

The Marriage-Free State¹

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Abstract This paper sets out the case for abolishing state-recognised marriage and replacing it with piecemeal regulation of personal relationships. It starts by analysing feminist objections to traditional marriage, and argues that the various feminist critiques can best be reconciled and answered by the abolition of state-recognised marriage. The paper then considers the ideal form of state regulation of personal relationships. *Contra* other recent proposals equality and liberty are not best served by the creation of a new holistic status, such as civil union, or by leaving regulation to private contracts. Instead, the state should develop piecemeal regulations that apply universally.

Feminists have been pointing out the peculiarities of the marriage contract for at least a century and a half, but to no avail. (Pateman 1988, 5)

Feminists have long criticised the institution of marriage.² Historically, it has been a fundamental site of women's oppression, with married women having few independent rights in law. Currently, it is associated with the gendered division of labour, with women taking on the lion's share of domestic and caring work and being paid less than men for work outside the home (Lewis 2001). The white wedding is replete with sexist imagery: the father 'giving away' the bride; the white dress symbolising the bride's virginity (and emphasising the importance of her appearance); the vows to obey the husband; the minister telling the husband 'you may now kiss the bride' (rather than the bride herself giving permission, or indeed initiating or at least equally participating in the act of kissing); the reception at

¹ I worked on material relating to this paper while a Visiting Scholar at the Center for the Study of Law and Society (CSLS) in the Boalt School of Law at the University of California, Berkeley, and while an Early Career Fellow at the Centre for Research in the Arts, Social Sciences and Humanities (CRASSH) of the University of Cambridge. I benefited hugely from the support of both CSLS and CRASSH. I presented earlier versions of this paper, and of material that relates to this paper, at the University of York Morrell Conference on Children, Schools and Families, the University of Cambridge Workshop in Political Philosophy, the Nuffield Political Theory Workshop at the University of Oxford, the Philosophy Graduate Workshop at Birkbeck College, the Political Theory Project Research Seminar at Brown University and the University of Warwick Philosophy Seminar. I am very grateful to all the participants for their comments.

² See, for example, Wollstonecraft 1996, Mill 1996, de Beauvoir 1997, Friedan 1963, Firestone 1979, Pateman 1988, Okin 1989. Additional recent feminist contributions are discussed later in this paper.

which, traditionally, all the speeches are given by men; the wife surrendering her own name and taking her husband's.

Despite decades of feminist criticism the institution resolutely endures – though not without change. The most significant change has been in the introduction of same-sex marriages and civil unions in countries such as the UK, the Netherlands, Belgium, Spain, Canada and parts of the USA. In the USA in particular, same-sex marriage is a fiercely contested and central part of political debate, with many states alternately allowing and forbidding it as the issue passes between the legislature, the judiciary and the electorate.³

If marriage is to exist as a state-recognised institution then it must, as a requirement of equality, be available to same-sex couples. There is a great deal to celebrate in recent moves to widen marriage, and it is hard not to be touched by the scenes of same-sex couples rejoicing as they are finally allowed to marry.⁴ In this paper, though, I argue that even these welcome reforms do not go far enough to address egalitarian concerns.

Feminists have been the main critics of the institution of marriage, and in the first part of the paper I discuss feminist arguments. I show that feminists attack marriage from several different angles, which can leave the feminist position somewhat conflicted on whether reforms such as same-sex marriage render the institution just. I argue that the way to reconcile feminist accounts is to support the abolition of state-recognised marriage. In the second part of the paper I discuss options for regulating intimate relationships in a marriage-free state.

I

Feminist critiques.

My current position on marriage is that I am against it. ... Politically, I am against it because it has been oppressive for women, and through privileging heterosexuality, oppressive for lesbians and gay men. (Braun 2003, 421)

In this quote, and in feminist argument more generally, we can identify two distinct critiques of marriage. Both are common and yet in tension. The first states that traditional marriage is bad because it oppresses women. The implication of this critique is that being married makes women *worse* off. The second critique is that traditional marriage is bad because it privileges heterosexuality. The implication is that being married makes people, both men and women, *better* off: it provides benefits that are unjustly denied to homosexuals. But these critiques seem contradictory. If marriage oppresses at least some of its participants, why would homosexuals want to participate in it? On the other hand, if marriage ought to be extended to homosexuals because it confers privilege, what have feminists been complaining about all this time? And yet the two critiques are found together in the

³ In the 2012 US elections citizens of Maine, Maryland, Minnesota and Washington voted to allow same-sex marriage or civil union. President Obama publicly endorsed gay marriage during the campaign. Previously several states, such as Hawaii and California, had voted against same-sex marriage.

