

# **The Liberal Neutrality, Marriage, and Non-Monogamous Marriage**

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Abstract: The paper discusses the relationship between the liberal ideal of state neutrality and the status of marriage law in a liberal democracy. It seeks to explore whether the special status that marriage as a particular form of human relationship enjoys is justified. Taking neutrality as an ideal rather than a restraint, the assumption is that neutrality requires that marriage's special status should be questioned if no good reason is provided to justify it. It looks at mainly two features of marriage: the amorous assumption and the monogamous limit. It first challenges these features as potentially non-neutral. Basing the marriage law on amorous assumptions is essentially promoting one kind of life. After looking at some of the reasons offered in defense of promoting marriage, it argues that even the best reason, that which concerns the wellbeing of children, is not decisively enough to justify the current legal status of marriage. Similarly, the promotion of monogamy does not seem to be justified sufficiently by the reasons offered in its defense. Some of the criticisms of polygamy may require further considerations. However, even if those criticisms are sufficient, the paper proposes that we do not view polygamy as simply one thing. Instead, we should identify different structures of relationships (along with monogamy). This requires us to have a more general objection to all polygamous structures (both amorous and non-amorous) in order to fully reject polygamy.

## Table of Contents

<b>Introduction .....</b>	<b>1</b>
<b>The liberal state and neutrality .....</b>	<b>3</b>
The liberal neutral state .....	3
Neutrality as an ideal.....	10
<b>What state neutrality implies for the institution of marriage? .....</b>	<b>15</b>
Marriage as a comprehensive conception of good .....	17
Defense of marriage (as an amorous, committed relationship).....	23
An alternative for defenders of marriage .....	32
<b>Neutral state and polygamy .....</b>	<b>36</b>
Monogamy is insufficient .....	37
Does the state have a point in rejecting polygamy? .....	40
<b>Conclusion .....</b>	<b>48</b>
<b>References.....</b>	<b>50</b>

## Introduction

This paper tries to explore some issues about marriage and polygamy in the context of a liberal state. Given that a relatively large amount of debate centers around the United States, this paper may as a result be seen as joining a somewhat American debate. It does not mean, however, that the ideas regarding liberalism and marriage should not apply to other countries as well. It discusses the liberal principle of state neutrality and its role in the debate about marriage and polygamy. It agrees with some critics of marriage that, in the liberal state, the promotion of marriage, as it currently is legally defined, is potentially unjust. It will in particular attack two features about marriage: the amorous assumption, and the limit of number of people in a marriage of two.

First of all, it challenges the current amorous assumption of marriage law as not neutral. Some liberal thinkers believe that the state should stay neutral as to its citizens' conception of a good life. This means that the state should not discourage or promote certain ways of life based on any comprehensive conception of what is a good life. It suggests that there is not a standard way of living one's life in a community, whether the majority of people in that community practices certain way of life. In this sense, each individual is free to consider what kind of life she wants to pursue as long as the life is compatible with justice.

One of the recent uses of neutrality is by Elizabeth Brake to attack the state promotion of marriage. Marriage, Brake argues, is endorsed by the state in the US, endorsement could be seen as a violation of state neutrality. To respect neutrality and treat different conceptions of life more fairly, Brake proposes a 'minimized marriage' law (Brake, 2012). Defenders of marriage, on the other hand, argues that the social meaning of marriage need to be protected.

Another controversial issue is the legalization of polygamy. Unlike monogamy, which binds two individuals who are expected to be in a romantic, intimate, and economic union,

polygamy sees the involvement of more than two people in one (or more) marriage. The Western world is predominantly monogamous, both socially and legally. However, we should not take this to be the result of completely voluntary decisions. After all, both the society and the state have arguably taught people to endorse monogamy.

Yet arguments have been made against the legal recognition of polygamous marriages for various reasons. For example, Stephen Macedo points out that polygamous marriages are almost seen solely in the form of polygyny, which is the case of one husband marrying several wives. Polygyny is, firstly, non-egalitarian; secondly, it often results in the wives and children lacking care and resources (Macedo, 2015).

Although Macedo, among other defenders of monogamy, makes several arguments against the legal recognition of polygamous marriages, he does not reject the state neutrality principle. This urges us to consider circumstances that do not fit Macedo's arguments. For example, if polygamy, mostly seen in the form of polygyny, is statistically known to be bad for the wives and children involved and are against principles of equality and distributive justice, none of these seems to apply to same-sex polygamy or polyandry. Why, then, should we reject polygamy altogether? We should also ask whether non-legalization is the desired way to discourage polygamy (or some form of it) if we are to discourage it. It is unclear whether defenders of monogamy have in mind an appropriate treatment of polygamy after weighing and balancing conflicting reasons, or are simply defending the promotion of monogamy.

## The liberal state and neutrality

Individuals have sexual freedom and freedom of association. The state should not criminalize people for marrying or cohabitating with more than one sexual partners. We are still, however, left with the question posed by the liberal principle of state neutrality. After all, the current institution of marriage should not be taken for granted. Marriage is an important issue for most people in a society, and it seems some justification should be given as to why the state recognizes and regulates marriage in a particular manner. One can question whether amorous, monogamous marriage is the only morally right kind of personal relationship one can have, and if individuals may reasonably wish to lead different lives. Having done so, we can further critique the role the state plays in affecting people's life with the help of the neutrality principle.

### The liberal neutral state

Some liberal thinkers argue that the state should remain neutral in treating individual citizens' conceptions of what a good life is. This means that the state should not adopt policies that will tell people what is good, but instead allow individuals to freely decide what ways of life they want to pursue and question and replace their choices. One core premise of this is the conception of rational revisability. This idea states that individuals can always evaluate and rank different conceptions of life and decide for themselves which ones are worth pursuing. The state should stay away and let its citizens lead their own lives as they see fit as long as these lives are compatible with justice.

While there is no doubt that many individuals make poor decisions in their life, and sometimes it may seem that they would be made better off if someone steps in and makes the decision for them, there can be problems to this arrangement. The state, or the majority which has the power to legislate, can also be mistaken in choosing the conception of good. Even if

the conception of the majority is one that is worth living, it does not mean that the choice by the minority is not. In this case, there is the danger of imposing the opinion of the majority on the minority. Joel Feinberg, writing about legal paternalism, argues that people have a “spontaneous repugnance toward paternalism,” which he assumes to be well-grounded and supportable (Feinberg, 1971).

Some authors have also pointed out that the value of a life can depend on whether it is thought worth living by the very person who lives it—whether the conception of good life is endorsed by the person (Dworkin, 1989). Going to the church every week is can be valuable for religious people. It would be almost meaningless for a non-religious person to attend church services regularly. Promoting a conception of good life that many do not endorse neglects their interests and risks putting them in an unfavorable position.

The conclusion given by some liberals is that the state should stay neutral to different conceptions of good life. Rawls explains his neutrality principle with the ideas of the priority of right and good as complementary to the right. He suggests that political liberalism only allows the conceptions that do not violate the principle of liberty. Also, he allows some all-purpose means to be promoted, such as money and education, as such resources can be used by all to pursue their own good life. In total, Rawls states that his political liberalism allows five types of conceptions of good to serve as complimentary to the rights: (1) the idea of goodness as rationality; (2) the idea of primary goods; (3) the idea of permissible comprehensive conceptions of the good; (4) the idea of the political virtues; and (5) the idea of the good of a well-ordered (political) society (Rawls, 1988).

Comprehensive conceptions are those that tell people what is valuable and ideal for life and character and guide people’s nonpolitical conduct (Rawls, 1988). Permissible comprehensive conceptions are comprehensive conceptions that respect the principles of justice. For example, marriage is permitted as long as the notion of marriage does not violet

the principles of justice. An idea of marriage that requires the wife to become a subject of the husband, on the other hand, is not permitted, as it violates the liberty of the wife.

However, many have criticized the idea of state neutrality. Some writers, together labeled the communitarian school, argue that liberalism is too individualistic and neglects the importance of community. Instead of stepping away and letting individuals freely lead their lives, they argue, promoting a common good is the better alternative after taking into the account the individual dependence on community. Moreover, neutrality also faces serious challenges from liberal theorists.

Michael Sandel challenges the idea that individuals are free to revise all conceptions of good freely. He argues that the liberal revisability requires that individuals can view the self from a distance and find out what is good. Viewing the self from a distance, Sandel argues, is impossible in many cases, as for many the self is an “encumbered” one. He argues that it is wrong to view the self as prior to the ends. Rather, he writes, the self should be seen as constituted by individuals’ ends. Thus, Sandel states, individuals achieve good life by fulfilling the parts we are given that constitute the ends (Sandel, 1984).

Sandel’s opinion is plausible in that we cannot assume that all individuals are completely free to revise all of their conceptions of good. It might be a more important issue when it concerns some ethnic-religious communities. Some communities can be considered as illiberal, having their own traditions, norms, and rules, but it seems problematic to impose liberal rules on them (Kymlicka, 1992). Members of such communities may indeed have no intention in questioning and revising their conceptions of good, but rather wish to live their life pursuing what their position in the community asks them to do. Their life is meaningful when they live as a member of this illiberal community. In such a sense, imposing liberal rules in the name of liberty is problematic.



