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Is Marriage Incompatible with Political Liberalism?

Abstract: This paper examines three arguments that claim marriage, as a political institution, is incompatible with political liberalism. These arguments are drawn from Elizabeth Brake¹ and Clare Chambers.² My purpose here is to determine which, if any, of the arguments show marriage to be incompatible with political liberalism.

The “Neutrality Argument” claims that the political institution of marriage violates the political liberal principle of neutrality. I claim that no such violation occurs. The “Unjustified Discrimination Argument” alleges that marriage involves the state in unjustified discrimination. I suggest there are grounds for the differential treatment identified. The “Public Reason Argument” argues that marriage, as it is currently structured, violates the political liberal principle of public reason. I claim that its current structure can be justified by appeal to public reasons. I therefore conclude that none of these arguments successfully demonstrate that marriage is incompatible with political liberalism.

Keywords: Marriage; Neutrality; Political Liberalism; Public Reason; Unjustified Discrimination

Introduction

This paper examines recent arguments that claim marriage is incompatible with political liberalism. It first explains, in Section 1, what exactly these arguments are against – the political institution of marriage – before elucidating what the charge of incompatibility amounts to in Section 2. It then moves on to present and evaluate three distinct arguments:

¹ Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (New York: Oxford University Press, 2012).

² Clare Chambers, “The Marriage Free State”, *Proceedings of the Aristotelian Society* 113 (2013), pp.123-143.

the “Neutrality Argument”, the “Unjustified Discrimination Argument” and the “Public Reason Argument”. These are drawn from the work of Clare Chambers³ (the Neutrality Argument) and Elizabeth Brake⁴ (the Unjustified Discrimination Argument and the Public Reason Argument). I have extracted these arguments from the author’s texts, but reconstruct them for clarity, and to bring out more forcefully their applicability to the charge of incompatibility.

The three arguments make three distinct claims about the political institution of marriage. The Neutrality Argument holds that it violates the principle of neutrality. The Unjustified Discrimination Argument claims that it involves the state in unjustified discrimination. The Public Reason Argument maintains that it violates the principle of public reason. I present and evaluate each of these in turn in Sections 3, 4 and 5. My purpose here is to determine which, if any, of the arguments show marriage to be incompatible with political liberalism. I conclude in Section 6 that none of them successfully do so.

1. A Political Institution of Marriage

The three arguments I discuss do not focus on the question of whether marriage itself is unjust, nor do they attempt to show that marriage is traditionally or currently racist, sexist, or homophobic. These are possible and reasonable objections, but the arguments I consider focus instead on the status of marriage as a political institution within many (if not all) Western liberal democracies. It is the fact that the state is involved in marriage at all that, according to these arguments, causes marriage to be problematic for political liberalism.

³ Chambers, “The Marriage Free State”.

⁴ Brake, *Minimizing Marriage*.

A 'political institution of marriage' exists when marriage comprises a legal status that is conferred, recognised and regulated by the state, and which has a particular bundle of rights and benefits that attach to it. Contrasting this with the alternative - a non-political institution of marriage – helps to highlight the state's current involvement in this institution. With a non-political institution of marriage, there would still be marriage, but it would be a non-legal status that could only be attained via a non-political body, such as a church. The state would not recognize the relationship as especially legally significant, although it might still regulate some relationships typically associated with non-political marriage, such as the parental relationship, via other means. Consequently, no legal rights or benefits would depend on the status alone.

2. Incompatibility

Brake and Chambers have different overall projects. Whilst neither argues that marriage (in some form) should be erased completely as an option for people to choose, they do both think that something needs to change. Where they differ, is in what they think that change should be. Chambers is a marriage abolitionist. She aims to show that any political institution of marriage is problematic, and should be abolished.⁵ We can therefore understand the Neutrality Argument to be making a strong incompatibility claim, which can be defined as follows:

Strong Incompatibility Claim: a political institution of marriage is in principle incompatible with political liberalism.

⁵ Chambers recognises that personal relationships do still need some form of regulation, but claims that this should not be achieved through a political institution of marriage or any other form of regulation that uses a status and associated bundle of rights and responsibilities (that is, holistic regulation).

Brake, on the other hand, is a marriage reformer. She aims to show that the current political institution of marriage is problematic, and stands in need of reform. As such we can understand the Unjustified Discrimination Argument and the Public Reason Argument to be making a weak incompatibility claim, which can be defined as follows:

Weak Incompatibility Claim: the current political institution of marriage is incompatible with political liberalism.

I aim to demonstrate through the evaluation of the three arguments that none succeed in their aims; neither the Strong Incompatibility Claim nor the Weak Incompatibility Claim is vindicated.

3. The Neutrality Argument

Clare Chambers is concerned about holistic forms of regulation for personal relationships. Holistic regulation occurs when a status (such as marriage) is created, through which a “package of legal rights and responsibilities”⁶ is conferred on to the individuals in the personal relationship. It is this package – or bundle – of rights and responsibilities that the Neutrality Argument focuses on, and which is identified as problematic for political liberalism.⁷ Chambers does not provide a fully worked out argument for why bundling legal

⁶ Chambers, “The Marriage Free State”, p.134.

⁷ Brake also has a ‘Neutrality Argument’ against bundling. “Because the state cannot assume that spouses must relate in a certain way, it cannot assume one set of one-size-fits-all marital rights” (*Minimising Marriage*, p.170). I focus on Chamber’s argument here because it is an example of a Strong Incompatibility Claim, and distinct in its focus on the claim that the state expresses a non-neutral value judgment. The discussion is however also relevant to Brake’s work.

rights and responsibilities in this way is problematic, but the central ideas of the Neutrality Argument can be drawn from the following passage.

Bundling is...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.⁸

In what follows I attempt to reconstruct this argument as fully as possible. I take the central ideas to be that the (non-perfectionist) political liberal state should not be making or expressing value judgements about ways of life and relationships. However, the bundling that occurs in the sort of holistic regulation that partially constitutes the political institution of marriage amounts to the state making such value judgements. So, the political institution of marriage is, no matter what bundle of rights are associated with it, necessarily illiberal.