⁴ See, for example, <http://www.buzzfeed.com/mjs538/portraits-of-gay-couples-just-married-in-new-york>

writings of many feminists. As the editors of a special edition of the journal *Feminism & Psychology* on marriage note, the articles 'indicate the struggles that married feminists undergo in choosing to participate in an institution that is both the heart of heterosexual privilege and the heart of heterosexual women's, lesbians' and gay men's oppression.' (Finlay and Clarke 2003, 417-8)

These two critiques can be divided into what I call practical and symbolic effects. This distinction is not rigid but indicates the difference between ways in which marriage might affect individuals' material or legal status and ways in which it consolidates or instantiates social norms or ideological values. This four-way split in common feminist critiques of marriage explains why it can seem so difficult to develop a coherent feminist position and to be sure which sorts of reforms are progressive and which are reactionary. It explains, that is, the troubling ambiguities expressed by Merran Toerien and Andrew Williams, who label themselves a "feminist couple". "In short," they write, 'we want to get married and we do not.' (2003, 435)

The first feminist critique of marriage is that it has practical effects on women that make them worse off. Practical, empirical harms to women resulting from marriage include the contingent facts that marriages tend to reinforce the gendered division of labour, which itself means that women earn less and are less independent than men; that they reinforce the idea that women do most of the housework, even if they work outside the home, which saps their energies and dignity; and that domestic violence may be exacerbated by marital concepts of entitlement and ownership. (Kingston 2004, 158-61)

The force of these critiques of marriage depends on particular laws and sociological facts. In past incarnations of marriage, when the institution left women with few or no rights over their bodies, possessions, children and lives, practical feminist critiques were particularly salient. Janet Gornick argues that truly feminist marriages must involve an egalitarian division of household and caring labour, and suggests state action to enable and encourage both partners to work fewer hours outside the home than is currently normal, devoting their remaining time to domestic labour (Gornick 2002). Such changes are not easy. Changes to marriage law in favour of gender equality are hard-won victories resting on the suffering of many women, and changes in social norms concerning domestic labour are extremely hard for even feminist women and would-be egalitarian couples to achieve (Schwartz 1994, Hochschild and Machung 1990). Nonetheless, these sorts of critiques can in principle be overcome.⁵

But feminists also argue that marriage disadvantages women symbolically, by casting women as inferior. Thus Susan Moller Okin argues that 'marriage has earlier and far greater impact on the lives and life choices of women than on those of men

⁵ Celia Kitzinger and Sue Wilkinson adopt this optimistic view in 2004, 135. Card is more sceptical. On her analysis, the very idea of marriage as a state-awarded license giving claims over another person's property and person is profoundly problematic, for it exposes individuals to each other and puts in place legal barriers to separation. In doing so, marriage inevitably leaves its participants (largely its female participants) vulnerable to abuse. As she puts it: 'For all that has been said about the privacy that marriage protects, what astonishes me is how much privacy one gives up in marrying. ... Anyone who in fact cohabits with another may seem to give up similar privacy. Yet, without marriage, it is possible to take one's life back without encountering the law as an obstacle.' (Card 1996, 12)

(1989, 142), with girls less likely to aspire to prestigious occupations or feel able to contemplate being happily independent. Anne Kingston also investigates the symbolic aspects of marriage, arguing that marriage continues to exert a grip on women who feel compelled not only to marry but also to conform to ever more costly symbolic standards (2004). Pierre Bourdieu describes this form of symbolic effect as 'symbolic violence'. Symbolic violence affects thoughts rather than bodies, and is inflicted upon people with their complicity (Bourdieu 2001, Bourdieu and Wacquant 1992). In other words, symbolic violence occurs when, through social pressures, an individual feels herself to be inferior or worthless.

One particularly pernicious form of symbolic violence that marriage enacts on women in contemporary western societies is the sense that they are flawed and failing if unmarried. Research shows that many heterosexual women see single life as a temporary phase preceding marriage, and that being single for longer or when older is construed as sad and shameful, and at least partially the fault of the single woman herself (Sandfield and Percy 2003; Reynolds and Wetherell 2003). A particularly striking example of this sort of pressure can be found in *The Rules*, the best-selling self-help book that instructs women to secure marriage by following a strict set of guidelines such as not telephoning men, not describing their own sexual desires or asking them to be met, and not minding when men are angry. Women wishing to ignore, let alone criticise, *The Rules* are sharply admonished:

If you think you're too smart for *The Rules*, ask yourself 'Am I married?'. If not, why not? Could it be that what you're doing isn't working? Think about it. (Fein and Schneider 1995, p. 120)⁶

We might ask, however, whether it would matter if women felt pressure to enter into marriage if it were the case that the practical aspects of marriage were egalitarian. In other words, if marriage no longer disadvantaged women practically, would it matter if they were pressured to enter it symbolically? We might have a number of autonomy- and diversity-based objections to such pressure, which would apply to both women and men. But one way in which pressure to enter into even reformed marriages might particularly harm women (and thus be of particular concern to feminists) is through the simple fact that marriage has *historically* been an extremely sexist institution. Even if these historical oppressions have been reformed, such that wives are equal to husbands in all areas of law, marriage remains an institution rooted in the subjection of women (Pateman 1988; Card 1996; Toerien and Williams 2003, p. 434; Jeffreys 2004; Thaler and Sunstein 2008, p.219).

