be conceded that it is an empirical sociological issue what exactly the social meaning of marriage is. At all events, even if my speculations are along the right lines, it is clear that the most that is generally expected within our society is that *most* marriages will *typically* have these three features. Everyone knows that some marriages involve much less in the way of economic and domestic cooperation than others (some married couples live apart and do not have shared finances); everyone knows that in a great many marriages, the mutual commitment to sustaining the relationship disappears as the couple separates or gets divorced; it is presumably widely assumed that some marriages involve no sexual intimacy between the spouses at any time. So these three features are unquestionably not in any sense “criteria” that marriages have to meet to count as marriages.<sup>10</sup> Nonetheless, it



seems plausible to me that it is generally expected that at least typically, most marriages have these three features.

The fact that marriage has this generally-understood social meaning allows married couples to use marriage as a signal with a distinctive communicative power. In effect, the couple can say “We’re married,” confident that their audience – whoever their audience may be – will interpret their utterance in the light of this social meaning. The couple might have all sorts of reasons for having this communicative purpose (they might even be seeking to *deceive* their audience about certain facts), but one common reason for having this communicative purpose is that the couple wishes their audience to come to expect that the couple’s relationship conforms to a greater or lesser extent to what is typical of married couples. There are many reasons why a couple might wish their audience to come to have this expectation about their relationship. But perhaps one of the reasons that moves many couples particularly powerfully is that it helps to deepen the couple’s mutual *commitment* to their relationship if they can so easily and effectively make it known to other members of their society that they have a mutual commitment of this kind.

If marriage lacked this sort of generally-understood social meaning, then the couple could not be so confident that they could achieve such communicative purposes by informing others that they were married. Suppose that I told you, “James and I are each other’s *blibble*.” Even if there is a subculture in which being someone’s *blibble* is understood as having a certain significance, if you are not a member of that subculture, I could not be confident that you would understand the significance of what I had said; and even if there is an obscure branch of the law in which being someone’s *blibble* confers certain definite obligations and benefits, if you are not a lawyer specializing in that branch of the law, I could not be confident that you would

understand the legal significance of what I had said either. So the fact that marriage has a stable and generally-understood social meaning allows for marriage to play an effective communicative role in this way.

This reveals that the law plays two crucial roles in the institution of marriage. First, as we have seen, marriage gives spouses a package of legal powers and obligations towards each other. Many of these powers and obligations could also be acquired by making contracts, wills, trusts, power-of-attorney authorizations, and the like. But the law does more than just to enforce these mutual obligations (as it also does with ordinary contracts). It specifies a certain standardized package of powers and obligations, which it attaches to a special legal relationship that has a generally-understood social meaning. As I have explained, this standardized package of powers and obligations reflects the social meaning of marriage; and where necessary, they are enforced. This reinforces society's expectations that, at least typically, the relationships of most married couples will have the features that are generally expected of typical marriages. In consequence, marriage law in effect stabilizes and reinforces this social meaning. The result is that this social meaning of marriage is understood throughout the whole of society. The social meaning of marriage is not just understood by members of a particular religious community or subculture. It is understood by practically everyone, regardless of the particular religious tradition or subculture that they adhere to; indeed, in our society, even quite young children have a basic understanding of the social meaning of marriage. In this way, the law protects marriage against the risk of its ceasing to have such a generally-understood social meaning.

If marriage were not underpinned by the law in this way, but only by social custom, it could happen, at least in highly pluralistic societies like ours, that marriage would cease to have a generally-understood social meaning of this kind. Different religious organizations and different

communities might try to reinterpret marriage in different ways. For example, some communities might allow polygamy. Some communities might allow “temporary marriages” that were intended from the very beginning to last for just a single 24-hour period. Some might allow “ghost marriages,” in which a living person marries someone who has died. Some might allow people to marry their dogs or their cars. Some might allow an institution of *unilateral* and *asymmetric* marriage, which would allow me unilaterally to marry Ryan Gosling – even though unless Ryan Gosling reciprocates by marrying me in return, then while I will be married to Ryan Gosling, Ryan Gosling will not be married to me. (Presumably, to make this institution of asymmetric marriage consistent with the liberal principle of autonomy, it would have to be the case that Ryan Gosling does not acquire any obligations towards me just because I am asymmetrically married to him.) Finally, some communities might even allow *reflexive* marriages, in which a person would be allowed to marry himself.