Chambers is not particularly clear about why the state's making of value judgments is incompatible with political liberalism, but I think it makes sense to understand her argument in terms of neutrality.⁹ The reason that the state should not be making these types of value judgements is because it should adhere to the political liberal principle of neutrality. The principle of neutrality states that the state should remain neutral between the many varied conceptions of the good that its citizens hold. It should not hold or express a particular view

⁸ Chambers, "The Marriage Free State", p.136

⁹ Chambers refers to Tamara Metz in her explanation. Metz worries that her alternative Intimate Caregiving Union (ICGU) status, which is also a holistic form of regulation, might become as symbolically significant as marriage, and if it did, then this would mean that the state would act "in a way that reflects particular political commitments" (Chambers, "The Marriage Free State", p.136). See Tamara Metz, *Untying the Knot: Marriage, the State, and the Case for their Divorce* (Princeton and Oxford: Princeton University Press, 2010), p.148.

nor appeal to any particular view when justifying its laws, policies and institutions.¹⁰ This ensures that all its citizens are treated equally.

For example, consider the case of religion. The principle of neutrality prohibits the state from singling out one religion as the state religion, or, for that matter, from funding one religion's activity while not funding other religions' activities. Rather, all religions should be allowed to practise without state support and state interference. This would allow all citizens to freely choose which (if any) religion they ascribe to, without any preference being shown to any single religion by the state. If the state acted otherwise, it would not remain neutral between the differing conceptions of the good its citizens hold. For, a state religion or even a practice of specially funding one religion's activity to the exclusion of others can only be justified by appealing to one particular family of comprehensive conceptions of the good that pick out one particular religion as especially valuable (and so meriting state support). This would be a straightforward violation of the principle of neutrality that is at the heart of every non-perfectionist form of liberalism.

Chambers' view, then, seems to be that for the state to make and evince value judgements about ways of life and relationships is analogous to the state favouring one religion over others, and is therefore a violation of the principle of neutrality. For, although it is unclear what view the state expresses about ways of life via a political institution of marriage, Chambers appears to think that by having a political institution of marriage, the state is valuing one relationship type – marriage – as the “most fundamental”¹¹ and the best. This is

¹⁰ This is a “justificatory” view of neutrality, as opposed to a “consequential” view – see Will Kymlicka, “Liberal Individualism and Liberal Neutrality”, *Ethics* 99 (1989), pp.883-905, p.884.

¹¹ Chambers, “The Marriage Free State”, p.136.

why having a political institution of marriage is such a clear violation of a liberal principle of neutrality.

From the quote above we can see that Chambers thinks that the bundling of rights that occurs in holistic regulation is what constitutes the state making these inappropriate judgements about the value of one relationship over others.¹² Since marriage is a form of holistic regulation – it confers a “bundle of rights and duties”¹³ on to individuals in a relationship – having a political institution of marriage amounts to the state valuing marriage relationships over others. The complaint against marriage therefore applies *mutatis mutandis* for other forms of holistic regulation, such as civil partnerships. We can therefore understand Chambers as making the Strong Incompatibility Claim here because so long as marriage remains a form of holistic regulation (which is likely, whatever other reforms it might go through), Chambers will still take this argument to apply.

The argument can be set out as follows:

- 1) The principle of neutrality, which is an essential feature of political liberalism, requires that the state remain neutral between the many varied conceptions of the good that its citizens hold.
- 2) A political institution of marriage is a form of holistic regulation which means that it provides a bundle of rights and responsibilities through the assignment of marital status.
- 3) Providing a bundle of rights and responsibilities for relationships with a particular status (bundling) involves the state in demonstrating a positive value judgement regarding the relationship that can acquire the status.

¹² I will explain how we can interpret this claim in more detail in section 3.1.

¹³ Chambers, “The Marriage Free State”, p.135. (Chambers’ emphasis)

- 4) Marriage involves the state in demonstrating a positive value judgment regarding the marital relationship. (From 2 and 3)
- 5) Marriage is in principle incompatible with political liberalism (Strong Incompatibility Claim). (From 4 and 1)

3.1 An Evaluation of the Neutrality Argument¹⁴

The bundling that concerns Chambers occurs when individuals enjoy a package of legal rights and duties entirely as a result of those individuals acquiring a specific legal status, such as the status of being married. Once they have acquired that status, the package of rights and responsibilities is conferred automatically. The collection of rights and duties is tailored to each legal status. In the case of marriage, for example, the particular bundle of rights and duties will include the “rights to inheritance without tax, next-of-kinship rights, rights to financial support from each other, rights concerning children”¹⁵ and many, many more.

There are two possible ways to read Chambers’ claim that bundling causes the state to make value judgements. The first reading is that bundling, wherever it occurs in regulation, involves the state making value judgements about the things that it is regulating. This would imply that a political institution of marriage is just one instance of a general form of

¹⁴ A typical response to arguments that claim a political institution of marriage violates the principle of neutrality is to provide a possible neutral justification of the institution. See Simon May, “Liberal Neutrality and Civil Marriage” in E. Brake (ed) *After Marriage: Rethinking Marital Relationships* (New York: Oxford University Press, 2016), pp. 9-28. May suggests that if the “presumptive permanence” (p.13) of the marital relationship amplifies the beneficial effects of caring relationships, and the institution of marriage further enhances these effects, then this could provide a neutral justification for the institution. This is not my strategy in this section. Rather, I want to unpick the Neutrality Argument presented here, and challenge the particular inferences that it makes.

¹⁵ Chambers, “The Marriage Free State”, p.133.

regulation that violates the principle of neutrality. The second reading is that this particular instance of bundling that occurs in the holistic regulation of personal relationships (and not bundling in general) involves the state making particular value judgements about ways of life and relationships, and so it is this particular instance of bundling that violates the principle of neutrality. It can be demonstrated that both readings of this claim are false.