This question, of whether the patriarchal history of an institution continues to taint its modern incarnations even if the explicitly patriarchal aspects have been reformed, is a vexed one.⁷ It seems obvious that institutions need not remain unjust forever, beyond the abolition of that which initially made them unjust. For example, cotton-picking and chimney-sweeping are jobs that were once done by slaves and children respectively, both unjust forms of labour; and democratic participation was denied to women in the UK until the extension of the suffrage in the early C20th. But cotton-picking, chimney-sweeping and democracy are not unjust once slavery, child labour

⁶ For a feminist who is not too chastised to criticise *The Rules*, see Boynton 2003.

⁷ A particularly influential argument that the history of marriage pervades its present is found in Pateman 1988. Pateman's focus in that book is on marriage as a form of contract, and she strongly implies that no reform could render marriage non-patriarchal since the very idea of contracting parties is deeply embedded in insurmountably patriarchal concepts (pp. 184-5).

and sex discrimination are abolished: the injustice does not outlive its concrete manifestation.

What makes marriage different is that it is an institution entered into largely because of the meanings it represents. Couples may marry so as to obtain various practical benefits, but a key aspect of most marriages is the statement the couple makes about their relationship. For the marrying couple and for society in general, the symbolic significance of marriage is at least as important as its practical aspects, as demonstrated in debates about same-sex marriage, discussed next.⁸

Thus the state recognition of marriage is state intervention in, and control of, the meaning of marriage. This being the case, it is impossible to escape the history of the institution. Its status as a *tradition* ties its current meaning to its past. This feature of marriage makes the issue of what the institution really does represent, what meanings it carries, particularly pertinent.

The second strand of feminist critique of marriage is that it is heterosexist. According to this critique marriage *benefits* those who enter into it. Thus feminists, who favour gender equality and oppose discrimination on the grounds of both sex and sexuality, must oppose marriage as long as it is denied to same-sex couples (Toerien and Williams 2003, p. 434). Many feminists campaign for the extension of marriage to same-sex couples, and some argue that extending marriage to homosexuals would transform the institution. Margaret Morganroth Gullette writes that she was transformed from 'a rebellious critic of the institution into a vocal and explicit advocate' as the result of 'recognizing and honoring the growing desire of some of my lesbian friends and relatives to enjoy the protections that marriage now extends only to heterosexuals.' (2004)

Once again, this line of argument can be separated into practical and symbolic strands. Practically, marriage might privilege heterosexuality if the law were structured so as to give married couples particular rights that are denied to unmarried couples. Such laws would discriminate against both homosexual couples and heterosexual unmarried individuals (whether single or in a relationship). Some of the rights of marriage are unambiguously advantageous to those who have them.⁹ In the UK, for example, spouses do not have to pay inheritance tax when inheriting each other's property, unlike those in any other form of relationship. Similarly, Thomas Stoddard defends same-sex marriage 'despite the oppressive nature of

⁸ The public nature of the symbolism, the state's control over the meaning of marriage, is demonstrated in the difference between the legal requirements of civil marriages and civil partnerships in the UK. At a marriage the officiating Registrar is required to say:

Before you are joined in matrimony I have to remind you of the solemn and binding character of the vows of marriage. Marriage, according to the law of this country, is the union of one man with one woman, voluntarily entered into for life to the exclusion of all others.

There is no equivalent required legal declaration of the meaning of a civil partnership.