If it became widely known that different communities were allowing marriages of these kinds, marriage could cease to have a generally-understood social meaning. If you told someone, “I’m married,” or appeared in public visibly wearing a wedding ring, it might be harder for other members of the community to interpret what if anything you were aiming to communicate. (Are you married to someone else, or just to yourself? To a person or a car? Is the person whom you’re married to alive, and are they also married to you in return? The questions could be endless.) By underpinning marriage in the way in which it does, the law insulates marriage against the risk of its ceasing to have a generally-understood social meaning in this way.

In general, marriage has a communicative function of the sort that I have been describing only because it is *familiar* institution – an institution that we have all grown up hearing about. Presumably, marriage can only become familiar in this way if the culture of the society has

traditions surrounding marriage. Although it is crucial to marriage that it is a legal institution, it is also crucial that it is not just a legal institution, but also a social practice rooted in the society's culture.

It seems plausible that the main way in which social meaning of marriage is important is precisely that it gives marriage this communicative power. If that is right, then we can see why the exclusion of same-sex couples was never a *fundamental* aspect of the social meaning of marriage. The reason for this is simply that it is already a public fact about virtually every person in our society whether that person is a man or a woman. So, opposite-sex couples did not need to get married to communicate the fact that they were a couple consisting of a man and a woman; that was already a publicly-known fact about those two people.<sup>11</sup> Opening up marriage to same-sex couples does not fundamentally change the communicative power that marriage gives to opposite-sex couples. It is in this way that I propose to defend the two points that I relied on in my argument for same-sex marriage: first, the point that the exclusion of same-sex couples was never a fundamental part of marriage's social meaning; and secondly, the point that by allowing same-sex couples to marry, same-sex couples could have access to an institution that has fundamentally the same social meaning as marriage currently has.

So far, however, I have only explained what marriage is and what it does. I have not explained what *justifies* the institution of marriage. I shall turn to this question in the following section.

### **3. The justification of marriage**

Why is civil marriage justified? It seems clear to me that marriage is not *required* by justice: in principle, a society could be perfectly just even if it had never had the institution of

marriage. But not every way of justifying a social institution need involve showing that the institution is required by justice. In the tradition of jurisprudence that built up around the Fourteenth Amendment of the American Constitution, “justifying” a law or public policy typically involves showing only that it is “rationally related” to some “legitimate government objective”.<sup>12</sup> What is it for a government objective to count as “legitimate”? In some sense, it seems to me, a government objective is legitimate if it is in some uncontroversial way good for society as a whole. As Rousseau would put it, even if laws and social institutions are not necessary for justice, they can be justified by appeal to the “common good” or the “common interest.”<sup>13</sup> As I shall argue in this section, it seems plausible that marriage is justified because in this way it promotes the common good.

Presumably, however, nothing that is *inconsistent* with justice could be justified, even if it did promote the common good. So to argue that marriage is justified because promotes the common good, I must also argue that even though marriage is not *required* by justice, it is nonetheless *consistent* with justice.

A justification of marriage could, as it seems to me, take two forms. First, it could be a *metaphysical* justification – a justification of the sort that might be developed by a theorist, like a philosopher or a theologian – that is, a justification that explains *why* marriage promotes the common good, on the basis of a deep theory about the ultimate nature of the common good. I believe that there is a true metaphysical explanation of this kind, but it will inevitably be intensely controversial what exactly this true explanation is. Secondly, a justification of marriage could be a *political* justification – that is, the sort of justification that is offered by people engaged in ordinary political debate, such as political campaigners and activists, legislators, and legal officials. This justification would not seek to give the ultimate *explanation* of *why* marriage

promotes the common good; it would simply seek to persuade us that marriage *does* promote the common good.

It is a fascinating question what the correct *metaphysical* justification of marriage is. The account of the nature of marriage that I gave in the previous section suggests that it may be promising to look for a metaphysical justification of marriage in the ideas of Joseph Raz about the importance of “social forms” for valuable life-projects.<sup>14</sup> Perhaps more specifically, given my suggestion that marriage has a social meaning which gives it a distinctive communicative power, this metaphysical justification might invoke the ideas that one of the most ethically important elements of human life is the conversation or dialogue that human beings have with each other, and that one vital role for the law to play is in structuring and facilitating this conversation. However, I shall not focus here on the question of what the correct metaphysical justification of marriage is. I shall simply sketch a *political* justification of marriage instead.