However, even if we are to accept that revisability does not apply to every individual does not require us to give up the notion of revisability. Many people do revise or change their conceptions, and they should be free to do so. Neutrality enables individual to choose and revise their conceptions within the framework of political liberalism freely. Further, Kymlicka points out that liberals need not completely reject that the self is constituted by the ends. What should be supposed by liberals, and is admitted by Sandel, is that individuals can evaluate and change the ends (Kymlicka). This is compatible with political liberalism and successfully defends the liberal premise of revisability.

Charles Taylor argues that many primacy of rights theories are flawed because of the problematic premise they are based on. The premise, which Taylor calls the atomic thesis, suggests that individuals do not need the community to guarantee their capacity to pursue their goals. According to Taylor, the primacy of rights is often derived from social contract theories. These theories generally imagine a condition that is pre-law and pre-political, where self-sufficient free individuals come together to form a political community, giving up some freedom. Taylor argues that this kind of social contract theories implies that individuals can actually afford to be outside of these political communities and survive mostly alone. By giving up some freedom making the contract with a government, these individuals are guaranteed that certain rights of theirs will be protected and not violated by the government. Taylor argues that this premise is problematic and should not be one which political theories are derived from. In contrast, he proposes that the social thesis, which supposes individuals' capacity to pursue their preferences is dependent on the context and the society they live in, is closer to reality (Taylor, 1979).

Again, supporters of neutrality need not adopt the atomist thesis. Acknowledging dependency of individuals on a community still leaves room for the value of autonomy. The communitarian proposal of the common good is problematic. Dworkin argues that the

primacy of community in a liberal community concerns only the formal structure of the community's political actions. In countries like the US, the community does not have a collective sex life. It seems wrong to equal the majority of people's choice of life with the collective life (Dworkin).

Johan Tralau attacks the neutrality principle by discussing its implications on the prohibition of incest. He argues that neutrality does not prohibit incestuous sex and procreation, as it does not rate incest as intrinsically undesirable. Liberals, according to Tralau, can still prohibit incest on three grounds. First, allowing incest may harm the population as a whole. For example, widely practiced incest in the society could result in genetic impoverishment. He rejects this argument, because empirical evidence makes us believe that incest will not happen in a large scale even if it is decriminalized. The second argument is that incestuous relationships could result in the harm of the offspring. Tralau rejects the argument as it causes inconsistency with the intuition that parents with inheritable genetic defects, such as Huntington's disease, should not be forbidden from having children. Third, incest could be prohibited because the offspring will likely be stigmatized by the society, which is a harm to the self-respect, another primary good, as a result of the social norms in many societies. Again, Tralau rejects this argument for the inconsistency it can cause. He argues that children of inter-caste marriages in India also face stigmatization, yet it is certainly wrong to prohibit inter-caste marriage simply because there is the social norm against it that can cause stigmatization. He concludes that the implications of neutrality principle will be radical, and even revolutionary, and will be incompatible with the intuition of a lot of people (Tralau, 2013).

However, it seems to me that the neutrality principle is not to be seen as the sole principle that policies should consult with. The purpose of the principle is to make sure that the state does not arbitrarily promote a certain comprehensive conception of good or take a

position which supposes some comprehensive conceptions are superior than others. Surely we are not prohibiting incest only because it contradicts most people's most people's intuition? Otherwise we may have grounds for criminalizing homosexual relationships, adultery and some other activities in many places. The policies will also have to pass the test of other principles, such as the principle of harm to others. In my opinion, the neutrality would have served its purpose in the case of incest: it does not view incestuous relationship between two consenting adults as inherently inferior to other types of relationships and hence discourage it.

The ground of prohibiting incestuous relationship can be, as Tralau suggests, based on the harm to others principle. It is in my opinion that the same principle also carries some weight in the case of couples with Huntington's disease. However, we may think that couples with Huntington's disease deserve to have sexual and reproductive freedom, and the bad of prohibition trumps the consideration for the harm of the children, while the life of the children will still be of some value despite in less amount.

In the case of incest, on the other hand, we may have made the assumption that people who engage in incest have a choice. That is, they could have engaged in a "healthy" relationship, which will likely produce healthy offspring, but instead they chose to engage in a risky relationship. It now involves a question of desert: couples of Huntington's disease may be considered to deserve the chance to have children, while incestuous couples may not have such a claim. Even though incest may be a rare case, we may still have strong feelings against people who put their children at severe risk because of their life choices. This feeling is consistent with considerations to take children away from parents whose lives are clearly very harmful to the children.

To help this argument, we can imagine a case of a disease similar to Huntington's disease, except that it is quite easily curable. In this case, it would be more acceptable for the

state to discourage the couple from reproducing until the disease is cured. It is justified to make people's life with an easily curable genetic disease harder out of concerns for the interests of children. If the harm principle is well justified against incestuous relationship, it is well justified to make incestuous life harder. However, neutrality is still important in that it checks for arbitrary unfairness of accommodation. If the curable genetic disease is a result of voluntary choice as much as incest is, and the risks on children exactly the same, neutrality requires the state to treat sexual relationship of a patient of the disease and incestuous relationship equally.

The desert argument against incest still requires that incestuous inclination is a result of choice rather than factors individuals do not have control over. If incestuous inclination is not a matter of choice, and cannot be "cured," it seems to me that the treatment of incestuous couples should be consistent with that of couples with Huntington's disease. The state still has reasons to prohibit procreation in such cases, but those reasons should be weighed against the rights and liberty of those people. On the other hand, the state should have an interest in the procreation of every child, regardless of the parents. Parents should consider the resources available for the children to be sufficiently raised. Any birth that significantly risks the wellbeing of the kid is potentially unjust, and the state should have an interest in it. This example, I believe, shows how neutrality is to be what Alan Patten describes: a weighty but defeasible value instead of an "upstream value". (Patten, 2012).

This leads us to the defense of neutrality as an ideal instead of a strict constraint on state policies. An important disagreement over neutrality is found among the liberals. Many liberals have criticized neutrality. Such criticisms include, but are not limited to, those regarding the feasibility as well as the desirability of neutrality. However, even if one can remain skeptical about either the feasibility or desirability of state neutrality, it does not mean that it has to be completely abandoned. Both Balint and Patten propose neutrality in a weaker

sense. This means that the power of neutrality constraint is not absolute, but rather an ideal, or a weighty factor to be accounted of (Patten; Balint, 2015). Neutrality is still desirable for especially the protection of minorities. This leaves the question of how neutrality should be approached. It might be a good idea to make some clarifications about how neutrality should be treated as an ideal.

### Neutrality as an ideal

Balint argues that “it is neutrality that brings about fair and equal accommodation of difference,” and hence “a commitment to fair and equal accommodation is a commitment to a principle of neutrality (Balint).” Patten also points out that one reason for the state to stay neutral, apart from that individuals should be left to lead their life as they see fit, is the importance of providing “fair opportunity for self-determination (Patten).” Since liberals value fairness and equality, as well as autonomy, they have an interest in the state being neutral at least to some extent.

If neutrality is seen as an ideal, we must treat neutrality differently than how it was originally proposed to be treated. It is no longer that the state should not produce any law that violates neutrality. Rather, the state should always take neutrality into consideration, and weigh it against all other costs and benefits. The state does not seem very neutral for taxing cigarette, in that it makes it harder for smokers to choose a life smoking. However, it also has good reasons to tax cigarette. For one, it promotes health, which can be seen as a primary good. Also, smoking increases the burden on health care system, and it seems fair that smokers should contribute more because they are likely to take up more resources because of their voluntary life choices.

Taxing cigarette is an example of the state treating neutrality as an ideal. The state can seek to make the best decision while respecting neutrality. The role of neutrality is important because neutrality makes sure that the state does not tax smokers more than they should pay.

In other words, the state is justified to make the life of smokers harder only to an extent required by good reason, and neutrality prevents the state to go beyond this and cause further unfairness and discouragement. It also urges us to question whether any position taken by the state is sufficiently justified, as we must keep weighing opposing reasons.

Another necessary feature of neutrality is that it should be able to cope with changes in the society. Balint suggests that neutrality should be a range concept. This means that it should take into account the “changing nature of the range of ways of life over time,” which requires that the checking and balancing of neutrality should be “ongoing rather than one-off (Balint).” The advantage of this is that policies and laws which originally seemed neutral can be revised or abandoned when they are later considered non-neutral.

One of the most discussed issues about neutrality is the question of neutrality of what. Some authors have pointed out the impracticality of neutrality of effect (Rawls, 1988; Arneson). Neutrality of effect requires that the state policies do not make some conceptions of good more or less popular. An objection may also be added that there is no reason to believe that the current popularity of any conception means anything to justice. Conceptions and practices are allowed to gain or lose adherents, or even to die out. Neutrality does not assume that all comprehensive conceptions of good are equally valuable, or valuable at all.