⁹ Exemption from inheritance tax is a clear advantage since not only does it provide a financial benefit to those who are married, but it is also a law that can, in effect, be avoided if the surviving spouse has a selfless principled objection, by donating the equivalent of the tax to others. Other special privileges of marriage are more subjective in their effects. Is it a privilege or a burden that, in the UK, a woman's husband is assumed to be her child's father on the birth certificate, whereas unmarried men may be so named only with their consent and presence? The answer will depend on the particular circumstances.

marriage historically, and in spite of the general absence of edifying examples of modern heterosexual marriage.’ (1997, p. 754) One key argument for Stoddard is the legal and customary advantages given to married couples, such as rights to pensions, health insurance and inheritance.¹⁰

Heterosexual-only marriage also has discriminatory *symbolic* effects. By recognising heterosexual marriage the state confers legitimacy and approval on such partnerships and denies it to homosexual ones. Thus Maria Bevacqua, a feminist lesbian, argues:

The exclusion of a portion of the population from a major social institution creates a second-class citizenship for that group. This is a humiliating experience, whether as individuals we feel humiliated or not. (2004, p. 37)

Bevacqua’s insistence that the humiliation is independent of the feelings of the humiliated emphasises the deeply symbolic nature of the institution. Marriage presents and represents a particular symbolic meaning that transcends individuals’ subjective self-understandings and experiences. Instead, it appeals to supposedly shared social understandings of value, understandings that can fail to respect minority and historically-oppressed groups. In particular, marriage reinforces the idea that the monogamous heterosexual union is the (only) sacred form of relationship.

Stoddard argues that marriage is ‘the centrepiece of our entire social structure’ and notes that the US Supreme Court has called it ‘noble’ and ‘sacred’. (1997, p. 756) Understandably he ‘resents’ and ‘loathes’ the fact that, according to the Court and US policy, homosexuals are not deemed able to enter into such noble and sacred relationships (1997, p. 756). Like Bevacqua, Stoddard believes that legalising same-sex marriage is a crucial egalitarian step, even if many homosexuals have no desire to marry. Indeed, Stoddard argues that same-sex marriages would also benefit heterosexual women, as they would serve the feminist purpose of ‘abolishing the traditional gender requirements of marriage’ and thus divesting the institution of ‘the sexist trappings of the past.’ (1997, p. 757)

According to these feminist critiques, then, marriage oppresses both those heterosexual women who do or could participate in it and those homosexual women and men who could not; and it does so in ways that are both practical and symbolic. But these criticisms can conflict in their implications for marriage reform, rendering the debate exceedingly complicated.

¹⁰ It is worth noting that the existence of tax and other benefits for married couples does not simply mean that unmarried individuals cannot access a benefit. When that benefit is a tax break or similar it imposes a measurable *cost* on those who do not receive it, since their tax burden will necessarily be higher than it would be if the benefit did not exist for others. In other words, the move from tax equality to tax breaks for the married cannot be Pareto-optimal: the benefit for the married can be achieved only at the expense of the unmarried. David Estlund emphasises this point, and argues that pro-marriage campaigns are also coercive (1997, p. 163). Since marriage is unjust in both its effects on women and its unavailability to homosexuals, it follows that those who are married are benefiting from injustice.

Consider, for example, whether it would be desirable from a feminist perspective to legalise same-sex marriages. With the various feminist critiques in mind we can see that the issue is by no means clear-cut. Heterosexual-only marriage is symbolically oppressive to women and to homosexuals. If homosexuals are allowed to marry, it is not clear whether its oppressiveness will rub off onto homosexuals, making them worse off, or whether the radical progressiveness of homosexuality will rub off onto marriage, making all women better off. As we have seen, Stoddard argues that progressiveness will prevail. Paula Ettelbrick, on the other hand, predicts the triumph of patriarchy and reaction: 'marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation,' she writes (1997, p. 758). For Ettelbrick, these effects will not be combined to homosexuals, since '[g]ay liberation is inexorably linked to women's liberation. Each is essential to the other.' (1997, p. 758) Card similarly argues that, although it is unjust that marriage is denied to homosexuals, the injustice of the institution as a whole means that lesbians and gay men should not fight for the right to marry – just as white women should not have fought for the (equal) right to be slave-owners (1996).

We can identify similar ambiguities in the issue of allowing homosexual couples to enter into civil partnerships but not marriages (as is the case in the UK). Such a policy has two advantages from the feminist point of view: first, homosexual couples are given access to the practical benefits of marriage and second, the idea of a civil partnership breaks away from the patriarchal symbolism of historically-oppressive marriage. Some feminists also argue that homosexual civil partnerships will benefit heterosexual women, whether married or not, by undermining both the hegemony of marriage and the idea that traditional gender roles must prevail within it. Indeed, one way of breaking away from the patriarchal history of marriage might be to offer civil partnerships to heterosexual couples as well as to homosexual ones (currently forbidden in the UK).¹¹ The status of civil partnership would thus be doubly egalitarian: it would emphasise equality between heterosexual and homosexual couples since both could enter into it, and it would emphasise equality between men and women by breaking from patriarchal history and by imposing equal terms on each member of the partnership.