The first reading – that bundling always involves the state making value judgements – cannot be what Chambers has in mind. If bundling always involves making value judgements, then every time the state bundles any set of rights and duties, it is being illiberal. Liberal states do this a lot and it is almost never judged to be a violation of the principle of neutrality. Take contract law for instance. When we sign a contract – and take on the legal status of ‘contract holder’ - a bundle of rights and duties relating to contract law and the judicial system are conferred on to us (in addition to those that are stated in the contract). In legislating this, the state does not make any positive value judgments about the status of ‘contract holder’ in this situation. It is simply establishing an efficient system for resolving disputes. (So, if anything, it is the efficiency of such a system that is valuable, and not being party to a contract!) As this example suggests, it is not clear how the simple act of bundling a group of rights and benefits that relate to a status in itself amounts to the state making any value judgements about that status or the people acquiring it. Bundling in itself does not violate neutrality, and is not illiberal. It is little more than a useful legal tool.

What about the second reading – that the particular bundling of rights and duties in the holistic regulation of personal relationships involves the state in making value judgements? I think this is the reading that Chambers intends. The particular bundle of rights and duties (identified above) are relevant to many important areas of our life – what Chambers refers to

as “functions of life”.¹⁶ The first problem that Chambers identifies with this particular instance of bundling is that it involves the state making the false assumption that “all the most important functions of life are met within one core relationship”.¹⁷ She takes this assumption to be false because it is not always the case that people arrange their lives in such a way as to have all their important life functions – such as property owning and child rearing - occurring in one central relationship. She then seems to suggest that it is because the state makes this false assumption, and bases the regulation of personal relationships upon this assumption, that the state makes and expresses the positive value judgment that this one core relationship is the “most fundamental”¹⁸ or best.

It can be demonstrated that this second reading of the bundling claim is also false. This is because we can show that there are reasons to think that the state does not make the problematic assumption that all of an individual’s most important life functions will occur in one relationship. If it is shown that this problematic assumption is not being made then there is nothing left on which to base the claim that the state is making a value judgment regarding the relationship on to which it is conferring the bundle of rights and benefits.

There are three reasons to challenge the claim that the state assumes that all important life functions will occur in a single core relationship. First, because the rights and benefits for certain life functions (for example, parental rights or health benefits) will only come into play when required – when that particular life function occurs. If that life function does not occur, then the right or benefit will never materialise. If a married couple do not have children, then they will not receive parental rights. If both spouses work, and both spouses have spousal

¹⁶ Ibid, p.135.

¹⁷ Ibid, p.135.

¹⁸ Ibid, p.136.

health benefits, then neither spouse needs to use the other's entitlement, but it is still there. As such, the state is not assuming that all these important life functions will occur in one core relationship, but puts in place protections for this situation if it occurs.

Second, the state recognises that these important life functions can occur in other relationships. The state confers rights and duties that concern e.g. property owning and child rearing outside of marriage as well as within it. Those who are married can obtain these rights and duties with people other than their spouse. Those who are not married can also attain these rights and duties without marrying. Marriage is just one option for obtaining these rights and duties among others. This provides a further reason to maintain that the state is not assuming that all important life functions will occur within one central, marital, relationship.

It might be objected that there are some rights and duties that are not available outside of marriage, or that there are some that are not attainable with equal ease. Brake gives the example of “entitlements to special eligibility of immigration or legal residency ... [and] hospital and prison visitation rights”.¹⁹ Another example might be inheritance tax laws.²⁰ However, in response to this objection, it should be noted that I do not need to claim that all marital rights and duties are available outside of marriage in order to challenge the idea that the state assumes all important life functions occur in one core relationship. It is enough to show that some are available outside of marriage as this indicates that the state allows for the possibility that some central life functions will occur outside of (or in the absence of) a single core relationship.²¹

¹⁹ Brake, *Minimizing Marriage*, p.181

²⁰ I thank an anonymous reviewer for highlighting this worry and for this particular example.

²¹ There is a further question, not addressed here, about which rights and benefits should be made available outside of the marital bundle.

The third reason to challenge the claim that the state makes this problematic assumption is to recognise that there is an alternative explanation for why the state uses bundling: efficiency. It is true that not all people will fulfil all their most important life functions within one core relationship. However, for many people, it will be the case that they fulfil a large number of these important life functions within one core relationship.²² It is therefore efficient for the state to provide the rights and duties for these life functions in a bundle, for those that want it. This justification for bundling in terms of efficiency is neutral in the sense that it does not express or appeal to a particular conception of the good, it simply responds to a (contingent) sociological fact about the way that individuals order their lives. It is worth noting though that if this trend altered so that people didn't tend to fulfil most of their life functions in one relationship, then bundling would no longer be efficient, and could no longer be justified in this way. Additionally, if these valuable life functions became disassociated with marriage, then the state may well lose its interest in providing this bundle of rights and duties through marriage, as it would not be an efficient tool to do so.²³

To clarify, my claim regarding efficiency here relates solely to the method of providing particular rights and benefits (i.e. in a bundle) as this is what the Neutrality Argument focuses

²² I think it is reasonable to assume that this trend is not solely due to the existence of the marital bundle of rights and benefits. Whilst the marital bundle might provide some incentive for people to bundle their life functions in one core relationship, so do social norms, practicalities and traditions. As such, providing the bundle of rights and duties can be seen as primarily responding to (and not causing) the trend to bundle one's life functions.

²³ My point about efficiency here is specifically concerned with the claim that bundling implies the state is making a problematic assumption. I am not claiming that efficiency could provide a neutral justification for the political institution of marriage as a whole.

on. I have not said anything about the reasons the state might have for providing particular rights and benefits, or for providing any marital rights and benefits at all.