For the purposes of such a political justification of marriage, it is sufficient, it seems to me, to argue for the following three points: (a) it is a central part of many people’s *most fundamental goals and aspirations in life* to participate in the institution of marriage, and that a legal institution of civil marriage is necessary for these people to satisfy these aspirations; (b) the existence of the institution of marriage does not in itself cause any serious harms; and (c) at least *prima facie*, marriage is consistent with justice (there is no obvious reason to think that the existence of marriage violates anyone’s rights or the like). For the purposes of the political justification of marriage that I am sketching here, I shall assume here that an institution that has these three properties promotes the common good of society as a whole, and can in that way be justified.

Does marriage have the first property (a)? It seems undeniable that a great many people in our society aspire to participate in the institution of marriage, and that this aspiration is a central part of their most fundamental goals and aspirations in life. Moreover, the account of the nature of marriage that I gave in the previous section clarifies the precise content of these life-aspirations. The content of these life-aspirations to have a legal relationship with another person that involves mutual legal powers and obligations, and a generally-understood social meaning, of the kind that I have described. It is reasonable for people who have this aspiration to wish for the social meaning of this legal relationship to be underpinned and stabilized by the law in the way that I have explained. Thus, the best way for the state to enable these people to satisfy these life-aspirations is by maintaining the legal institution of civil marriage. So we may assume that marriage does indeed have this first property (a).

What of the second property (b)? Does the existence of marriage cause any serious harms? We might wonder here about the widespread stigmatization of unmarried people as sad pathetic losers. This is a point that is stressed particularly by Chambers, who goes so far as to say that the existence of the institution of marriage perpetrates “symbolic violence” on young women, by making them think that their lives will be failures unless they get married.<sup>15</sup> (Chambers takes the paradoxical term ‘symbolic violence’ from the work of Pierre Bourdieu.)

To assess this objection, we need to be clear about what exactly this “stigmatization” consists in. One possibility is that this stigmatization merely involves the *belief* that some members of society have, that single people are sad pathetic losers. In this case, it is not clear that the liberal state should try to engage in propaganda to eradicate this belief. According to the principle of political liberalism, the state should not take sides on disputed questions about what makes for a good life; and according to the liberal principle of autonomy, the state should leave it

up to individuals to make up their own minds about such questions autonomously, without pressurizing them to adopt any particular view. In general, within a liberal framework, the state should stay neutral on the question of whether or not married life is preferable to single life. Thus, the state should not actively *promote* marriage: it the state should not produce propaganda to encourage people to get married, or to persuade people that married life as preferable to unmarried life. The most that the state may permissibly do is simply to make marriage available to those who wish to participate in it.

Alternatively, another possibility is that this stigmatization involves unjustly *discriminating* against single people, or in some other way infringing on their human or civil rights. In that case, the state should certainly aim to protect single people against such injustices. It is not clear, however, that the disestablishment of civil marriage is necessary or even particularly effective for protecting single people in this way. Even without civil marriage, some people will live together as couples, while others will be single, and the single people could still be stigmatized or discriminated against. The most effective way to protect single people would be to outlaw discrimination on the basis of marital status (as many American states – though not the U.S. federal government – already do).

Does marriage harm other non-marital relationships between individuals? It seems plausible that on balance, marriage need not be particularly harmful to what many would regard as the most of important of all human relationships – the parent-child relationship. Perhaps marriage harms non-marital caring relationships between adults? But again it is not clear that the existence of the institution of marriage itself is to blame for any harm to such adult caring relationships. Marriage could still exist even if the entitlements to third-party benefits (which we



discussed at the beginning of the previous section) were detached from marriage and made available to any demonstrable caring relationship.

We might wonder about “polyamorous” relationships – that is, amorous or sexual relationships involving three or more people. Under our current institutions, every marriage involves exactly two people, neither more nor less; our current institutions do not permit “group marriages” involving more than two people. Moreover, it seems plausible that the institution of marriage could not be reformed to allow such group marriages without profoundly changing its social meaning. So, if the state refuses to allow such group marriages, does the institution of marriage somehow harm the people who are involved in such polyamorous relationships?