However, the policy of distinguishing civil partnership from marriage also has disadvantages. As long as the title "marriage" is reserved for heterosexual relationships the institution of civil partnerships *entrenches* the gendered nature of marriage, since the idea that marriage must be between a man and a woman is reinforced, and with it traditional gender roles. Moreover, the fact that marriage symbolically oppresses homosexuals remains, since the discriminatory and hierarchical distinction between heterosexual and homosexual couples is unchanged if only heterosexuals may marry. Finally, such a move does nothing to challenge the hierarchy that marriage enacts between being partnered and being single, since rights are even more forcefully allied to the former and denied to the latter. Thus Celia Kitzinger and Sue Wilkinson argue:

By re-branding as 'civil partnership' a union that is otherwise identical to opposite-sex civil marriage, civil partnerships achieve the

¹¹ This solution is advocated by the Equal Love Campaign, which describes itself as "The legal bid to overturn the twin bans on same-sex civil marriages and opposite-sex civil partnerships in the United Kingdom." See <http://equallove.org.uk>

symbolic separation of same-sex couples from the state of 'marriage'. They grant same-sex couples the possibility of legal conformity with institutional arrangements which formally recognize heterosexual intimacy while effectively excluding us from that very institution. The irony is that this separation is positively valued by many feminists and LGBT activists because it is the *symbolism* of marriage – and not the civil institution itself – that is the target of their critique. (2004, p. 144)

The question of how, from a feminist standpoint, we can best understand and interact with the institution of marriage is thus incredibly complex, and this complexity is mirrored in the diversity of feminist positions on the issue. One way of understanding this diversity is by returning to the idea that marriage is an *institution*.¹² I have highlighted a puzzle, which is that feminists argue that marriage is both oppressive to its (female) participants and oppressive to its non-participants. These two oppressions seem in tension, but the tension might be resolved if we take a broader view. It is possible that, *if the institution of marriage exists*, it is better to be married than not, but that the *very existence of the institution* is oppressive. In other words, it might be that women are better off if marriage does not exist at all; but if marriage does exist they are better off married than unmarried. On this account juxtaposing marriage's oppressiveness to women and to homosexuals fails to compare like with like: marriage is oppressive to women as compared to a world without marriage; it is oppressive to deny homosexuals marriage only insofar as that institution does exist.

This analysis fits with some of the examples of oppression just given. The symbolic pressure on women to marry, and the idea that they are worthless if unmarried, means that *if marriage exists* women are better off married than unmarried. This view is compatible, then, with the idea that it is harmful to be denied access to marriage *if the institution exists for others* and confers practical or symbolic benefits. But there is no necessary harm if the state refuses to recognise marriage at all.¹³

The natural implication is that women and gay men are better off, and justice is served, if marriage ceases to exist as an institution. Abolishing the institution satisfies all feminist critiques, and is thus a policy implication around which feminists should unite.

II

The Marriage-Free State. I advocate, then, the abolition of state-recognised marriage and the institution of what I call a Marriage-Free State. The state recognises marriage in the relevant sense when it applies a *bundle* of rights and duties to married people *because they are married*.¹⁴ The italics highlight the two parts of the claim. In a society

¹² I am grateful to Fabienne Peter for pressing me on this point.

¹³ The European Declaration of Human Rights protects the right to marry, a right which has also been seen as fundamental in US constitutional law. Insofar as the right to marry is a genuine right it is best understood as the right to form committed partnerships, and to enjoy protection from undue legal interference in those relationships, rather than as a right to have one's marriage recognised as a special and privileged legal status.

¹⁴ This idea of state recognition does not exhaust the ways in which a state might take an interest in marriage. A state may also take an interest in marriage by defining and setting limits on it: stating who may and may not enter into a marriage and which procedures must

with state-recognised marriage the members of a marrying couple thereby acquire a *bundle* of rights and duties that they did not previously have. For example, they may acquire rights to inheritance without tax, next-of-kinship rights, rights to financial support from each other, rights concerning children, and so on. These rights are given to the couple *because* they are married, not because they have chosen each right in turn (for they have not), and not because there is some other feature of their relationship that merits them (for non-married couples living in identical circumstances will lack some or all of these rights).

Abolishing state-recognised marriage means that the state no longer provides a bundle of rights and duties to people because they are married. It does not mean making it illegal for people to participate in the symbolic institution of marriage or to call themselves married. Without state-recognised marriage people could still engage in private religious or secular ceremonies of marriage, but these would have no legal status.

Even if marriage is abolished as a legal category the question of how to regulate personal relationships remains. Personal relationships still have to be regulated so as to protect vulnerable parties, including but not only children; so as to regulate disputes over such matters as joint property; and so as to appropriately direct state benefits and taxes.