Proponents of neutrality, instead, mostly focus on neutrality on the side of state input. Neutrality of justification, another type of neutrality often discussed, means that the state should not justify any policy with reasons that some comprehensive conceptions are more valuable than others (Rawls, 1993). The problem with neutrality of justification is that a policy that is neutrally justified can in effect promote or discourage certain conceptions. For example, the state may introduce a policy that favors one religion with the justification that establishing one religion will promote some common good (Arneson; Patten).

Rawls adopts the neutrality of aim, which requires that the state “does not do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it (Rawls, 1993).” This, however, as Balint points out, can be insufficient because despite the neutral aim or intention when the policy is introduced, society can change (Balint).

The neutrality that Patten and Balint suggest is something that requires that the state equally accommodates competing conceptions of good. It might be the same as one interpretation of neutrality of intention. The difference is that this principle neutrality does not forbid, but is weighed against other considerations. Moreover, equal accommodation requires that the check for neutrality is on-going.

This paper adopts neutrality in this form. As an ideal, it is another name for the goal of the state to be fair and autonomy respecting. We can evaluate policies based on whether they arbitrarily make some conceptions of life more appealing without any good reason.

Another question is how the state should approach neutrality. Patten mentions three ways: privatization, generic entanglement, and evenhandedness (Patten). Similarly, Balint distinguishes between a hand-on and a hand-off approach (Balint). The main concern is whether the state, while aiming to treat different conceptions of good with fair accommodation, should play an active role in monitoring neutrality, or try to stay away from interference.

For example, the hands-on approach means that the state recognizes different important conceptions of good and accommodate them neutrally. Balint argues that the state in a hands-on mode of neutrality can never take care of every aspect of the society (Balint). This means that it is impossible for the state to make sure all conceptions of good receive equal treatment when it is actively trying to provide such treatments. Further, hands-on approach is inevitably not neutral between conceptions of good that are recognized and those

that are not, or does not exist yet. This means that it is not so compatible with individual revisibility.

Balint favors the hands-off option, which requires that the state plays the minimal role by providing the most basic provisions which can accommodate all conceptions. For example, in the case of marriage, the state can simply provide a law that allows people to enter all types of contractual relationships that respect justice. The details of such relationships will be up to the contract. This minimal regulation means that the state limit individual choices out of concerns for justice, while beyond this point the individual is free to lead her life as she sees fit.

Sometimes, however, it is simply impossible to be really hands-off. Language, for example, cannot be dealt with through a hands-off approach. A hands-on approach must be adopted. A government document for the public to get information should take into consideration what languages are spoken by some of the important ethnic groups. It is inefficient to add Japanese on top of the list of languages public documents must be in if there are less than 10 Japanese speakers in the country. Plus, it is not desirable to include Latin in the list in case that one day a group of people may convert to Latin speakers.

Fortunately, this defect of the hands-off approach is partly treated by neutrality as an ongoing check. If Japanese speakers does one day become a significant part of the population, or if there emerges a group of Latin speakers, the state can respond to their needs.

However, even with the aid of the ongoing check of neutrality, it may still be questionable whether the hands-on approach is as good as the hands-off approach in the case of marriage. First, unlike language, which is shared and an instrument for communication, individual marriages need not resemble conceptions held by any social or cultural group in order to be valuable. Second, unlike converting to a new language, it is assumed that



individuals may actually rationally revise the conceptions of marriage they know. For the two reasons, a minimal approach may be more desirable in the case of marriage.

Adopting neutrality as an ideal allows us to question whether current legal institutions are arbitrarily promoting some conceptions of good life. It provides a means for us to justify institutions that can accommodate a wide range of conceptions fairly.

## What state neutrality implies for the institution of marriage?

In the liberal state, a person's understanding of relationships is a matter of her own conception of good life. She may want to marry in the commonsensical sense. Or, she may have a different plan for her life. If neutrality is accepted as an ideal, the state should seek to do nothing to encourage her to engage in certain kinds of relationship than others unless some other considerations of justice outweigh neutrality. This understanding of the state neutrality principle has some implications on the laws concerning marriages.

One implication of neutrality is that the state, in dealing with comprehensive conceptions regarding things such as marriage and other relationships, should introduce policies that would respect individuals' self-determination and fair opportunity to pursue their goals. In addition, existing laws should be under constant scrutiny and be revised if they are revealed to be non-neutral.

To argue that the promotion of marriage conflicts with neutrality, it should be shown that marriage presupposes a comprehensive conception of good. It is not a primary good, which the state has an interest in promoting. There are other comprehensive conceptions of good that might have the same claim as marriage does, so that those should enjoy the same treatment as marriage. To show that, it seems sufficient to show that reasonable citizens may deliberate to engage in relationship that is different from how we normally understand marriage. These relationships must also be compatible with justice. It is, thus, not right for the state to arbitrarily promote marriage. Further, it will make an even stronger case if these other relationships can promote primary good just as marriage does.

Before discussing why marriage is a comprehensive conception of good, it might be worth stating why this question is important. After all, western societies seem to be doing

generally fine with marriage and monogamy. People who do not wish to marry can simply choose not to, while civil union is also an option in many countries, although in some places (the UK, for example) civil union seems to be reserved for homosexual couples. Monogamy also seems to have received limited challenge. In other words, there seems to be not much harm, at this point, to keep the special status of marriage.

The importance to question status of marriage is because of the belief that in recognizing marriage, the state plays a role in promoting marriage. Norms about marriage can act as an oppressive force. At the very least, they play a very important role in shaping people's lives. While the major source of pressure, which can also be a source of injustice, stems from the society, it is not right for the state to enhance this. To normalize marriage and only marriage is to give individuals few option. In other words, the society may assume, justly or unjustly, that marriage is the only right conception of life. It is definitely not right for the state to assume so along with the society.

The effects of pressure on individuals to marry is not only strong in the liberal world, but in many illiberal countries worldwide (which the pressure to marry can be arguably much more harmful). One reason for a more neutral version of marriage law is that it can influence the opinion of many who do not live in a liberal country as well as those who do. If one country's legalization of same-sex marriage starts a trend in the world, so might a neutral marriage law have positive influences beyond a single country's border.

The question regarding monogamous, amorous marriage is important mainly for two reasons. First, in pursuit of autonomy, the state should allow its citizens to explore more justice compatible options. Secondly, fairness provides a reason for the state to make sure that its citizens, no matter how small in number, should have a fair opportunity to live their life as they see fit. Since autonomy and fairness can be approached through neutrality, we can look at the current institution of marriage from the perspective of neutrality.

## Marriage as a comprehensive conception of good

Marriage is a right according to the Universal Declaration of Human Rights. It might be seen by many as one of the ultimate ends in life. It may be safe to say almost all human beings need to be emotionally connected to other human beings. Further, many view an intimate relationship as distinctively valuable. It seems right to include the right to form relationship as a fundamental right among others such as the right to have access to food and health care. Many would also say that marriage should be a legal institution, so that the relationship is supported and regulated by the state.

However, one question emerges here: how is it that only marriage, which assumes some very specific features, a legally recognized relationship, while others are not? Can it serve the entire population equally well? The answer probably is: it cannot. There are two problems with the existing marriage law. The first is that the current marriage law is only compatible with some conceptions of life. The second is that the state's legalization of marriage promotes marriage itself by helping to normalize the strong expectation for every person to marry, resulting in injustice such as the oppression of women and people who might have opted not to marry had there not been such strong norms for marriage.

The marriage as defined by the current law should be seen as a comprehensive conception of good. It is a comprehensive conception because it presupposes that an individual would view a life which is shared exclusively with a romantic partner as one that is valuable. Some conceptions even believe that romantic relationship, which ultimately becomes marriage, is necessary for a valuable life. Brake uses the word “amatonormativity” to describe this dominant idea in society which is also manifested in the law. Marriage law that endorses amatonormativity seems to be too narrow a definition to be supposed a universally desired and prioritized model of human relationship.

It is, it seems, impossible that this conception receives the endorsement of every person. It cannot serve many other comprehensive conceptions about relationship which respect justice. For example, some may envision a marriage-like relationship that is not amorous, because they do not feel romantic love at all, but can enjoy a life shared with a friend. Or, some may want to marry, but not commit exclusively to their spouses, or commit their whole life to the marriage, believing that a lifelong commitment to one person is not one worth living. While these are possible to achieve through the institution of marriage, it nevertheless conflicts with the assumption of the law, and can result in misunderstanding. With the help of social norms, it may in effect discourage people from choosing relationships other than one that is compatible with a comprehensive conception of marriage.

Brake argues that amatonormativity is a source of oppression in the society. This source of oppression seems to have an especially strong effect on women, as many are told that their most important sources of happiness are the relationships with their partner and the family. It can also be argued that men and women alike, nevertheless, are heavily influenced by such norms and treats marriage as one of the most essential goals in their lives (Brake). A person who enjoys and wants solitude may be under amatonormative pressure to marry. Moreover, a person who does not like solitude, but does not feel romantic love for any person (or simply prefer living with a friend far more than with a romantic partner), may be under pressure to choose marriage over an arrangement she likes less.