In the next section, I shall turn to the question of whether the arguments that I am sketching in this section provide adequate justification for an institution of monogamous marriage that is restricted to couples, and so not available to any group of people that is larger (or smaller) than two. The question in this section is simply whether the existence of marriage actively harms such polyamorous relationships.

In fact, there is, in some quarters, considerable hostility against polyamorous relationships – and this hostility has sometimes influenced the courts, especially in child custody decisions.<sup>16</sup> But it is not clear whether the institution of marriage itself is to blame for this hostility. Marriage could still exist, in more or less its current form, even if all legal disadvantages on polyamorous relationships were removed. Even if they cannot enter into group marriages, the individuals involved in such polyamorous relationships could still be free to live together, to engage in whatever forms of consensual sexual intercourse they wish, to own property together, and to make wills and contracts with each other, and so on. As I have suggested, if they have a demonstrable caring relationship, they should also be entitled to all the

third-party benefits that are currently attached to marriage. So, even though polyamorists are indeed disadvantaged in some ways that are unjust, it is not clear that they are harmed by the institution of marriage itself.

What about the third property (c)? Does marriage violate anyone's rights? Historically, marriage has unquestionably violated people's rights. In many jurisdictions, marriage still unjustly discriminates against same-sex couples by arbitrarily excluding them from the right to marry; but as I have argued, one perfectly good way of rectifying this injustice is simply to allow same-sex couples to marry.

More seriously, marriage historically violated the rights of women: it subjected wives to the power and authority of their husbands (while encouraging the marginalization of unmarried women as low-status "spinsters" or "old maids"). It was a highly significant change in the law and social meaning of marriage when it changed from being a radically hierarchical institution, in which the wife was subordinated to her husband's authority, to being, at least in theory, a partnership of equals. This change was clearly required if marriage was ever to become compatible with justice. In general, marriage can only avoid violating the rights of women if it is combined with aggressive efforts to promote gender equality, and with an explicit repudiation of marriage's egregiously sexist past. Still, it seems possible to combine marriage with an anti-sexist regime of this kind. It is presumably for this reason that marriage itself remains strikingly popular among women – even among women who have an unquestionable commitment to combating all forms of sex discrimination and other violations of the rights of women.

What about polygamists, who wish to have more than one marriage at the same time? Why is it not a form of arbitrary and unjust discrimination for marriage to exclude married people from having more than one marriage simultaneously? A number of same-sex marriage

advocates – most notably, Calhoun (2005) – have argued that the state’s refusal to allow polygamists to have more than one marriage at a time is essentially *unfair*, in the same way as it is unfair for the state to refuse to marry same-sex couples.

However, it seems to me that it is not arbitrary for the state to refuse to allow polygamy in this way. The history of polygamy creates a reasonable ground for concern that the reintroduction of polygamy is unlikely to be able to avoid recreating the serious harms that have historically accompanied polygamy in the past. As J. S. Mill memorably argued, polygamy in his day was even worse for women than the sexist form of monogamous marriage that he campaigned against.<sup>17</sup> Unfortunately, it seems clear that in spite of decades of efforts, sexism and discrimination against women have still not yet been completely eradicated. Given the deeply sexist character of polygamy in the past, it is reasonable to fear that reintroducing polygamy might exacerbate the forms of sexism that persist. Clearly, it is an empirical question whether polygamy could be reformed in a way that provides a safeguard against these dangers, but even in advance of a thorough investigation of these empirical questions, polygamy’s troubling history makes it reasonable for us to treat these risks as a reason against allowing polygamy. So the state’s refusal to allow polygamous marriages is not as arbitrary as its refusal to allow same-sex marriages.<sup>18</sup>

There is admittedly an important difference between polygamous marriage and group or plural marriage. Even though Abraham was married both to Sarah and to Hagar, Sarah was not married to Hagar. There was not one group marriage involving all three individuals, but two marriages – one between Abraham and Sarah, and another between Abraham and Hagar. Some theorists might conjecture that group marriages could avoid some of the historical problems with polygamous marriages. It is far from clear what evidence there is in support of this conjecture,

but at all events, there is another reason for thinking that it is not unjust or arbitrary for the state to refuse to allow any group of people that has more than two members to form a marriage.