Some argue that personal relationships should be regulated on a contractual basis.¹⁵ The contractual model has various problems, which I discuss elsewhere (Chambers forthcoming b). But even if relationship contracts are permitted there is a need for an additional regulatory framework for personal relationships. Such regulation is required for several reasons. Even if contracts are allowed the state must set limits on contracts that would be unjust for the contracting parties (such as contracts amounting to slavery) or for third parties such as children, and must provide guidance for disputes that arise between people in personal relationships who have not made a contract. There is also a need for regulation to protect legitimate state interests and to provide clarity on matters that must be determinate in law. So relationship contracts cannot replace marriage. There must still be a regulatory framework, a series of state directives, applying to personal relationships.

It is useful to distinguish two general models for state regulation of relationships: holistic and piecemeal. Most advocates of non-marital regulation of personal relationships take a holistic approach; I argue here in favour of piecemeal regulation.

be followed for a relationship to become a marriage. A marriage-free state might refrain from showing this sort of interest in the institution but it is not a requirement of a state counting as marriage-free that it so refrains, for a marriage-free state might take an interest in setting limits on even private marriages. For example, the state might make it illegal for religions to marry children. Even if the state refuses to recognise marriages, religious or secular, it still has an interest in protecting children and thus in setting limits on what non-state individuals and groups may do to them.

Another important way the state might interact with marriage is by registering and enquiring about its existence, for example on official forms. I take it that a marriage-free society will not do this for any purposes other than monitoring the prevalence of private marriage, or applying such regulations to private marriage as may be required by justice (such as a prohibition on marrying children).

¹⁵ Advocates of regulating relationships on a contractual basis include Schultz 1982, Fineman 2006, Weitzman 1983.

Holistic regulation of relationships involves creating a *status*, analogous to marriage, which confers upon people a package of legal rights and responsibilities. Both existing marriage and civil unions are examples of holistic regulation. When entering into these relationships individuals take on a bundle of rights and responsibilities covering multiple areas of life such as property ownership, tax status, inheritance, next-of-kinship, child custody and immigration. On a holistic model of marriage reform the state continues to award some people a bundle of special rights and duties. It simply awards that bundle on the basis of a status other than marriage.

Civil unions are the most familiar alternative to marriage on the holistic model, but they are not the only one. Several progressive thinkers have proposed new holistic statuses to replace marriage. Some advocate versions of civil unions that differ in some way from the existing legislative models (Thaler and Sunstein 2008, March 2010). Other theorists advocate completely new statuses, usually replacing the marital focus on adult sexual partnership with an emphasis on care. For example, Tamara Metz proposes disestablishing marriage and replacing it with a state-recognised Intimate Care-Giving Union (ICGU) status, one that could apply to any relationship of intimate caregiving (2010). Similarly, Elizabeth Brake advocates what she calls minimal marriage, a status that is also dependent on caregiving (2012).

All of these models – civil union, ICGU status and minimal marriage – improve on the state recognition of traditional marriage by breaking from the patriarchal, exclusionary and controversial meaning of that institution. In other words, each is to be preferred to marriage symbolically. Their practical advantages depend on their particularities. British civil partnerships afford the partners (who must be same-sex) much the same legal rights as are afforded to married spouses (who must be different-sex). So British civil partnerships are neither better nor worse than marriage in terms of the practical support they provide to personal relationships; their advantage is that they counteract the egregious heterosexism of traditional marriage.

Brake and Metz propose more radical alternative statuses, both holistic forms of regulation.¹⁶ Metz does not give details of the regulations of ICGU status, but the basic idea is that it is intimate caregiving, in all its forms, that is deserving of recognition and protection. For Brake, minimal marriage means 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.’ (2012, p. 158) Both theorists make the convincing case that caregiving is a better basis for public policy than marriage since care is a more fundamental activity: a primary good essential to human flourishing that nevertheless brings with it risks and vulnerabilities. For them, state recognition and protection of caregiving status therefore protects the vulnerable and allows all to access vital human goods.

I endorse the claim that caregiving is crucial and worthy of state protection. However, I suggest that holistic regulation, implementing a new status, is not the best replacement for state-recognised marriage. There are two problems with holistic regulation. The first is that holistic regulation involves a *bundle* of rights and duties. The second is that holistic regulation operates by people *opting in*, so that there can

¹⁶ Metz states ‘In many ways, an ICGU status would look like marital status today. It would afford legal recognition from which would flow various legal presumptions.’ (2010, p. 134.)

be differences in the status, rights and protection awarded to relationships that are functionally equivalent.