So far I have demonstrated that there are reasons to challenge the claim that the state is making the problematic assumption. If the state is not making this assumption, then there is nothing left on which to base the claim that a positive value judgement is being made about the relationship that the bundle of rights and duties is conferred on to. Chambers seemed to be claiming that the non-neutral value judgment is made and expressed because the state confers a bundle of rights and benefits onto a single core relationship that it assumes encompasses all important life functions. I have shown that there are reasons to think the assumption that would lead to this value judgement is not being made. If this is the case, then there are therefore no grounds on which to claim that the value judgement is being made.

There need to be additional grounds on which to make such a claim because there is nothing about the fact that the state uses a holistic form of regulation that involves bundling, or the fact that it confers this particular bundle of rights and duties onto married couples, that indicates that it necessarily holds or expresses neutrality violating value judgments about the relationships that are regulated by these means.

So long as a regulatory institution can be justified on neutral grounds, and so long as the particular bundle of rights and duties associated with that regulatory institution can be justified on neutral grounds, then there is nothing to indicate that by establishing that institution the state thereby makes neutrality-violating value judgements. On pain of absurdity (namely, that almost all modern legal regimes are non-liberal), Chambers must accept that reasons of efficiency are neutral reasons supporting regulation by bundling. It may be that some particular 'incidents' in the bundle cannot be justified on neutral grounds (e.g., as would be the case of a right by a husband to his wife's labour), and that would be reason to

remove them from the bundle. But that is not a reason of neutrality against bundling in general.

Chambers' claim that the bundling of rights and duties associated with the political institution of marriage amounts to the state making a neutrality-violating value judgement has been shown to be false. The Neutrality Argument therefore does not successfully uphold the Strong Incompatibility Claim. Furthermore, it appears that the Neutrality Argument does not offer obvious grounds for supporting the Weak Incompatibility Claim either.²⁴

4. The Unjustified Discrimination Argument

The Unjustified Discrimination Argument is drawn from Elizabeth Brake's work. It claims that the current political institution of marriage involves the state in unjustified discrimination: specifically "amatonormativity".²⁵ This argument is not one of Brake's positive political liberal arguments in favour of marriage reform.²⁶ However, the charge of unjustified discrimination, if true, would constitute a reason to treat the current political institution of marriage as incompatible with political liberalism. It also comprises the starting point of the Public Reason Argument (see Section 5).²⁷ The charge however is a contingent

²⁴ The Neutrality Argument does however highlight that there might be some rights and benefits typically associated with marriage that the state needs to ensure are (more readily) accessible via alternative means. This doesn't challenge the current institution of marriage per se, but rather the context in which the current institution is situated.

²⁵ Brake, *Minimizing Marriage*, p.88.

²⁶ The discussion of amatonormativity, and later, the moral value of caring relationships in this section is drawn from the first part of Brake's book where she considers and rejects moral defences of marriage. It utilises moral arguments and as such is not a 'political liberal argument'.

²⁷ The Public Reason Argument is a political liberal argument in favour of marriage reform

one; there can be a non-discriminatory version of the institution of marriage. Thus, the argument claims that the institution is weakly incompatible with political liberalism.

In order to fully articulate this argument it will be helpful to explain Brake's particular criticism of both the institution of marriage and the societal ideal of the romantic couple. Both of these things, according to Brake, contribute to "amatonormativity", which she defines as the "disproportionate focus on marital and amorous love relationships as special sites of value" as well as the associated "assumption that romantic love is a universal goal".²⁸ Brake considers this problematic because she thinks it leads to the devaluation of other caring relationships that don't fit into the category of the romantic couple, which in turn discourages people from investing in these relationships.²⁹ This is due to the "systematic discrimination"³⁰ of non-amatonormative relationship types and the linked privileging of both married and unmarried romantic couples. The privilege that amatonormative relationships receive is twofold. First, they are given "social importance".³¹ Second, they are eligible for all the legal rights associated with marriage.

The discrimination that non-amatonormative relationships are subject to, then, is the withholding of these privileges. This amounts to two forms of discrimination. First, non-

²⁸ Brake, *Minimizing Marriage*, p.88.

²⁹ The claim that non-amatonormative relationships are devalued and that people are discouraged from investing in them looks like an empirical claim that could easily be challenged. Whether or not we agree with this claim, or that amatonormativity contributes to it, the important point for the Unjustified Discrimination Argument is that unjustified discrimination occurs.

³⁰ Brake, *Minimizing Marriage*, p.89.

³¹ *Ibid*, p.90.

amatonormative relationships are subject to “tangible discrimination”³² in that they are ineligible for the legal bundle of rights and benefits associated with marriage. Second, instead of being regarded as socially important, non-amatonormative relationships are judged negatively as lacking something especially valuable – an enduring romantic relationship. Brake describes this as ‘non-tangible’ discrimination.

Brake’s objection to both types of discrimination is the following. The amatonormative judgment that romantic couples are especially valuable is false, and so the legal discrimination that is based on this judgment is unwarranted (since legal discrimination can only be justified by actual reasons, if it is to be justified at all). This is because the feature that contributes to the value of the relationship – that it is a caring relationship – is present in both the eligible romantic dyadic relationships and certain ineligible relationships (in particular friendships and “nonamorous care networks”).³³ Brake argues that the moral value of these caring relationships does not differ. For, these alternative relationships types can fulfil the same purpose as amatonormative relationships for those participating in them. These non-amatonormative relationships involve the same important features as amatonormative relationships: “mutual support, intimacy, and caretaking that provide emotional fulfilment and are grounds for moral approbation”.³⁴ Finally, Brake argues that the distinctive features of amatonormative caring relationships – their amorous nature, centrality and exclusivity- do not make them any more valuable than non-amatonormative caring relationships.³⁵

³² Ibid, p.94.

³³ Ibid, p.91.

³⁴ Ibid, p.97.

³⁵ Ibid, pp.94-102.