Given the dominance of such norms, some may argue that the law is just serving the need of the society. It might be argued that the law is neutral in justification: since marriage has been considered such an important good by almost the entire society, and is a right of every citizen, the state introduced the law to serve all citizens. This is not enough. There are two problems with this argument. First, despite the dominance of amatonormative norms, not every citizen subscribes to them. Thus, the law does not serve all people. It serves a portion

of it, albeit a large portion. It does not seem that because lots of people want marriage, it deserves promotion.

Secondly, by recognizing only the traditional form of marriage, the state plays a significant role in discouraging citizens to experiment with different ways of life. We are not sure that every citizen, when allowed to fully “step back” and evaluate her options, would always choose to share a life with some romantic partners but not friends, or not to share a life with anyone at all. Individuals should be allowed to design their pattern of life, including the way their relationships are arranged, freely within the limit of justice.

Some may object by saying that marriage, or some form of committed romantic relationship, is valued by the majority of human beings, regardless of country or culture. This might be true, for we may expect to see more criticism of marriage if the majority of people do not see romantic relationship as more important. However, satisfying people’s need to commit to a romantic relationship does not mean the state has to go as far as promoting marriage. After all, promoting a conception of good because almost all people seem to think it is superior is still an example of non-neutral state. By legally recognizing personal relationships that are more diverse than simply marriage, the state allows people to voluntarily choose marriage while respecting neutrality. Even if it turns out to be an empirical truth that human beings will most likely still prefer committed, romantic relationship, it does not seem to warrant an arrangement that legalizes only such a relationship. The fact that some people may prefer a non-romantic life partner (even if they think that a good marriage is intrinsically the best way of life) is good reason for us to consider protecting their fair opportunity to lead the life they want.

To further illustrate how reasonable citizens may choose a different relationship than marriage, consider two close friends who enjoy sharing a life together, and decide to enter a marriage-like contract which would allow them to claim some of the spousal benefits (maybe

even enhance their relationship just through the legal recognition of their relationship). They continue to date their respective romantic partners, but these relationships have not been as committed as the one between themselves. They mutually agree that (if polygamy is not allowed, which I think is unjust) if they become fonder of their respective lovers, they will divorce and marry their lovers. However, if they maintain the strongest bond between themselves until they die, this relationship will last until that day. Of course, things may not always turn out ideally: one of them may have a great lover and the other does not, creating a dilemma (which, again, could be avoided if polygamy is legal). However, we can still conceive of reasonable citizens choosing this way of life knowing about such risks, as risks are present in all kinds of lives. This, I think, is a good reason in favor of accepting personal relationships which are not amorous or highly committed as legitimate claimants for legal recognition.

What is also important is that the two people in the story could lead a good life if they choose to marry their respective romantic partners. They may endorse comprehensive conceptions which suppose that marriage is valuable. However, they do not endorse conceptions which suppose that marriage is the only valuable relationship, or that a life in which one is married is the only one worth living. The special status that marriage enjoys today may reflect such amatonormative norms to an extent and tends to enhance them.

The merit of treating marriage neutrally may not be limited to fairly accommodation of people who may have different conceptions. Those who prefer marriage can also benefit from the information provided by a diverse society. John Stuart Mill, in his *On Liberty*, argues that individuals should be allowed to freely experiment with their life, provided that it does not harm others (Mill). How can married people be certain that marriage is the only thing worth trying in their life? That they did not choose to be married for all their life simply because the kind of life is never questioned? For some of those who nevertheless choose

marriage over other options for their whole life, the availability of alternatives may be afford more confidence in the statement that these people chose voluntarily.

Neutrality of marriage is mostly compatible with the liberal value of autonomy, which requires that different options be available for individuals to freely choose from. Neutrality of marriage, at least at the legal level, allows citizens to have different options presented equally in front of them. This, some proponents of autonomy perfectionism may agree, is a scenario of greater individual autonomy.

When marriage is the norm, individuals face some pressure to get marry. This may arguably be seen as a potential threat to individual autonomy. For ethnocultural minorities or certain immigrant groups, some theorists have proposed minority rights in order to protect the liberty of individuals of these minority groups from dominant social norms (Kymlicka). One reason for such protection is that the autonomy of individuals who are the minorities can be threatened by the dominant norm. This applies to not only ethnocultural minorities, but also African Americans and gays. Further, I believe, it applies to asexual people, or people who are of the majority background, but wish to revise their conceptions of life. According to liberalism, any autonomous individual in the liberal state should be allowed to revise and change her conception of life. It follows, then, that to ensure that those individuals truly enjoys the fair opportunity to be autonomous, the state should not promote a single conception of good and discourage all others.

To reform the legal institution of marriage, Brake argues that marriage should be minimized. She argues that care relationships such as that between friends, or care networks of more than two people, should be legally recognized, and enjoy some of the rights and privileges traditional marriage has (Brake). This, I believe, is a step toward neutrality and justice. It makes the state more neutral to different conceptions of good life. It also provides, through law, reasonable alternatives to citizens who are open to consider different options.



Unlike some theorists who argue for the complete privatization of marriage, Brake argues that a legal institution regulating personal relationships is required by justice, mainly because that the state has an interest of justice in personal relationships, and that some of the rights and benefits that justice requires for partners in a relationship are best provided and protected by the state (Brake). For example, a spouse should have the right to visit her partner in hospital. Or, one is automatically considered as an emergency contact for her partner. These arrangements do not necessarily have to be made through legally getting married, but a law that specifies in serving partners of a caring relationship provides a convenient means. For this reason, legal recognition is a step toward neutrality, for it eliminates many obstacles for people who wish to engage in a caring relationship. Clare Chambers also argues that leaving personal relationship completely to individual contracting is insufficient, both for justice and pragmatically. She argues that the state must have some default directives for legal relationships, while allowing contracting within the scope permitted by justice (Chambers, 2015).

Daniel Nolan argues that a principle of “marriage-like” equality would require the state to recognize any relationship that are like marriage and deserves recognition (Nolan, 2015). This not only avoids the difficulty of defining precisely what marriage is, or should be, but provides a great insight: that it never should have been marriage which deserves state recognition, but all marriage-like relationships, which share with marriage characteristics that raise concerns about justice and are suitable for state regulation.

Having argued for the insufficiency of only recognizing marriage legally, Brake further proposes using the name minimized marriage law for this reformed marriage law. Her main goal is to upset the meaning of the word “marriage” by deleting the amatonormative assumption. This may be seen as part of the larger project to combat amatonormativity, which Brake views as potentially oppressive. It seems to me, that it is at this point that some

defenders of marriage find their disagreement with Brake. Mainly, they resist the idea that the amorous feature of marriage should be damaged. Next I will look at their arguments. While I will try to attack their argument, I also explore another alternative, which I think respects justice and may be accepted by some theorists on the both sides. More importantly, I think this alternative, while in no way more just than some of the proposed reforms of marriage like Brake's, could be more politically viable given the potential resistance any marriage reform is likely to meet.

### Defense of marriage (as an amorous, committed relationship)

The first kind of arguments in defense of marriage argue that the social meaning of marriage makes it valuable to someone, and is worth promoting. The second kind argues that the social norms about marriage enhance commitment between spouses, and hence make marriage a better institution for the wellbeing of children.

Suppose that there are no economic and institutional arrangements favoring married couples, there is still one thing that makes marriage valuable. As Macedo argues, the word of marriage, as an institution itself, with the name "marriage," has its values (Macedo). For many people, marriage is a double recognition. It is a legal recognition, as the couple is deemed married in the eyes of the law and the state. It is also a social recognition. A couple is seen as a family in the eyes of friends, relatives, and the society in general. These recognitions can be valuable to the married. Couples may want their relationships to be public and known. For many, it is a way to show their love and commitment with their partner. It may also, by making their marital relationships public, affect how they feel about their relationships. For example, Macedo points out that being married constraints individuals' behaviors in certain ways (Macedo). This may arguably improve certain aspects of some relationships, and it seems reasonable and rational that people want a legal institution of marriage to improve one of their most important relationships in their life.

In a similar argument, Ralph Wedgwood argues that the main value of the institution of marriage is that it protects its social meaning, allowing the word “married” to have a communicative power. More specifically, Wedgwood names three important features of the social meaning of marriage: sexual intimacy, economic and domestic cooperation, and mutual commitment to sustaining the relationship. Although not every marriage has these features, Wedgwood argues the fact that most marriages do, and that telling others one’s marital status can communicate this social meaning, make the protection of this social meaning necessary for marriage. As a result, He argues that a political justification of marriage is available, as no reasonable citizen, through public reason, would deny other citizens’ opportunity to realize their life aspirations if these are not unjust or harmful. He further argues that that gay marriage does not change the social meaning of marriage, for its communicative function works the same: when someone says she is married, one can know that she is romantically committed to another person. As a result, he not only rejects reformists’ argument for marriage reform, but also rejects non-monogamous marriage (Wedgwood, 2015).