As I have argued, the exclusion of same-sex couples was never one of those aspects of the social meaning of marriage that made a big difference to what marriage meant for opposite-sex couples. By contrast, the exclusion of group marriages seems to be a significantly more important part of the social meaning of marriage. (Imagine that whenever one learnt that someone was married, one could not form any clear expectation about the number of people involved in the marriage in question; the communicative power of marriage would clearly be impaired by this change.) So it seems that it would not actually be possible for groups that have more than two members to be included in a legal or institutional relationship that had the core social meaning of marriage as we know it. Thus, the only complaint that the proponents of group marriage can make is that they would prefer if we had a *different* social institution, with a different social meaning, instead of marriage as we know it. In the next section, I shall turn to the question of what if anything could justify our society in choosing which of these two alternative social institutions to have.

As I said above, it seems to me that these three properties of marriage (a), (b), and (c), taken together, are enough to give a political justification of the institution of marriage. But some theorists might raise questions about this justification of marriage. For example, Brake has objected to my justification, suggesting that the desire to marry may not be a desire that the state has any reason to help citizens to satisfy.<sup>19</sup> In particular, she suggests, the desire to participate in a social institution that has the core social meaning of marriage is an *objectionable* preference (and in this respect, presumably, similar to a racist desire to maintain the supremacy of a certain ethnic group or the like). Her reason for taking such a dim view of this extremely common desire

is that it involves desiring that marriage should maintain its core social meaning, and so in effect involves desiring that other relationships – such as polyamorous relationships or the like – should *not* be legally recognized as marriages. In this way, she suggests, this desire reveals a kind of animus against those other relationships.

However, it is surely not true that most people who seek to marry need be motivated by any such animus towards other non-marital relationships. (Just talk to your married friends: if they are at all like my married friends, you will find that few if any of them are motivated by any such animus.) Married couples may be entirely sympathetic towards polyamorous relationships, and keen to ensure that such polyamorous groups should be entitled to all the same third-party benefits as married couples. The mere fact that such group unions are not recognized as marriages is not enough to make it the case that the wish to marry need involve any animus or hostility towards such relationships.

*Prima facie*, then, the simple justification that I have given seems to be an adequate political justification of marriage. In the next section, I shall investigate whether this justification is consistent with political liberalism.

#### **4. Is this justification of marriage consistent with political liberalism?**

As we have seen, Brake argues that the institution of civil marriage, in anything like its current form, is incompatible with political liberalism. A similar claim is defended by Tamara Metz, who argues that having a legal institution of civil marriage is equivalent to establishing a particular religion as the official religion of the state – in effect, in her view, it is establishing a particular ideal of family life as the official ideal of the state.

As I shall argue in this section, once we accept that the best political justification for the institution of marriage in something like its current form is the simple justification that I sketched in the previous section, then it will become clear that this justification of marriage is quite consistent with political liberalism. In order to argue for this, I shall have to make it clearer exactly what this principle of political liberalism amounts to.

The Rawlsian conception of political liberalism, as I understand it, has its roots in Rawls's reflections on how to accommodate Rousseau's insights into the problem of reconciling political authority with individual freedom within the context of a liberal pluralistic society. Political authority inevitably involves the state's bossing people around, telling them what to do and what not to do, and threatening the use of coercive measures to ensure compliance. How can bossing people around in this way be reconciled with the respect that is due to the dignity of free and autonomous individuals? According to Rousseau, this reconciliation is possible only if the exercise of political authority is the expression of the *general will*, the will of the whole citizenry as a united body.<sup>20</sup> But how can such a general will exist in a liberal pluralistic society, where many mutually incompatible religions and comprehensive doctrines are held by different individuals?

The solution that Rawls's political liberalism gives to this problem is to propose that even in a highly pluralistic society, we can make sense of a standpoint of *public reason*. This is a standpoint that can be shared by all reasonable citizens, regardless of the comprehensive religious or philosophical doctrines that they accept. To make this solution fully clear and precise, we would have to say a great deal more about what it is for a citizen to count as "reasonable", and also about what it means for a social institution to be "justified" from a standpoint that all such reasonable citizens can share.