In sum, then, Brake takes the fact that these relationships are caring relationships to be the relevant feature in determining the value of relationships, and without a difference in the value of these relationships, there is no way of justifying the differential treatment that occurs. The differential treatment that occurs is therefore unjustified discrimination. This makes the current political institution of marriage incompatible with political liberalism. However, this issue could be remedied by making more caring relationships eligible for marriage for instance. We can therefore see that the Unjustified Discrimination Argument leads to the Weak Incompatibility Claim.

The argument in full can be set out as follows:

- 1) Unjustified discrimination occurs when people are treated differently and the reasons for the differential treatment do not warrant it.
- 2) The current political institution of marriage is amatonormative.
- 3) Amatonormativity leads to the differential treatment in both tangible and non-tangible ways, of amatonormative and non-amatonormative relationships.
- 4) Amatonormativity bases this differential treatment on the judgment that amorous dyadic relationships are particularly valuable.
- 5) The judgment that amorous dyadic relationships are especially valuable by comparison with non-amorous and non-dyadic relationships is false.
- 6) False reasons cannot warrant differential treatment.
- 7) The differential treatment caused by amatonormativity is unjustified discrimination.
- 8) The current political institution of marriage involves unjustified discrimination. (From 2 and 7)
- 9) Any political institution that involves unjustified discrimination is incompatible with political liberalism.
- 10) The current political institution of marriage is incompatible with political liberalism (Weak Incompatibility Claim).

4.1 Evaluating the Unjustified Discrimination Argument

I do not deny that a political institution of marriage involves differential treatment. It is clear that it does.³⁶ I also concede to Brake that the caring nature of these relationships is what we should focus on. The claim that I want to challenge is that the political institution of marriage is amatonormative (claim 2) in virtue of the fact that it bases this differential treatment on the judgment that amorous dyadic relationships are especially valuable (claim 4). It is not clear that the differential treatment involved in the political institution of marriage is based on the judgement that amorous dyadic relationships are especially valuable, and so it is not clear that the differential treatment that occurs is unwarranted, and nor, therefore, that it amounts to unjustified discrimination.

I have three responses to the Unjustified Discrimination Argument. The first two provide reasons for thinking that the differential treatment that occurs in the political institution of marriage is not based on the problematic amatonormative judgement. The first response suggests that amorous dyadic relationships are distinctly valuable (even if they are not especially morally valuable), and that this distinctness could warrant the differential treatment. The second response suggests that the value of caring relationships is not the only relevant factor when it comes to political regulation. There are other factors to be considered, such as the risks involved in the caregiving that occurs in caring relationships. Focusing on these risks might provide a way to distinguish amorous dyadic relationships from other relationship types, and therefore provide a warranted reason for the differential treatment, which is related to the nature of this particular caring relationship. The third response

³⁶ I do however question (at the end of section 4.1) the view that those ineligible for marriage are treated negatively.

challenges the view that non-amatonormative relationships are treated negatively as a result of the differential treatment. I claim that Brake's argument, as it stands, lacks answers to each response.

The first response aims to show that there are reasons to think that amorous dyadic relationships are distinctly valuable. If this is the case then then the differential treatment that occurs could be warranted and justified by appealing to this distinctness. There are two reasons to think that the caregiving that occurs in amorous dyadic relationships is distinctly valuable. These reasons are linked to the specific nature of amorous dyadic relationships, and so provide reasons to think that these relationships themselves are distinctly valuable. In order to illustrate what these are, it will be helpful to understand first why Brake thinks care is morally valuable. She holds that care is morally valuable because of its role in helping us both "motivationally and epistemically, to fulfil general moral duties and special obligations of relationship".³⁷ Care enables us to obtain intimate knowledge of the other person, knowledge that it is hard to gain outside of the caring relationship, such as an individual's "hidden desires and needs and the complex bases of their well-being".³⁸ This level of intimate knowledge allows carers to look after the other person well, and in addition, the care also motivates them to do so. As a result, the other person is looked after well and the duties and obligations of the relationship are met. This description highlights the importance of intimacy for care, as it enables these motivational and epistemic benefits.

With this explanation in mind, the two reasons for thinking that the caregiving that occurs in amorous dyadic relationships is distinctly valuable are: first, that it seems plausible that amorous dyadic relationships involve distinct "obligations of relationship"; and second that

³⁷ Brake, *Minimizing Marriage*, p.85.

³⁸ *Ibid*, p.86.

they are conducive to a unique level of intimacy that enables a distinct level of caregiving to be achieved.

Brake maintains that there is no “basis for morally distinguishing [the] responsibilities”³⁹ that occur in amorous dyadic relationships. For Brake, the fact that a relationship is amorous does not change the moral value of the obligations that occur in the relationship. However, the fact that it is amorous could, and arguably does, generate distinct obligations. It is also possible that dyadic relationships generate different obligations from non-dyadic relationships. An amorous dyadic relationship could therefore be viewed as distinctly valuable. One example of such an obligation is the duty of fidelity.⁴⁰ This duty may have the same moral value as duties that occur in other relationship types. However it is a distinct duty that only occurs in amorous dyadic relationships. The valuable caregiving that occurs in that relationship is therefore valuable in virtue of a distinct obligation being fulfilled. This distinctness could give rise to reasons that warrant the differential treatment of amorous dyadic relationships. If the duty of fidelity is unique to amorous dyadic relationships, and the political institution of marriage supports the fulfilment of this duty in particular, then this looks like a possible justification of the institution.

³⁹ Ibid, p.96.

⁴⁰ There are others ways in which the duties of amorous dyadic relationships could be different. Christopher Bennett for instance suggests that exclusive relationships of conjugal love are the only relationships in which the participants assume “responsibility for the whole person, the whole life of one’s partner” and so have a “generalised duty to support the other and see them through any problems that they are having in any area of their life” (“Liberalism, Autonomy and Conjugal Love”, *Res Publica* 9 (2003), pp.285-301, p.296). He thinks this leads to a particular type of reciprocal recognition of the other which is particularly valuable for promoting an individual’s autonomy. This could be a further way in which amorous dyadic relationships might be thought to be distinctly valuable.