This social meaning, however, is contingent. We may imagine that in some societies, both as of now or in the past, telling someone that you are married to a person must entail the communication that you live with a different-sex person. Sometimes it also communicates that the couple have children, the wife changes her last name to that of her husband’s, or even that the wife belongs to the husband as if she is his property. Wedgwood points out that none of his three important features of the social meaning of marriage is universal, and this seems to me enough to consider this social meaning fluid, flexible, and susceptible to change. The communicative power of the status of marriage, as a result, is limited, if not often misleading.

Maybe commitment is in general beneficial to almost all individuals? For example, what is often expected of married couples, as some marriage vows imply, is that the couple should not abandon each other regardless of the other's health or wealth (Macedo). This, combined with norms of presumptive permanence about marriage, allows people to be committed to support and care for each other, which is presumably universally needed.

Anca Gheaus, however, argues that love can also do this, and is a better means of achieving it (Gheaus, 2015). What's more, there are arguably also norms that friends and lovers should commit to supporting and caring for each other. If the state is interested in improving the general wellbeing of all citizens, there is no obvious reason to leave out caring relationships between friends. Marriage are mostly based on love, and, as Brake points out, people cannot always control their love (Brake). So there seems to be doubts about whether marriage makes spouses' life better as well as whether marriage is the only institution that could do this.

It is not clear that the opportunity to realize one's aspiration to marry relies on such strong promotion of marriage. It seems to me that a law that accommodates the tradition, as well as other variations of it, is sufficient to serve followers of the tradition. Even if marriage does have, or should have, a social meaning exactly as Wedgwood argues, it does not seem that an institution that accommodates marriage as well as many other kinds of personal relationships takes away married couples' ability to communicate the features of their relationship. For example, the expectation that spouses should be sexually committed exclusively to each other is arguably enhanced by the majority of society agreeing on this aspect of marriage. However, it should not be concluded that an agreeing majority is necessary for a married couple to realize this aspect. They can either have a portion of the society agreeing with them on what marriage means, or simply promise that they would be

sexually committed. As long as the society agrees that promises should be kept, they might be able to have a sexually exclusive marriage.

A more diverse institution may weaken the tradition. This weakening of one dominant, previously state-endorsed tradition, as the first chapter hopefully shows, is quite compatible with liberal ideals of autonomy and neutrality. It should still allow citizens who endorse amatonormative conceptions to pursue and achieve these goals. Thus, in troubling the social meaning of marriage reformists do not take away their fellow citizens' opportunity to realize their aspiration to get married. If they do make this traditional version of marriage less achievable, it is in order to provide fare opportunity for pursuing other conceptions of life. In addition to Wedgwood's argument that reasonable citizens would not deny others the opportunity to marry, public reason will allow us to go further and have an institution that does not confine itself to some social meaning of marriage, but accommodate a diverse range of personal relationships.

What is more, just as Macedo's suggestion that the word "marriage" itself has some value, so should this claim be considered in the opposite way at the same time. While some people may want to get married partly because of marriage itself, other may reject the word "marriage" despite valuing legal recognition of their relationships. As Brake points out, some feminists and liberals have criticized the institution of marriage as one of heteronormativity. They argue that the notion that being married constrains one's life to being sexually committed to only one's spouse is different than what many in the gay and lesbian community endorse (Brake). Again, we may argue that any reasonable citizen could find a traditionally fixed social meaning associated with marriage incompatible with their life plans.

Brake's suggestion of the name "minimal marriage" for her minimized framework is partly for the same reason that Macedo uses to justify same-sex marriage: that expanding the idea of marriage to people formerly excluded by the society helps to legitimize their

relationship in the eyes of society. They differ on to what extent the meaning of marriage should be expanded. Macedo suggests that it should allow same-sex couples to marry, but not go further at this point, as it will weaken the effect of same-sex marriage legalization to help legitimize homosexuality (Macedo). Brake, on the other hand, wishes to weaken amatonormativity and legitimize caring relationships. While extending marriage rights to gay people is easily acceptable for this purpose, there are also some good reasons to further extend the meaning of marriage.

The fact that the word “marriage” is valuable to some is a reason to legalize same-sex marriage. Civil union, even treated the same as marriage by law, is insufficient. Moreover, people who practice polygamy, for religious or cultural reasons, may also want to call their legal relationships marriage. The fear, according to Macedo, is that by stop calling it marriage, the state will inevitably allow private institutions, such as the church, to determine who can marry (Macedo). It would be true if third-parties can, for example, tell a couple that they only recognize marriages endorsed by a church or a comprehensive doctrine, and the state cannot regulate such discrimination. As long as the right to marry, or form other caring relationship, is recognized by the state as a basic human right, it seems the state can support individuals who are legally married and wish to call their personal relationship marriage.

Moreover, promoting marriage, which as a social institution is already strong, has obvious costs. A strong norm about marriage can threaten individual’s autonomy. Brake points out that many people focus too much with their life on marriage, which could lead to unsatisfying, or even sad, lives (Brake). Imagine if marital commitment is further supported by such a strong social norm that divorce is strongly stigmatized. Despite its costs on individual autonomy, it may indeed enable many to have a secure, stable marriage. It hardly seems to be a good position for a liberal to maintain that divorce should be rightly stigmatized.

The value of romantic commitment presupposes comprehensive conceptions. Neutrality rejects any justification by a comprehensive conception. Thus the first kind of arguments in defense of the amorous meaning of the legal institution of marriage should not be accepted. We also reject the defense of marriage based on its instrumental value to married people, since it is not necessary for these people to successfully pursue their conceptions of life that the state needs to reject recognizing other personal relationships.

The second kind of argument defends the amorous feature of marriage for its ability to promote certain common goods. Simon Cabulea May argues that marriage is a presumptively permanent relationship. Some other personal relationships, like friendship, are not presumptively permanent, because there is no social expectation that people commit to a permanent bond at the outset. However, people mostly do not commit to a permanent bond at the outset of a romantic relationship either. Two friends can certainly “marry” and, by doing that, commit to a permanent bond. The fact that one is widely practiced and normalized should not be a criterion to decide what kind of relationship can be a presumptively permanent (May, 2015).

May proposes one good that a social norm about presumptively permanent marriage may do: it helps enhance social stability, which is a primary good. Moreover, he suggests that public institution can possibly enhance the good effect of presumptively permanent marriage (May). If marriage, relative to other types of relationships, does have a special stability-promoting effect, it seems that there is a reason for the state to promote marriage. However, it is not clear how presumptively permanence in marriage will translate into social stability. How are longer and more committed marriages related to the stability of a society?

A more important concern of the consequences of reforming marriage is about children’s interests. May suggests that the social norms about the presumptive permanence of marriage can also benefit children. If this is empirically true, and the link between such a

social norm and the wellbeing of children is strong enough, a separated parenting framework (proposed by Brake) will not be enough. As long as we expect the majority of society raise children through married, biological parents, a separated parenting framework may not be able to prevent children from being harmed by the failure in their parents' marriage. The assertion that other types of caring relationships can be equally suitable for children provides limited help too.

Anca Gheaus also points out the possibility that a high degree of commitments between parents can be beneficial towards children's wellbeing (Gheaus, 2012). A brief published in 2003 by the Center for Law and Social Policy in Washington, DC reports that there is some evidence that marital status does not matter much for school achievements and behavioral problems among children who live with both biological parents and children who live in step-families. However, it points out the possibility that the status of marriage changes the commitment, expectations, and attitudes of parents, making them better in some cases. The social institution of marriage may also be helpful. In the end, it adds that "most children not living with married biological parents grow up without serious problems (Parke, 2003)." However, as some authors have pointed out that while we have evidence showing that stable marriages tend to benefit children, we do not know if marriage itself has much role to play here (Brake; Nolan).

The important empirical question is whether the social norm of presumptive permanence in marriage (or social norms in general) tends to make married couples stay in a better relationship, and in turn benefit children more. We should immediately raise the question of whether any social norm does play a significant role in improving marriage. Many marriages are bad. The good ones, one can suspect, are mainly thanks to factors that will make the relationship good with or without social norms about marriage.



These empirical questions, however, could be difficult to prove or disprove, but it is one that cannot be neglected. While both sides may find it difficult to support their arguments with empirical evidence, it seems that there is some reasonable ground to be conservative in the short term. After all, if marriage really benefits children significantly, both defenders of marriage and reformers may agree that radical changes can be rash. Being conservative, however, does not mean that the state must continue to promote marriage as an exceptionally special institution. Even if we know marriage benefits children, it still begs the question of how much promotion does marriage deserve for this. When we know more about how marriage acts as a factor of children's wellbeing, we will know better about how marriage should be treated legally.

The defense of marriage using on the ground of children's interests also needs that a legal institution of marriage enhances the social norms. However, relying on some comprehensive doctrines to better the wellbeing of children may not be the best idea. Some reasons, like the costs of promoting such doctrines, have been discussed. The comprehensive doctrine can itself weaken despite having a special legal status. The society has become more tolerant when it comes to divorce and relationships that are traditionally less accepted. As a result, more children would experience living in a family not of their both biological parents. This means that even if social norms about marriage are favorable to children, legal recognition of marriage will not be sufficient.