First, the bundling problem. Holistic approaches tend to assume that all the most important functions of life are met within one core relationship. This is the model behind civil unions. Many people, such as most married people, do centralise activities such as intimate coupledness, childrearing, property-sharing, next-of-kinship and inheritance. For such people, the bundling feature of holistic regulation is unproblematic, even convenient. But the state should recognise that many individuals' arrangements are more wide-ranging. Separated couples with children may continue to co-parent but share no other relationship. Others maintain a nuclear family unit but also share property or care with an elderly parent or sibling. Bundling caring activity into one privileged status does not capture the complexity and diversity of real lives.

Bundling is also problematic for political or non-perfectionist liberals, since a holistic bundled status involves the state in making value-judgments about better and worse ways of life and in marking one type of relationship out as the most fundamental.¹⁷ Indeed, as Metz herself notes, special expressive status akin to the symbolic significance of marriage might become attached to ICGU status, and the conferral of such status does involve the state in 'acting in a way that reflects particular political commitments.' (2010, p. 148)

Some advocates of holistic regulation reject this bundling aspect. For example, under Brake's scheme each individual can be 'minimally married' to more than one person at a time, assigning different rights (which Brake calls 'minimal marriage rights') to different people (2012, p. 303). But Brake's account is still vulnerable to the second problem with holistic regulation: people must *opt in* to receive legal protection. People who have not, or not yet, chosen to acquire the status of minimal marriage, ICGU, or civil union are left unprotected – *even if they are in relationships that are functionally identical to those who have acquired such status.*

The Law Commission offers a compelling example to explain what is wrong with this situation, in the context of current British marriage law:

Take the position of cohabitants who have children and have been living together for a long time. The mother stays at home to look after the children and has no real prospects of re-entering the job market at a level that would enable her to afford the child-care that her absence from home would require. ... In order to obtain any long-term economic security in case of the relationship ending, she would first have to persuade him that he should take steps to protect her position. It might well be that he is quite happy with the status quo, which favours him.

Even if she were able to overcome this initial hurdle and persuade her partner that something should be done, they would then have to decide what steps were appropriate. It might be thought that the obvious answer is that they should marry. But research suggests ... that many cohabitants think it

¹⁷ Metz explicitly acknowledges that 'Both marriages and ICGU status reflect value judgements.' (2010, p. 148.) Her argument is that ICGU status is preferable since caregiving is a legitimate area of state interest. Elizabeth Brake argues that political liberals should endorse minimal marriage since care is a primary good; I address her account in forthcoming a.

wrong to marry purely for legal or financial reasons. The alternative would be for them to declare an express trust over their home or enter into a contract for her benefit. However, such arrangements may be complex and require legal advice. The couple may simply conclude that the issue is not sufficiently pressing to take any further, and that they have other spending priorities. (2007, p. 33)

The outcome is that if the couple separate the woman is left without the financial protection afforded to divorcing spouses, despite the fact that the relationship is functionally identical to many marriages.

The same problems occur with any proposed holistic status. There must be a difference in law between those with that status and those without that status, for otherwise the status is purely symbolic and affording it is outside the state's purview. But then the existence of that status means that legal protection is denied to those who are engaged in caring relationships but have not acquired the protected status.

Instead I propose *piecemeal* regulation, which has two key features. First, the piecemeal model *rejects bundling*. Piecemeal regulation involves the state regulating the different functions or parts of a relationship separately. There would be no assumption that, in any particular case, all the functions coincided in one relationship. Thus there would be separate regulations for property, child custody, immigration and so on. Each of these regulations would stand separately, and individuals could form relationships with different people for different functions.

Second, piecemeal regulation involves *no special status*. Anyone engaged in a regulated relationship activity is subject to the relevant regulations. Deviation from legal regulations, when allowed at all, exists only on an *opt-out* basis.

The problem with holistic regulation is that it requires individuals to opt in to a particular status in order to access protections. Instead, the state should set a regulatory framework that stipulates the non-voluntary, default rights and duties that apply to everyone who performs any given function: anyone who is the primary carer of a child, any people who share in purchasing their main home, and so on. Alternative statuses such as minimal marriage or ICGU status mean that there will be differences between those who have, and do not have, those statuses even if there is no functional difference in their relationship. In contrast, piecemeal regulation starts by working out what justice requires in any given area of human life and relationship, and secures that requirement for everyone.

The content and form of the ideal piecemeal regulations is beyond the scope of this paper. Separate arguments would be needed both to identify each area of state interest and to specify what the just regulations should be. Such arguments would proceed as follows. For each proposed area of state regulation of relationships we ask first whether, and second why, the state has a legitimate interest in regulation. The answers to these questions indicate the content of that regulation. Crucially, the arguments are separate for each proposed area of regulation.