The second reason for thinking that amorous dyadic relationships involve a distinct form of valuable caregiving relates to the motivational and epistemic benefits of care. Care is valuable because it enables us to gain intimate knowledge of another and motivates us to use that knowledge to care for them. Brake claims that the features of an amorous dyadic relationship do not make the care that occurs more morally valuable than that which occurs in non-amorous, non-dyadic relationships. For example she claims that we can care for more than one person and that it isn't clear why focusing on one person makes the care more valuable.

Again, whilst it may be the case that caregiving is equally morally valuable across these relationship types, there is a reason to think that care found in amorous dyadic relationships is distinctly valuable. The nature of romantic dyadic relationships particularly fosters and enables the motivational and epistemic benefits of care. In a romantic couple each individual is concerned with only one other person, whom they love. This means each person has more time and opportunity to learn about the single other which enables them to provide uniquely tailored care. They also have the undiluted motivation to care for that single person in this deep way. The amorous dyadic relationship is conducive to a particular form and level of intimacy, which enables a particularly deep level of care to occur.

To be clear, morally valuable care does occur in non-amorous, non-dyadic relationships. The claim here is that it is different enough from the care that occurs in amorous dyadic relationships. This means that amorous dyadic relationships have a distinct value, even if they are not especially valuable. Further, it seems that this distinct value could warrant the differential treatment that occurs in the political institution of marriage, as it could be seen to support this particular level of care.

Moving on to the second response to the Unjustified Discrimination Argument, it should be remembered that the specific concern here is with the political institution of marriage involving unjustified discrimination. When it comes to questions of political justification there are other aspects of relationships and the care involved (other than its value) that might be relevant to questions of differential treatment - for instance, the risks of caregiving.

Tamara Metz argues that state involvement in personal relationships is warranted when the relationships involve intimate caregiving. Whilst she acknowledges the value of care and of intimate care in particular, it is not the value of the care that warrants state involvement. Rather, it is because intimate caregiving involves particularly grave “material, physical and psychological”⁴¹risks. All caregiving involves some risk. This is because it “creates vulnerability” for the caregiver who has to “expend resources” on the person they are caring for, resources which “they might otherwise use to care for themselves”.⁴² These resources will include material resources such as money, physical resources such as physical health, and psychological resources such as mental health. To add to the riskiness of expending these resources on another, reciprocation whilst expected is not guaranteed to occur, nor is it predictable what form it will take. This is because caregiving is “unmonitored, unpredictable, and often incommensurable”.⁴³

Intimate caregiving is particularly risky because it is “unpaid, unrecognised and undervalued, and not seen as producing ‘marketable’ skills”.⁴⁴ This leads to the generation of “systematic vulnerabilities” for intimate caregivers and “serious disincentives” to become an intimate

⁴¹ Metz, *Untying the Knot*, p.126.

⁴² *Ibid*, p.126.

⁴³ *Ibid*, p.126.

⁴⁴ *Ibid*, p.126.

caregiver.⁴⁵ The state has an interest in intimate caregiving work being “done well” and in the “benefits and burdens” of intimate caregiving being “distributed justly”.⁴⁶ For this reason, and because the state is the body that has the “task and tools [for] protecting citizens from physical harm and securing a framework for the just distribution of the costs and benefits of political life”, the state is warranted in regulating intimate caregiving relationships in order to mitigate against these risks, by for example, ensuring neither party is impoverished by divorce, and thereby mitigating the economic risk.

Metz claims that intimate caregiving is present in a variety of relationships. She argues for an institution that makes all relationships that involve intimate caregiving eligible for regulation via an “Intimate Caregiving Union Status”.⁴⁷ I think her argument is reasonable, and agree that it could demonstrate that all instances of intimate care require some kind of state insurance. However, I also think that this focus on the risks of intimate caregiving could provide a reason for the differential treatment that occurs in the political institution of marriage. If the risks in one type of relationship are further intensified by the nature of that relationship, then this could provide a reason for regulating that particular caring relationship in a different way.

If it could be shown that amorous dyadic relationships involve particularly risky intimate caregiving, then this might warrant the differential treatment that occurs in the political institution of marriage. I think there are reasons to think that this is the case. As a result of being dyadic, the caregiver in this relationship is dependent on just one other person to reciprocate the intimate care, which means that it is more detrimental when the reciprocation

⁴⁵ Ibid, p.127.

⁴⁶ Ibid, p.127.

⁴⁷ Ibid, pp.113-151.

does not happen, or is reciprocated in a way that still leaves the caregiver vulnerable. This can be seen, for example, when caregiving leads to financial dependence. As a result amorous dyadic relationships look as though they generate acute instances of physical, material and psychological vulnerability. This could in turn warrant differential treatment.

These two responses aimed to show that there are alternative ways of viewing the basis of the differential treatment that occurs in a political institution of marriage. The possibility of these alternatives suggests that more needs to be done before it can be claimed that the differential treatment is amatonormative – that it is based on the claim that amorous dyadic relationships are especially morally valuable.⁴⁸

The third response to the Unjustified Discrimination Argument notes that some of the force of the argument seems to rest on the claim that the differential treatment is negative, and that the ineligible relationships are devalued, discouraging people from forming them or valuing them highly. However, the fact that you can get state recognition of one form of relationship does not immediately indicate that other relationship types are considered less valuable, or contribute to them being treated as such.