For these reasons, then, the idea of public reason clearly requires much greater clarification and investigation than I can give it here. One central issue that we would have to resolve is what exactly determines which principles can be appealed to from the standpoint of public reason. Some philosophers take the approach of attempting to work out what these principles are purely in the *abstract*, simply by considering citizens as free and equal individuals who are committed to living peaceably together, without giving any attention to the actual distribution of ethical views among the population.<sup>21</sup> In my own view, this abstract interpretation of the idea of public reason is highly problematic; I am attracted to a much more *empirical* interpretation of the idea of public reason, according to which the actual distribution of ethical views among the population is part of what determines which principles can be appealed to from the standpoint of public reason.

Unfortunately, however, I cannot probe these difficult questions here. I shall just have to rely on a rather rough-and-ready intuitive sense of what can be justified from the standpoint of public reason – although as we shall see, we shall have to confront at least one of these difficult questions eventually.

According to the political justification of marriage that I sketched in the previous section, marriage is not necessary for every just society; marriage is justified simply because, in societies that had a tradition of marriage, maintaining that tradition can promote the common good. According to this justification, maintaining the institution of marriage promotes the common good simply because marriage does not clearly violate any rights or cause any serious harms, and a lot of people make it a central part of their fundamental life-aspirations to participate in the institution.

On the face of it, this political justification does not appeal to any controversial comprehensive doctrine. It is clear for example that this justification does not rely on any controversial “conjugal” ideal – such as the idea that “finding true love” with one other person is the uniquely best or happiest way of life. This justification rests only on the assumption that helping members of the community to achieve such central aspects of their fundamental life-aspirations promotes the common good.

In this way, it seems to me, marriage can be justified without appealing to any controversial view about what is good or valuable in life. Moreover, marriage also need not actively promote any such view either. The state need not seek to propagate the view that marriage is more valuable or honourable than other non-marital relationships. Indeed, as I have argued, the state should not actively promote marriage; marriage should simply be made available for those who wish to participate in it.

Could any reasonable citizens simply reject the relevance of the fact that many members of the population make it a central part of their basic life-aspirations to participate in marriage? Could a reasonable citizen insist that this fact does nothing whatever to support the claim that marriage promotes the common good? This question is hard to answer conclusively without developing a detailed interpretation of the principle of political liberalism, and an interpretation of the notion of a “reasonable citizen.” But intuitively, it does not sound reasonable to me for participants in political debate simply to brush aside the central components of their fellow citizens’ fundamental life-aspirations, at least so long as those life-aspirations do not involve imposing any serious harms on anyone else.

Of course, people’s goals and aspirations in life are, as always, moulded by their society’s particular history and traditions. This is always the case. I aspire to be a good



philosopher and scholar, but it is only in societies that have traditions of such philosophical scholarship that this aspiration could arise.

Some proponents of political liberalism – and perhaps especially the more “abstract” versions that I mentioned above – might think that in justifying social institutions and policies from the standpoint of public reason, we should disregard all facts that depend for their explanation on the particular cultural traditions and history of the society in question, as if the point of such justifications were to remake society anew, from the ground up, like revolutionaries who are setting out to build a new Utopia. This is certainly not how most participants in political debate think of what they are concerned with; they take themselves to be concerned with practical questions that arise within the context of a particular set of social and political traditions. The proponents of this sort of liberalism seem to approach political deliberations from the perspective of a sort of “revolutionary vanguard.” This “vanguardist” interpretation of the liberal principle may ground an objection to justifications that rest on historically contingent life-aspirations of this sort. But the attractions of this vanguardist version of liberalism are dubious, to say the least.

As I said, marriage is not a requirement of justice; a society could be perfectly just even if it had never had the institution of marriage at all. My justification of marriage implies only that, given that marriage has come to inform the central life-aspirations of many citizens, it is a perfectly defensible for us to maintain the institution of marriage, so long as we also ensure that it does not cause serious harms or violate any requirements of justice.

The final objection that I wish to consider focuses on the point that a significant number of people would prefer it if there were a somewhat *different* institution, instead of an institution that has the core social meaning of marriage as we know it today. In general, a great many

people are not completely happy with the social meaning of marriage as it currently exists (for example, some traditionalist Christians may think that it would be better if marriages were generally understood to be *indissoluble*). Again, let us imagine the complaint that some polyamorists might raise against my justification of marriage. These polyamorists, let us suppose, would prefer an institution that is in some ways like marriage, but in some other crucial ways quite different – since they would prefer the favoured institution to be open to polyamorous groups with more than two members. Not everyone can have the scheme of social institutions that they would most prefer. If I am right that allowing group marriages would profoundly change the social meaning of marriage, then we cannot have an institution that has *both* the social meaning that marriage currently has *and* the social meaning that these polyamorists would prefer. So how are we to choose?