Consider, for example, immigration rights for partners. Advocates of open borders will argue that the state should not control immigration at all, so there is no justification for any relationship-based immigration rights. Others will argue that

states do have a legitimate interest in controlling immigration, in which case an argument must be provided as to what sorts of immigration should be allowed and what that implies for rights of immigrants to bring others with them. Depending on the outcome of that argument we might be left with a defence of immigration only for solitary economically-necessary workers, or with a defence of allowing all immigrants to bring a certain number of people of their choice with them (regardless of relationships between them), or any number of other possibilities. The point is that no status such as marriage settles these arguments in advance.

Or, consider the example of inheritance tax. Current UK law awards a privilege to spouses and civil partners that is not awarded to others, in the form of an exemption from inheritance tax for transfers between partners. Citizens in general are not allowed to nominate a person who is exempt from inheritance tax; they can opt in to the exemption only by marrying or entering a civil partnership. Inheritance tax exemptions might not be justified at all. But if they are justified this cannot be because married people are somehow more in need, or more deserving of, exemptions than others.¹⁸ Exemptions might be justified on the grounds that if one cohabitant dies it is unfair or undesirable to require the other cohabitant to leave their home in order to raise the money to pay tax on the inherited portion of the home. If this is the justification then the tax exemption should be awarded to all people who inherit a portion of their primary residence. Alternatively, an exemption from inheritance tax might be justified on the grounds that it is good public policy to allow people one tax-free heir (perhaps because doing so encourages saving and hard work, since people know that what they save will pass to their nearest and dearest rather than to the Treasury). If this is the justification for the policy then *all* people should be allowed to nominate one tax-free heir of their choice, for the incentive will work regardless of whether that heir is a spouse, child, friend or charity.

Finally, consider parenting. It is clear that the state has a legitimate interest in regulating how adults care for children so as to protect those children. Some such regulations, such as the duty not to physically abuse a child, apply to any adult interacting with any child, whether that adult is a stranger, a professional caregiver, a relative or a parent. Other regulations might legitimately apply to professional carers but not to parents, perhaps because to apply them to parents would be an unjust interference in family life and parental privacy. For example, nurseries and childminders have to adhere to stricter health and safety standards than do private family homes. It is not my argument, then, that there should be no legal recognition of the differences between different sorts of relationships. But these differences should be based on the functional differences between strangers, professional carers and intimate carers – and perhaps between primary carers (such as parents or guardians) vs. non-primary intimate carers (such as wider family members). The crucial point is that there should be no difference between primary caregivers based on whether or not those caregivers have sought some special state-recognised status, such as ICGU or minimal marriage. Piecemeal regulation thus has the advantage that it targets all relevant people, and does not miss those who have not sought the relevant status.

¹⁸ Doubtless some defend exemptions for married people as an incentive to marry. Such arguments fail on two counts: first, there is no legitimate state interest in incentivising people to marry (as opposed to incentivising stable relationships, or care, or some other good); and second, few proponents of this argument would actually want people to marry purely for the money.

One potential objection to my argument is that it undermines liberty. The current regime allows people to choose whether to marry, and one reason people choose not to marry is to avoid the consequent legal regulations. Should it not be possible to form a relationship without incurring extensive legal duties?

The answer to this question depends on the relationship activity in question. Some relationships, such as parenthood, rightly bring duties that cannot be avoided except in the most extreme circumstances. Other relationships, or relationship activities, seem more suitable for variation. I do not take a stand here on what those areas of legitimate diversity might be, or even if there are any; in general the liberal state should regulate only when there is a pressing need to do so. But *if* there are areas of relationships that need regulation but in which there can be legitimate diversity then the right approach is to allow people to *opt out* of the default regulations (which must be designed with justice in mind), rather than to leave people unprotected unless they *opt in* to some privileged status.

Opting out would be a matter of drawing up a contract or trust expressly setting out how the relationship deviates from the default. The law would stipulate when opting out is possible, and any limits that might apply. So the legal complexity and expense described by the Law Commission above would fall on those wanting to escape the protection offered in law, not to those wishing to be protected.¹⁹

Piecemeal regulation has many advantages, then. It is more flexible, allowing a variety of ways of life to receive appropriate state attention. It can meet the needs of caring relationships but does not assume that all caring relationships are attached to other forms of intimacy or that people have only one sort of caring relationship. And it dispenses entirely with one special status to which special recognition and thus endorsement is attached. Instead, the importance of many different forms of relationship is recognized, and each is provided with the legal recognition, rights and responsibilities appropriate to it.

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¹⁹ As J. S. Mill argues, 'laws and institutions should be adapted, not to good men only, but to bad' (1996).

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