There are two ways that state ‘non-regulation’ can be understood. The first is negative. The state appears to communicate that other non-amatonormative relationships are not worthy of regulation. The second however is positive. By not regulating certain relationships, the state could be understood as saying that it is happy for these relationships to remain unregulated. They do not pose a particular threat. This could be because there are already other regulatory

⁴⁸ I do not provide conclusive reasons for claiming that the differential treatment is warranted by these alternative bases. Rather, I aim to show that it is plausible that the differential treatment is warranted by them, and as such it needs to be shown that it is not, before it can be claimed that the differential treatment is based on (unwarranted) amatonormative reasons.

structures in place that can (indirectly) manage any threats they might pose (e.g. general laws against assault etc.) It is not immediately obvious which way the non-regulation of non-normative relationships should be understood, but I don't think that Brake has done enough to demonstrate that it is definitely the first, negative, interpretation, or that it is the state's regulation of marriage that explains the negative treatment of other relationship types if or when it occurs.

To sum up the discussion of the Unjustified Discrimination Argument, these three responses aim to show that the Unjustified Discrimination Argument does not successfully demonstrate the Weak Incompatibility Claim as it is not clear that unjustified, negative, differential treatment occurs as a result of the current political institution of marriage.

5. The Public Reason Argument

The Public Reason Argument is also taken from Elizabeth Brake's work. It starts from the assumption that the political institution of marriage is a "part of the basic structure"⁴⁹ of society, and so unquestionably subject to the requirements of public reason. It claims that the current political institution of marriage violates the political liberal principle of public reason, because the state has to appeal to non-neutral value judgments, "drawn from within comprehensive doctrines",⁵⁰ concerning the value of certain relationships in order to justify its current structure. Brake regards the structure of the institution as changeable, and so this argument can be understood to be making the Weak Incompatibility Claim – that the current institution of marriage is incompatible with political liberalism.

⁴⁹ Brake, *Minimizing Marriage*, p.134.

⁵⁰ *Ibid*, p.168.

In addition to the requirement of justificatory neutrality identified in Section 3, the justification of rules, laws and institutions should also be understandable and acceptable to all citizens – this is the principle of public reason. This principle is required because within a political liberal polity citizens should be regarded as free and equal, and yet it is recognised that they will hold many reasonable yet differing and incompatible views about “value, morality, religion, and the good life”.⁵¹ The principle states that political institutions and “rules that regulate our common life [must] be, in some sense, justifiable or acceptable to all those persons over whom the rules purport to have authority”.⁵² This is to ensure that all citizens, with their many differing and often conflicting views, are treated as free and equal. The reasons appealed to when justifying these institutions and laws must therefore be public reasons – “reasons which everyone can reasonably recognise as valid public considerations”.⁵³

The Public Reason Argument follows a typical argument made in favour of same-sex marriage, and Brake aims to show how this argument has more extensive implications than the same-sex marriage proponents realised. These arguments begin with the “recognition that the state provides numerous benefits through marriage ... which are denied to same-sex relationships”.⁵⁴ They characterise “marriage as providing a legislative framework for certain adult relationships”⁵⁵ and claim that the restriction to heterosexual couples requires a justification that appeals to public reasons. The proponents aim to show that there is no way

⁵¹ Jonathan Quong, “Public Reason” in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Introduction.

⁵² Ibid, Introduction.

⁵³ Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), p.256.

⁵⁴ Brake, *Minimizing Marriage*, p.140.

⁵⁵ Ibid, p.140.

to distinguish same-sex and different-sex relationships without appealing to reasons that depend on contested (rather than public) views, therefore demonstrating that the restriction to heterosexual couples is unjustifiable, and that equal treatment demands that marriage be available to homosexual couples as well. Brake, assuming that marriage is characterised in the same way, demonstrates how this argument can be taken further.

The Public Reason Argument focuses on a particular feature of the current political institution of marriage. This feature is the restriction to “sexual or romantic relationships, [that involve] shared domicile or finances, aspirations to permanence or exclusivity, or a full reciprocal exchange of marital rights”⁵⁶. The argument begins with a concern about equal treatment: the state provides numerous benefits through marriage that are denied to caring relationships that do not fit the romantic couple norm, such as close friendships and adult care networks.⁵⁷ The principle of public reason, claims Brake, demands a justification “for excluding friendships, care networks, and groups from the benefits of marriage”⁵⁸ that appeals to public reasons. Such a justification, she claims, cannot be provided.

The reason why Brake thinks that this restriction cannot be justified appropriately is because the justification has to appeal to the view that this particular type of relationship – the romantic couple -is especially valuable. In other words, the only way to distinguish romantic couples from other relationships such as friendships or care networks, is to appeal to the special value of romantic couples. This view is not one that all citizens can endorse or accept because it is not a view that they will all share as there are “many varying conceptions of

⁵⁶ Ibid, p.168.

⁵⁷ This is the concern identified in the Unjustified Discrimination Argument.

⁵⁸ Brake, *Minimizing Marriage*, p. 144.

good relationships [which] exist within different comprehensive doctrines”⁵⁹ that citizens hold. The view that romantic couples are especially valuable is contested, and so it cannot be appealed to when justifying the restriction that is present in the current political institution of marriage. To appeal to such a view, is to violate the principle of public reason. The current political institution of marriage can therefore be seen to be incompatible with political liberalism.

The argument can be set out as follows:

- 1) The principle of public reason requires that all laws and political institutions can be justified by appeal to public reasons.
- 2) Under the current political institution of marriage only romantic couples are eligible for marriage.
- 3) The restriction to romantic couples is only justifiable by appeal to a contested view about the value of romantic couples.
- 4) Appealing to a contested view violates the principle of public reason.
- 5) The current political institution of marriage is incompatible with political liberalism (The Weak Incompatibility Claim).

5.1 An Evaluation of the Public Reason Argument

My response to this argument is therefore to challenge claim 3) and suggest that it is possible to find a suitably public justification of the current restriction of marriage to romantic couples.⁶⁰ This is because the relationship that romantic couples have involves something that

⁵⁹ Ibid, p.168.