One thing that no sensible version of liberalism can say is that every citizen can reasonably veto any law or social policy whenever he or she would prefer an alternative. It can often happen that the whole society unanimously agrees that they need to have a policy of kind *K*, but everyone has some objection to every particular policy of kind *K*. For example, there could be unanimous agreement that a road needs to be built between two towns, but for every possible route that the road might take, someone objects to the road's being built along that route. The only answer seems to be that in such cases we need to reach a collective decision by means of a generally-agreed democratic procedure. Presumably, in a case where there are just two policies that we have to choose between, the democratic way to make the decision will involve some kind of majoritarian procedure. Indeed, it seems that no reasonable citizen could reject resorting to a majoritarian procedure in cases of this sort: to insist on having a veto power

in such cases whenever the majority's preferences differ from one's own seems to me clearly unreasonable.

So it is at this point that it becomes relevant that marriage remains a highly popular institution, vastly more popular than any of the alternatives that marriage's radical critics have proposed. (If we had a referendum tomorrow about whether to abolish marriage, we could be confident of what the outcome would be.) Of course, this might change. If polyamory becomes much more common, people may lose interest in monogamous marriage. In that case, it might make sense to replace marriage with something else. But until then, if marriage continues to enjoy such widespread support, there seems nothing wrong in persisting with it. Since such an appeal to democratic procedures seems unavoidable in any plausible version of political liberalism, this justification of marriage seems to me to be quite consistent with political liberalism.

## **5. Conclusion**

An astute reader will have noticed that my justification of marriage implicitly endorses certain *communitarian* ideas – specifically, ideas about how established institutions which become familiar, through the existence of contingent social and cultural traditions, can enable us to achieve certain goods which are not otherwise available. (Indeed, it is hard to think of a clearer illustration of this basic communitarian insight than the institution of marriage.) At least to a modest degree, this communitarian insight is a *conservative* idea, since it implies that there are often reasons to maintain established institutions, once they have become familiar in this way – even if those institutions only came into existence for contingent historical reasons, not because they were strictly necessary for the sake of justice.

Many philosophers think that such communitarian and conservative ideas are essentially inimical to the liberal tradition in political philosophy. I disagree with this: it seems to me that these communitarian insights are entirely compatible with certain central liberal ideas. In my view, it is possible, not only to reconcile a kind of communitarianism with the liberal principle of autonomy, but also to reconcile a kind of communitarianism with the more Rawlsian kind of political liberalism, which demands that the state should be in a way neutral between contested conceptions of the good.

At the same time, this happy reconciliation of communitarianism and liberalism does require rejecting the view that the goal of political philosophy is to produce what I have called “vanguardist” justifications of social institutions. According to this vanguardist approach, political philosophy should aim to justify a particular scheme of social institutions, but without paying any attention to the particular traditions and practices of any particular society; instead, political philosophy should develop a blueprint for the ideal society purely by considering human social life in the abstract. In my view, a different conception of political philosophy is preferable.<sup>22</sup> The role of political philosophy in my view is to articulate principles that we can use to evaluate actually existing social arrangements, in all their contingent messy detail, and to compare these actual arrangements with the realistically available alternatives, in order to see which are more just, and which would better promote the common good. When we approach the questions in this way, we will see that a familiar institution like marriage can be justified in a way that is quite compatible with all plausible kinds of liberalism.

<sup>1</sup> This paper started out as a series of comments delivered at a session on marriage at the 2013 meeting of the Western Political Science Association in Hollywood, and at a book symposium on Elizabeth Brake's *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012) at the 2014 Pacific Division Meeting of the American Philosophical Association in San Diego. More recently, in February 2015, it was presented at the Legal Theory workshop at the Law School of UCLA. I am grateful to the members of all those audiences for very helpful comments.

<sup>2</sup> See Brake, *Minimizing Marriage*; Cheshire Calhoun, "Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy", *San Diego Law Review* 42 (2005): 1023-1042; Clare Chambers, "The Marriage-Free State", *Proceedings of the Aristotelian Society* 113 (2013), no. 2: 123-143; and Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for Their Divorce* (Princeton, NJ: Princeton University Press, 2010).