As Brake argues, it is wrong for the state to help solve economic problems of single mothers by encouraging them to remarry (Brake). Many problems associated with divorced and single-parent childrearing are at least partly due to socioeconomic factors (Parke). There are better alternatives of improving children's wellbeing in these cases than promoting marriage. Although the value of two committed, loving biological parents could be unique,

the ability of the institution of marriage to promote children's wellbeing, even if existent, is limited.

Let's, for the sake of argument, suppose that the promotion of marriage does translate into better condition for children and is considered the ideal way of doing it. It must be asked, then, why such considerations warrant the extent of promotion that is the current situation. Why do we need to reject the legal recognition of other kinds of relationship for the sake of children? Why are we not going to establish a state church based on the comprehensive doctrine about marriage, whose main mission is to advocate for committed marriage? If there was already such a church (which can be a thoroughly comprehensive doctrine, or can just be partly comprehensive, specializing in instructing people about marriage), should the state promote it for the wellbeing of children? This is the kind of question neutrality asks. The state may introduce policies so that some conceptions are treated more favorably than others. However, the extent of such favorable treatment must be justified by good reason and be checked with neutrality.

Promotion of marriage can be done without establishing state church. If we reject the establishment of a state church because the benefits for children is not worth the cost, we should also consider whether legalization of only marriage, not other relationships, is the best place we want to be in. Suppose that the stronger a social norm about marital commitment is, the better will be children's wellbeing, which place will the state want to be in? If it should not establish a state religion, should it subsidize organizations that promote the value of marital commitment? Should it provide economic benefits to married couples? Or should it recognize marriage alone, but provide no extra benefits to married couples? Should it have a marriage institution, while also provide some regulation for other personal relationships? Or should it view all marriage-like relationships equally? It is not clear to me what defenders of

marriage think how far concerns about children's interests urge us to go. Reservation about change can be problematic as the current position which state is in may be arbitrary.

We may also be cautious about how the state is justified to promote a comprehensive conception: if the state is justified to promote marriage, should it make marriage more realizable or should it tell people it is the intrinsically superior? I believe that even if neutrality is adopted as only an ideal, one can make a strong case against the second option. If this is true, we may further reflect upon what is implied by the sole legalization of marriage. While the state does not directly say the marriage is the superior relationship, some might argue that this could be interpreted as the implicit message.

The wellbeing of children, given our knowledge (or lack thereof) about the effects of marriage and considerations about neutrality, does not seem to justify the rejection of all marriage-like relationships other than marriage to be legalized. If there is somewhere a line drawn so that the extent to which the state can positively promote marriage should not go so far as to establish a state church, it seems that there also should be a line drawn so that there is also a limit to how much the state can promote marriage by discouraging alternative conceptions of life. The line should be drawn at least so that alternative personal relationships can be legalized. Failing to do so plays a significant role in decreasing people's autonomy in this respect. In this sense, although defenders of marriage could be true in asserting that promoting marriage is favorable to children, neglecting neutrality can have serious harm.

### [An alternative for defenders of marriage](#)

The disagreement over whether marriage should remain an amorous institution could remain controversial. Proponents of reform seem to have the advantage that recognizing different types of relationships is inherently more just. However, conservative considerations of the effects of weakening marriage on children are important. Empirical study on this issue can take time and be difficult. It may also be expected that parts of the society will reject such

reform, simply because it would contradict their comprehensive doctrine. What is more, defenders of marriage could simply be right about the positive effects of the amorous norms about marriage on children.

As I argue, however, we cannot ignore neutrality. Neglecting neutrality means that people's autonomy could be threatened. Even if we are to promote marriage, and even if we should keep marriage as an amorous institution, it does not mean we must deny recognition to non-amorous relationships. There can be a separate legal institution that recognizes all justice-respecting relationships, including amorous ones, while marriage is kept as a presumptively amorous institution. It can be thought of as a middle ground between the sole recognition of marriage and completely equal recognition for all marriage-like relationships. As the previous section argues that it is not clear how much promotion should be given to marriage if it is to be promoted at all, this suggestion would promote marriage to a lesser extent, while a diverse range of personal relationships can be legalized.

This is not a completely arbitrary solution. As discussed, justice provides the state with the reason to recognize personal relationships not traditionally perceived as marriage. On the opposite side, defenders of marriage argue, raising concerns about children's welfare, that some traditional meaning of marriage should be protected.

The two main consequences of this alternative solution can accommodate both sides. First, marriage will stay as an amorous institution, with its social meaning, as well as its name, relatively intact. Second, people who wish to engage in a legally recognized caring relationship (including ones that are amorous) have a significant chance of doing so. By doing so, they do not need to call their relationship a marriage. They will not be subject to many of the social expectations married couples have.

This arrangement can still be seen as a kind of promotion of the traditional meaning of marriage. The state, recognizing all marriage-like relationships, does not need yet another

legal institution for something that is already encompassed by the neutral law. It respects neutrality and people's autonomy to a greater extent than the sole recognition of marriage, while recognizes the reasonable conservatism about children's interests (given that such conservatism is legitimate, which this paper does not assume).

It may also be expected to weaken the social meaning of marriage to a degree. However, reasonable citizens can by themselves increasingly question the social meaning as a truly valuable thing instead of a comprehensive conception, hence weakening it anyway. If this happens in a large scale, relying on marriage to promote children's welfare will be insufficient. The original institution may be seen as a temporary solution, or a supplementary solution. A more fundamental way of promoting children's welfare must be achieved so as to guarantee children's welfare regardless of the conception of life adopted by the parents.

The reason that this alternative is worth considering is that, as argued in the previous chapter, the effects of marriage on the wellbeing of children do not justify the rejection to legalize all other personal relationships than marriage. Thus, regardless of how much the state wants to promote marriage for the wellbeing of children, it needs to seriously consider legalizing alternative personal relationships. On the other hand, it remains a possibility that committed, stable parenting can be effectively promoted by promoting marriage. Thus we may want to give marriage some promotion if we lack ways to make up for the loss of welfare of children due to weakened marital norms. The state may even provide economic benefits to married couples for this reason, if it is empirically viable. However, it is a model that respects the lines we drew in the previous section: it does not establish a state church to promote marriage; nor does it deny recognition to alternative personal relationships. If those lines are drawn reasonably, this model should appeal to reasonable citizens on both sides.

Moreover, I believe that as this alternative shows, there are possible arrangements which make it undecided that concern for children's welfare should lead to non-recognition

of non-amorous personal relationships. If defenders of amorous marriage insist on non-recognition, they will need stronger arguments than they now have.

If in the next chapter I successfully defend polygamy, then the institution of marriage, as well as the neutral institution, has a reason to accept it. This, though, has difficulties, as some possible polygamous relationships must involve relationships between two people who are not committed to each other. If polygamy is rejected for reasons concerning justice, marriage should not include polygamy. The neutral institution, however, will rely on more considerations to see what kind of restrictions it puts on the entry of relationships. For example, if polygamy is rejected out of concerns for gender equality, caring relationship with not romance involved seems to be immune from the most common forms of such egalitarian criticism. The separated institution is meant to accommodate Brake's caring networks, so it should seek to allow partnerships of more than two people regardless of what we conclude about polygamy.

## Neutral state and polygamy

Marriage is a comprehensive conception of good life. According to the neutrality ideal, it should not arbitrarily be promoted by the state. The state should nonetheless have regulations for marriage out of concerns of justice. Moreover, it should have regulations for all marriage-like relationships.

It leaves us with the question of whether such a change should include the legalization of polygamous marriage. In this paper, I call all caring relationships that are not monogamous (that is, one that involves only two people) polygamy. Such relationships can have more specific names, like polygyny or polygandry.

In societies like the US, monogamy is the dominant social norm. However, as Brake points out, monogamous marriage should not be seen as a “natural, standard” form of human relationship. Polygamous marriages are seen around the world in human history (Brake). In the United States, where most people seek monogamous marriage, polygamous marriages are known mostly to be associated with followers of the Mormon Church. Followers of the church are encouraged to practice polygyny. It can also be relevant to immigrants who are of a culture or religion which allows polygamy, or people who engage in polyamorous relationships.

Macedo points out that many scholars agree that the limitation of the number of people allowed in a marriage being two is arbitrary. However, he argues that the legalization of same-sex marriage does not lead to a slippery-slope towards polygamous marriage. Gays and lesbians are born with their sexualities, leaving them without choice for the way to achieve a good marital relationship. Polygamists, however, are not born as polygamists (Macedo, 2015). He is right that there is not a slippery-slope leading to the legalization of polygamy. It does not necessarily mean that it is justified to reject polygamy. The distinction

between same-sex marriage and polygamy mentioned here only suggest that for liberals in a Western country the legalization of same-sex marriages is a relatively easier and more obvious answer.

Some theorists have discussed polygamy as a cause for harms and oppression. Although some of the data are questioned by other theorists, most would probably agree that the structures of polygamy should raise reasonable concerns about their effects. This chapter will examine some of the arguments and explore whether polygamy should be justly discouraged.