⁶⁰ As Ralph Wedgwood notes, defending a claim that says there is *no* suitably public justification requires demonstrating that all possible justifications are unsuitable – and Brake doesn’t do this. See Ralph Wedgwood, “Is Civil Marriage Illiberal?” in E. Brake (ed) *After Marriage: Rethinking Marital Relationships* (New York: Oxford

all citizens, whatever their conception of the good, can agree is valuable. That something is caregiving. The promotion and support of caregiving could provide a public reason for restricting the current political institution of marriage to romantic couples. This might seem initially promising as a route to take, as pointing to the care that usually occurs in marriage, and demonstrating how marriage can foster, protect and promote this care via the tangible benefits that attach to the marital status is in fact a typical, liberal way of providing a defence for the political institution of marriage. Additionally, a number of authors (including Brake and Chambers) think that care is something that the political liberal state is legitimately concerned with. They also hold that the regulation of certain care-giving relationships is something that can be justified by appeal to public reason.

There might however be an immediate objection, along similar lines to that of the Unjustified Discrimination Argument, that the policy of regulating only the caregiving that occurs in romantic couples amounts to unjustified discrimination against other caregiving relationships. If the existence of caregiving in a relationship can provide a public reason for the justification of marriage, then it needs to be clearly demonstrated, on pain of being accused of unjustified discrimination, that there is a relevant difference in the caregiving that occurs in the relationships eligible for marriage. In other words, if caregiving is to provide a public reason for the restriction to romantic couples, then it needs to be shown that there is a relevant difference found in romantic couple relationships relating to caregiving. Otherwise we would have to appeal to some other, likely contested, feature of these relationships, to demarcate

University Press, 2016, pp. 29-50). He offers one possible public reason for the current institution of marriage; namely preference satisfaction, that cannot be satisfied in any other way. My response here provides a further possible public reason for the particular restriction to romantic couples, which focuses on precisely the feature Brake takes to be important – the fact that the relationship is a caring one.

them from e.g. friendship groups and adult care networks,⁶¹ which is what the Public Reason Argument objects to in the first place.

This response therefore directly challenges Brake's claim that there is no relevant way to distinguish romantic couples from friendships and other group relationships without appealing to contested views about the value of romantic couples.⁶² What would be a relevant way of distinguishing romantic couples in the context of the Public Reason Argument? As already established, the relevant feature to consider is the caregiving that occurs. A relevant difference in the caregiving that occurs will need to be something that warrants regulation of the relationship, as we are after all looking for a public reason that justifies the current institution of marriage. As we saw in the second response to the Unjustified Discrimination Argument in Section 4.1, which focused on the risks of intimate caregiving, there are already reasons to think that there is such a relevant difference. Caregiving that occurs in intimate relationships, such as romantic couples, involves caregiving that is particularly risky.⁶³ When intimate care occurs between two people it leaves the caregivers acutely vulnerable to the care being unreciprocated, and to being left without enough (physical, material and psychological) resources to care for themselves.

The existence of this risky care provides a public reason for the restriction to relationships that involve this risky care. Claim 3) of the Public Reason Argument can be refuted, as the

⁶¹ An Adult Care Network is an "informal association of friends or relatives who provide the reciprocal material and emotional support associated with marriage" (Brake, *Minimizing Marriage*, p.91).

⁶² This is also precisely what my first two responses to the Unjustified Discrimination challenge.

⁶³ Whilst I think I have presented strong reasons to think care is particularly risky, it might be thought that this is an empirical claim that requires further evidence. As such, my claim can be taken to be a contingent one. Nevertheless I think it is a possibility that needs to be taken seriously.

restriction to romantic couples can be justified by appeal to public reason, and so the Weak Incompatibility Claim cannot be upheld.

Two objections might arise at this point. First, that it isn't only dyadic relationships that involve such risky care. Informal networks of care, such as those set up for people with dementia, might also involve risky care – i.e. care that is unreciprocated. Whilst I acknowledge that unreciprocated care might arise in these informal networks, it is still importantly different. The fact that there is a network of care means that there is more than one person on whom to rely for reciprocated care. Additionally, organised networks can build in procedures to help mitigate against this risk. The probability of not receiving unreciprocated care and being left without resources to care for oneself is far higher in dyadic relationships.⁶⁴

The second objection is that it isn't only romantic couples that involve such risky care – that other dyadic relationships, for instance, also involve this acute vulnerability. However I think the discussion of the first response to the Unjustified Discrimination Argument in Section 4.1 gives us reason to think that romantic couple relationships do have features that enable particularly deep and intimate knowledge to be gained of the other person, which while opening up the possibility of individually tailored care, also leaves one distinctly vulnerable, making the care that occurs in such relationships distinctly valuable but also particularly risky. We allow those we love to learn how best to care for us, and are motivated to care for them using our own resources. This in turn puts those we love in a unique position to be able to harm us.

⁶⁴ I am grateful to an anonymous reviewer for bringing this objection to my attention and giving me the chance to clarify this point regarding the particular riskiness of dyadic relationships.

6. Conclusion

Each of the three arguments aimed to show that the political institution of marriage is incompatible with political liberalism. The Neutrality Argument claimed to demonstrate the Strong Incompatibility Claim – that a political institution of marriage is in principle incompatible with political liberalism. I assert that the Neutrality Argument does not conclusively show a political institution of marriage to be in principle incompatible with political liberalism. This is because the argument does not conclusively show a political institution of marriage as violating the principle of neutrality. What's more, the weaker claim does not stand on this argument, as the response demonstrated that the current political institution of marriage does not violate the principle of neutrality either.

The Unjustified Discrimination Argument claimed to demonstrate the Weak Incompatibility Claim – that the current institution of marriage is incompatible with political liberalism. I demonstrated that this argument does not establish this claim because we can challenge the claim that the differential treatment is based on the amatonormative judgement. It is possible to point to relevant differences in the caregiving that occurs in romantic couple relationships which can warrant the differential treatment that occurs. The Public Reason Argument also claimed to demonstrate the Weak Incompatibility Claim. I maintain that this argument is also unsuccessful in demonstrating this claim as it is possible to justify the current restriction to romantic couples by appeal to public reason.

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