<sup>3</sup> See Brake, *Minimizing Marriage*, p. 167.

<sup>4</sup> See Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), and "The Idea of Public Reason Revisited", *University of Chicago Law Review* 64 (1997), no. 3: 765-807.

<sup>5</sup> See Brake, *Minimizing Marriage*, p. 170.

<sup>6</sup> For an early statement of this point, see Joshua Cohen, "Deliberation and Democratic Legitimacy," in Alan Hamlin and Philip Pettit, ed., *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell, 1989), 17–34, p. 27.

<sup>7</sup> See my paper "The Fundamental Argument for Same-Sex Marriage", *Journal of Political Philosophy* 7 (1999): 225-242.

<sup>8</sup> See Brake, *Minimizing Marriage*, p. 170.

<sup>9</sup> One might wonder whether this social meaning should be understood as involving not just *expectations* and *common knowledge*, but also *norms* – in something like the sense that has been defined by Philip Pettit, "Virtus normativa : Rational choice perspectives", *Ethics* 100, no. 4 (1990): 725-755. However, I am not sure that it is necessary to include norms as part of the social meaning in this way. The main social norms surrounding marriage seem to be derivative from more general social norms. For example, we generally disapprove of those who break promises and cheat, and this seems to underlie our social norms against marital infidelity; and I speculate that a similar account could be given of the other social norms surrounding marriage. So it seems more plausible to me to suppose that the fundamental elements of the social meaning of marriage consist simply of expectations and common knowledge as I have suggested.

<sup>10</sup> So it was a serious misinterpretation of my argument for Brake's *Minimizing Marriage*, p. 142, to represent me as having described these three features as "criteria."

<sup>11</sup> My best statement of this point was probably in my blog post on the *New York Times* web site, "The Meaning of Same-Sex Marriage," *The New York Times*, Opinionator, May 24, 2012  
<<http://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality/>>

<sup>12</sup> For a helpful discussion of the Fourteenth Amendment, see Ronald Dworkin, "Sex, Death, and the Courts", *New York Review of Books* 43, no. 13 (August 8, 1996).

<sup>13</sup> See Rousseau, *The Social Contract*, Book II, Chap. 1, ¶1. Contemporary liberal political theory has an almost obsessive focus on *rights* and *justice* – see for example Jonathan Quong, *Liberalism without Perfection* (Oxford: Clarendon Press, 2011), p. 1. But it does not seem plausible to me that everything that the legal institutions of a society may permissibly do must promote justice, strictly speaking. Economic prosperity and public health are surely legitimate government objectives, but it is not clear that citizens have a *right* to most prosperous possible society, or to the healthiest possible environment; it seems more plausible to me that economic prosperity and public health are legitimate government objectives because they promote the common good.

<sup>14</sup> See Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988), pp. 307-13.

<sup>15</sup> See Chambers, "The Marriage-Free State", p. 126.

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<sup>16</sup> I owe this point to the response that Elizabeth Brake made to my comments on her book at the 2014 Pacific Division Meeting of the American Philosophical Association.

<sup>17</sup> See Mill, *On Liberty*, chap. 4, ¶21: “far from being in any way countenanced by the principle of liberty, [polygamy] is a direct infraction of that principle, being a mere riveting of the chains of one-half of the community, and an emancipation of the other from reciprocity of obligation towards them.”

<sup>18</sup> For some more pertinent comments on polygamy, see Samuel Rickless, “Same-Sex Marriage and Polygamy: A Response to Calhoun,” *San Diego Law Review* 42 (2005): 1043-1048; for a full-length discussion, see John Witte, Jr., *The Western Case for Monogamy over Polygamy* (Cambridge: Cambridge University Press, 2015).

<sup>19</sup> See Brake, *Minimizing Marriage*, p. 173.

<sup>20</sup> See Rousseau, *The Social Contract*, Book I, chap. 6, ¶9.

<sup>21</sup> For an example of a philosopher who seems to take this approach, see Quong, *Liberalism without Perfection*, p. 261.

<sup>22</sup> This point is connected with my criticisms of “ideal theory”; see my blog post “Against Ideal Theory,” *PEA Soup*, 3 May 2014 <<http://peasoup.typepad.com/peasoup/2014/05/against-ideal-theory.html>>