By legally recognizing marriage-like relationships and leave out polygamy, the state aims to discourage polygamy. It does not criminalize polygamous cohabitation because people have sexual freedom. There are other ways the state can promote or discourage polygamy. However, the focus of this chapter will be on the legal recognition of it.

### Monogamy is insufficient

The decision to legalize monogamy, but not polygamy, must clearly encounter some questions. This decision seems to treat people who would voluntarily choose polygamous over monogamous marriage unequally.

These people include certain cultural or religious groups who may legitimately claim that their practice of polygamy should be legally recognized if monogamy is. It also includes polyamorous partners and caring relationship partners. Also among the people who seems to be treated unjustly are the ones who may revise their conceptions of life, as liberal theorists argue. These people can claim that they deserve the equality to enjoy the rights that monogamists have.

On the other hand, legalizing polygamy can in general benefit. This is plausible because people are given few options now. Given the current situation, it remains doubtful



whether all of the people engaging in monogamy chose it voluntarily. One can question whether individuals have enough autonomy when making such life decisions.

We can first address some difficulties that are inherent to polygamy. One is the number of people one is allowed to marry. Some polygamous families have been reported to see wives neglected by their husbands. We can assume that a person simply cannot commit to too many people at the same time. Given that committing to too many people tend to produce no good other than causing injustice, the state is justified to put a cap on the number of people one can be committed to at the same time. An appropriate number can be difficult to decide, but this difficulty should not make us retreat to endorsing monogamy. This cap should allow us to avoid difficulties for the state to regulate such marriages, which is another reason for having it.

The other, which is not necessarily a difficulty, but something to consider, is whether we should allow open contract, or only one marriage contract for one person. Allowing open contract means that a person A who is married to B can choose to marry another person C, while C does not need to marry B; both B and C must be aware and approve of what is happening. By contrast, the one contract approach requires that a person can only have one marriage contract, with all of her spouses in and only in the same contract. Traditional polygyny fits the open contract model in that each wife is married to the only husband separately. The wives are often unjustly treated in traditional polygynous marriages, and the husband may not need the approval of his wives for a new marriage. To ensure equal formal rights, open contract approach should allow that both the wives and the husband can marry someone outside of the current marriage.

At first glance, there does not seem to be a strong reason why open contract should not be allowed. There will be practical difficulties, such as those associated with spousal rights and privileges and property division, but these difficulties can be approached. As long

as there is a cap on the number of people one can marry, it does not need to be feared that something too complicated will appear. Gregg Strauss argues that a structure where A is married to both B and C, while B and C do not marry each other is structurally unequal, whereas a polyfidelity model, which equates the one-contract approach, can be equal (Strauss, 2012). However, it is not clear how much formal equality can contribute to *de facto* equality. A genderly structured marriage, even with formal equality, can still be extremely unequal and oppressive. It would seem that granting each spouse equal rights of free entry and exit, combined with actions combatting oppressive social norms, is a more efficient and effective approach. While a polyfidelity model may be one ideal form of egalitarian marriage, it can also have considerable costs on individuals. On the other hand, the open contract approach would allow B and C to marry someone else as freely as A can. This means that B and C need not necessarily be stuck with only A.

The two approaches should also entail different considerations about the partner cap. For example, we may decide that under the one-contract law a contract can include a maximum of 4 people; under the open-contract law, on the other hand, one person can be married to no more than two people. These caps, no matter what the exact numbers are, might seem arbitrary, but there should be a limit set after many factors have been considered.

It seems rather unnecessary to show that reasonable citizens other than members of some religious communities may deliberate to choose polygamy. Polyamory provides a good case for it. Reasonable citizens may even deliberate a kind of polygamy that is not completely amorous, or not amorous at all. Like the example in the previous chapter about two friends engaging in a quasi-temporary (or quasi-permanent), similar cases can happen in the context of polygamy. There is no *prima facie* reason about justice that should make the state discourage such relationships.

This kind of relationship, like others that are considered polygamous, seems to deserve legal protection and recognition. Brake's minimal marriage requires that the state "can set no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships (Brake)." Whether Brake is right in arguing that care is a primary good, the state has a reason to legalize marriage-like relationships. This should not exclude relationships of more than two people. As a result, polygamy should be legalized unless its opponents are successful in arguing that it is incompatible with justice.

### Does the state have a point in rejecting polygamy?

Some have argued that polygamy is unjust and should not be legalized. Some argue that if monogamy is legal, so should polygamy. For some, this question is left open for more discussions and revelations.

The rejection of legalizing polygamy can be based on the harm associated with it. Or, some attempts to reject polygamy can be made if it is in conflict with some common good that is important for a society. This, however, becomes more a case of weighing different considerations together. The argument that monogamy should be the only legal marriage because it is best for children, even if true, must still answer many questions regarding people's freedom to marry and divorce in relation to children's wellbeing. Moreover, it must be compared with the effects of monogamy for consistency.

It is important to remember that when we discuss non-monogamous marriages, we are essentially discussing structures of the relationships. The meaning that society tends to ascribe to polygamy, which can be a source of stigmatization, is not a good reason to discourage it. We can reasonably identify different structures, such as polygyny, polyfidelity, same-sex plural marriage, and so on. These different structures, despite being mostly considered together as non-monogamous marriages, can have different effects, and must be

treated separately. We may successfully give different names to these structures that are not monogamous, thus eliminating the dichotomy of monogamy and polygamy. Monogamy will become simply one of the many structures possible for marriage. This means that if we find sufficient grounds of not legalizing one structure, it does not follow that we also have reasons to not legalize other structures that are not monogamous.

As the Mormon families exemplify, patriarchal polygyny can harm the wives and the children. Some wives in these marriages, which can consist of one husband and more than forty wives, are reported to be neglected economically and emotionally by the husband. There are obvious reasons for the state to discourage relationships exactly like this. The question, then, is what kind of relationships exactly should the state discourage given what we know.

We can identify a few features that may be associated with injustice in this case. First, it has a polygamous structure. Second, and more specifically, it has a polygynous structure. This could mean something given the differences between male and female biology. Third, this household embodies a form of patriarchy, which must be noted is to an extent shared by the society in general. Fourth, the numbers of wives and children are surprisingly big.

We should start with the last characteristic as it is the easiest. Since we already have a cap on the number of people one can marry, this kind of marriage is rightly discouraged. In the case of Mormon families, the fact that the single husband is the head of household, combined with the economic disadvantages of the wives, arguably helps make things worse. Out of concerns for justice, citizens should be reminded about the responsibility to make rational decisions about the number of partners they are committed to and, more importantly, the number of children they have. This does not necessarily have to be done through discouraging polygamy, or even by the state.

This shows how the attack on polygamy should be viewed as an attack on certain specific structures, such as polygyny in this case. It might be a different story if all the women in the marriage are equal to the husband and economically competent. And, for example, this problem may not be relevant for structures involving three lesbian partners or one wife and three husbands. A monogamist couple can have too many children for them to be competent parents, possibly as much as a marriage among two husbands and two wives.

Polygyny is often discussed in the accompany of patriarchy. This is not strange. Practically, it may be naïve to pretend that there is no clear association between the two. However, merely recognizing this association is not enough. Patriarchy is not a unique thing about polygamy. There are patriarchal monogamies, as there are non-patriarchal polygamies. If we are to consider discouraging polygamy because of concerns about patriarchal polygyny, we need to examine our feelings about patriarchal monogamy, as well as a patriarchal polygamy of two husbands and two wives. Moreover, polygyny, as defined in terms of the structure only, need not be patriarchal.

We may still decide that patriarchal polygyny is worse than other patriarchal marriages. It could be because that the polygynous structure enhances what is bad about patriarchy, and the former will be expected to mostly be seen with the presence of the latter. We may decide that patriarchy itself should be discouraged, but we nevertheless have good reasons to discourage a risky structure such as polygyny. Or, we may believe that egalitarian polygyny must be a myth; therefore, polygyny can be rightly seen as inferior to monogamy, which can be egalitarian.

The paper will not try to solve this problem. However, regardless of the answer, more questions must be asked. As far as we know, there are polygamous structures that are egalitarian. If we are to discourage polygyny, should we also discourage other forms of polygamous marriages? Should we, for example, discourage marriage among three

homosexual men as well? Should the side-effect of discouraging polygyny include the rejection of a marriage in which a bisexual woman is married to a homosexual woman and a heterosexual man?

I do not know if there is a good way of legalizing polygamy while patriarchal polygyny (or simply polygyny) is ruled out. Or, some may make the empirical assertion that legalizing polygamy will simply result in a surge of polygynous cohabitation even if we leave out polygyny. I also will not try to find an answer of how equality should be weighed against neutrality. What seems to me to be clear is that if we do not have good reasons to discourage all structures that are not monogamous, we have reasons to legalize those that are compatible with justice. There may be some considerations in favor of discouraging polygamy. This does not however mean that the considerations are strong enough to entail non-legalization.

Does justice require that polygamous structures should be egalitarian? Strauss suggests that traditional polygamous marriages, both polygyny and polyandry, which see one central spouse married to more than one peripheral spouses, without the peripheral spouses having any marital relation with each other, cannot be equal because the central spouse cannot commit to each periphery spouse as much as each periphery spouse is committed to the central spouse (Strauss).

Although traditional polygamy is not egalitarian, it may also be problematic to impose the polyfidelity model. The open-contract approach, as I have argued, is also formally egalitarian. By setting an appropriate cap on the number of people one can marry and giving everyone equal rights to enter and exit a relationship, individuals are given the means to be in equal position as their partners. In a non-ideal society like ours, the open-contract approach may result in de facto traditional polygamies. However, even if we make a traditional polygynous family marry under the one-contract approach, it can be expected that different spouses will be in unequal positions.

Should we be paternalistic and minimize the possibility that some may choose to commit to only one person, knowing that this person is also married to others? This makes this person at least kind of a central spouse. In this case, should we decide for those peripheral spouses that their decision is not wise? It would seem too paternalistic. People make unwise decisions entering monogamous marriages. Also, they may have simply made the right decision. The state does not seem to have strong reasons to intervene.

If many of the non-monogamous structures should not be discouraged, should monogamy be promoted? Some may argue that there is something uniquely good about monogamy that, out of concerns for the common good, it is justified for the state to not legalize polygamy in order to promote monogamy.

Macedo argues that monogamy is the arrangement that favors the equal opportunity for every individual to have a stable, intimate relationship (Macedo). If it turns out to be empirically true that once polygamy is legalized, it will inevitably lead to a messy relationship market which causes unjust outcomes to many, polygamy can be justly discouraged. However, that is beyond the capacity of a priori speculation. The predominant social norm favoring monogamy seems to be strong enough to encourage as well as pressure individuals to choose monogamy. If it will turn out that the majority will still favor monogamy, it seems fair that a small portion of the population should be free to pursue their conception of life, since it does not really decrease every individual's opportunity to have a stable, intimate relationship. If polygamy turns out to be accepted by a wider public, it is still not clear how that will threaten people's opportunity to have a stable, intimate relationship. Macedo may have in mind the consequences of surging popularity of polygyny as a result of the legalization of polygamy; however, polygamy in general, which is compatible with gender equality and equal formal rights for all, need not threaten people's opportunity to have a stable, intimate relationship.

Peter de Marneffe argues that marriage, as an exclusive, committed, two-person relationship, is a distinctive human good, and thus a liberal could consistently support the legalization of monogamy while reject legalizing polygamy. He suggests that if legalizing monogamy promotes this good, while legalizing polygamy does not, then such a position is justified (Marneffe, 2015). However, it is not clear how the definition of distinct human good works: why a similar relationship, but which involves three people, would not be seen by some as a distinctive good? Also, it is not clear how a distinctive good warrants promotion instead of protection or simply equal accommodation. Protection would mean to ensure that citizens have a good opportunity to achieve this good, while an opportunity to achieve alternative comprehensive goods are not necessarily sacrificed. Promotion, as has been discussed, could entail more, which may generate costs on individual autonomy. On the other hand, if protection is sufficient to secure the opportunity for people to engage in monogamous marriage, it is closer to the neutrality ideal, and is thus fairer. If many people see monogamy as distinctively good, even protection is probably unnecessary. It simply needs equal accommodation.

Marneffe gives another reason that the state could justly promote monogamy: the promotion of monogamy better suits the interests of children. The reason, which Marneffe suggests is not empirically demonstrably false, is something like this: the recognition of monogamy enhances the social institution of monogamy, which tends to create a relatively ideal arrangement for raising children; the arrangement is that the parents, who are romantically committed to each other, have children with and only with each other, because this would allow them to be more committed and competent parents (Marneffe).

It can be questioned whether the two-parent structure is actually the better option. As Brake points out, practices of shared child rearing, which can possibly make child rearing less burdensome for mothers, used to be seen in African American communities in history in



the US(Brake). It could turn out that the legalization of polygamy will not be a threat to children at all. It may also promote the kind of family where four parents are dedicated to raising one or two children together, which could even be better than a two-parent family.

Moreover, it must be asked what implications the legalization of polygamy would have that could affect children. Will it weaken the social norms about monogamy? Or does it weaken the social norms about marriage? If polygamy weakens social norms about marriage itself and is hence not desirable for children's interests, we are facing a similar question as whether legalization of marriage-like relationships should be rejected if the promotion of marriage is ideal for children.

If legalizing polygamy simply weakens social norms about monogamy, but not those about marriage, does it mean that monogamous marriages will be less stable? If it does, legalizing polygamy might in fact have bad implications for children. This, again, gives one reason for the state to promote a comprehensive good, but leaves the question of to what extent unanswered. On the other hand, other things may make monogamous marriages less stable. A novel may make its audience question the desirability of monogamy. It seems that few defenders of monogamy will argue that such books should be discouraged for the sake of children. Are we then justified to discourage a conception of good such as polygamy because monogamy is better for children?

If legalizing polygamy weakens social norms about monogamy, but does not make them notably less stable (probably because social norms about marriage and the relationship itself between the spouses are what really matter; a person exiting a monogamous marriage and entering a polygamous one may exit the monogamous one anyway?), then legalization is bad only as much as polygamy is itself worse for children's wellbeing. If this is the case, the state can rightly discourage those structures that are sufficiently bad for children. However, it is possible that as long as the structure of the family is not too complicated, polygamy will be

a minor factor influencing the quality of childrearing.

Marneffe himself emphasizes that he does not mean polygamy should not be legalized (Marneffe). Also, what about polygamous structures that do not produce biological offspring? If legalizing polygamy does not worsen children's wellbeing in general, then some polygamous structures should be legalized regardless of whether polygamy is a bad childrearing arrangement.

We are still left with the question of what if the legalization of polygamy will promote certain injustices. These injustices, as already mentioned, include children's wellbeing and gender inequality in society in general. These would be reasons that should make the state want to discourage polygamy. It would seem, however, that we need to know about how much exactly the good and bad effects of legalizing polygamy are in order to know whether polygamy should be legalized. In respecting neutrality, the state should also do the same calculation for monogamy: after weighing the actual wellbeing promoting effect of monogamy and its costs, it may appear to be less worthy of promotion.

In the end, it may turn out that allowing the legalization of polygamy should be the where we draw the line. There are strong reasons for accommodating polygamy fairly in comparison to monogamy. Even if we may not want to jump to that conclusion too quickly because of our reservation about its possible effects, the reason for drawing the line so that monogamy is the only legally recognized structure is very weak: it seems to only rely on our trying to play safe for the sake of children based on no decisive empirical grounds, and holding on to an institution that is itself insufficient for children.

## Conclusion

This paper agrees with Patten and Balint that neutrality is an important liberal ideal. It has instrumental value in protecting and promoting citizens' autonomy and fair opportunity to revise and pursue their conceptions of life. It is to be weighed against other ideals and goods.

In the second chapter, it argues that marriage, as it is currently defined, is a comprehensive conception of life, and hence should not be arbitrarily promoted. The law should admit and recognize all marriage-like relationships that respect justice. Such relationships include caring relationships discussed by Brake, and temporary marriage discussed by Nolan. A potentially powerful defense of the traditional social institution of marriage uses the interests of children as the ground for the promotion of marriage. This defense, however, urges more empirical revelation. Even if the results of empirical studies show that the traditional institution of marriage promotes children's welfare, it is not clear to what extent defenders of marriage think the state is justified to promote marriage. Neutrality may outweigh children's interests after a certain threshold of the latter is met.

To promote the social institution of marriage (or simply to protect it) as defenders of marriage advocate does not necessarily mean that other marriage-like relationships must be denied recognition. One example of recognizing marriage-like relationships while keeping marriage somewhat special is to have a separate law that makes minimal assumptions required by justice about what the partners want their relationships to be like.

Polygamy, like caring relationships, should be equally considered. It is a conception of life just like monogamy is. Moreover, when we discuss the effects of polygamous structures, we need to distinguish between different structures. This means that if we believe that some structures are bad, it does not necessarily follow that we need to discourage all polygamous structures. Thus, attacking polygyny or other types of unequal relationships

should not entail damage to egalitarian structures of polygamy. Concerns about children's interests are again raised in the debate about polygamy: it is possible that promoting monogamy is better for children in comparison to having equal accommodation for polygamy and monogamy. Again, this defense needs clarification and empirical evidence to support. Once more, even if promoting monogamy benefits children, the benefits must be weighed against the claim of citizens to be autonomous and treated fairly.

In sum, this paper argues that citizens should be autonomous and treated fairly for the pursuance of their conceptions of life. Thus the state, in respecting neutrality, should not arbitrarily promote or discourage comprehensive conceptions of life. This provides a reason for the state to review its current marriage law, which is insufficient for the wide range of potentially desirable conceptions of life. It should recognize personal relationships that are formerly not included in the definition of marriage. The only important reason given for not doing so is concerns for the interests of children. However, this paper has argued that the arguments formulated so far are far from decisive, and could still leave room for the recognition of more than what is now recognized.

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