The Diversity of Objections to Family-Structure-Based Policy

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0. Introduction

Recent debates about same-sex marriage have revealed a sharp disagreement about what motivates the move from opposite-sex-only to same-or-opposite sex marriage. To be sure, Canadian courts have asserted that same-sex marriage is simply a matter of equality for gays and lesbians. Equality on lines of sexual orientation is indeed the most obvious argument for same-sex marriage, more obvious than the arguments based on sex discrimination or a fundamental right to marry.[1] Yet there are very different ways of understanding the concern for equality that should lead us to accept same-sex marriage. One approach takes for granted that marriage is a good thing, which society is justified in supporting and promoting, and argues that denying gays and lesbians access to such a fundamental institution is grossly unfair. As the Ontario Court of Appeal insisted, marriage conveys society's highest seal of approval.

> Marriage is, without dispute, one of the most significant forms of personal relationships... Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed, conjugal relationships...[2]

Lack of the possibility of marital recognition for same-sex relationships therefore involves a violation of Section 15's guarantee of equality, whatever the concrete rights and benefits attached to marriage. This mildly traditionalist understanding of the inequality involved in opposite-sex-only marriage is broadly consistent with the argument for same-sex marriage that has been put forward in the United States by Andrew Sullivan, Stephen Macedo, Jonathan Rauch, and Dale Carpenter (Sullivan 1989; Macedo 1997; Rauch 2004; Carpenter 2005). Each of these figures think that same-sex marriage is a good thing, in terms of the general welfare of "gays, straights, and America," as Rauch puts it, but each also thinks that same-sex marriage is a requirement of equality, and would be justified even if it didn't have large benefits for public health and happiness. None of these thinkers nor the Ontario court sees any problem with society having an institution of civil marriage, even though marriage recognizes and promotes one particular form of

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1. On the sex discrimination argument, see Koppelman 2002. On the fundamental, unenumerated constitutional right to marry, see Gerstmann 2004. These arguments have received much more attention in the United States than in Canada, because on a minimalist reading, the 14th Amendment's requirement that no state shall deny any persons the equal protection of the laws could mean simply that no state shall allow any of its residents to be robbed and assaulted with impunity Epstein 2002, 77. As we will see later in the paper, Cass Sunstein insists that the 14th and 15th Amendments involves a much more robust "anticaste" principle. Whatever the truth about the 14th Amendment, Sunstein's analysis certainly fits the Canadian Charter. The minimalist reading is not even a candidate for an account of Section 15 of the Charter, since it guarantees equality under and before the law and equal benefit of the law, as well as equal protection, all wrapped up in an explicit rejection of discrimination that expressly allows for affirmative action. In Canada, therefore, the courts have not seen the need to consider the more arcane arguments for same-sex marriage.

2. Halpern v. Canada, (2003) O.J. No. 2268, paragraph 5.

intimate relationship, so long as this legal status is open in a genuine way[3] to gays and lesbians, as well as heterosexuals.

Supporting same-sex marriage but opposing the traditionalist case for same-sex marriage is a group of academics and activists who rally around the flag of "families of choice," a group that includes scholars such as Martha Fineman, Martha Ertman, Judith Stacey, and the other signatories of the 2006 manifesto "Beyond Same-Sex Marriage," as well as the Law Commission of Canada's 2001 report "Beyond Conjugality" (Stacey 1996; Fineman 2001; Ertman 2001; 2001; 2006). This other approach sees same-sex marriage as a step in the right direction, but only a step, toward the equal recognition and support of the full diversity human relationships. "The struggle for same-sex marriage rights is only one part of a larger effort to strengthen the security and stability of diverse households and families" (2006). According to this point of view, the inequality involved in the denial of same-sex marriage is just one of many inequalities implicit in the existence of marriage as a privileged public status. "Marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others... many other kinds of kinship relationship, households, and families must also be accorded recognition" (2006).

One of the issues at stake in these debates is that of neutrality between conceptions of the good life, or, more broadly, the exclusion of reasonably contestable religious, spiritual, and philosophical doctrines from the legitimate grounds of public decision-making (Lister 2007). There is a separate issue that I want to focus on in this paper, which has to do with the use of statistical generalizations in the making of public policy. Truth is not, in general, a sufficient condition for the legitimate use of statistical generalizations in the drafting of legislation.[4] Even if some generalizations about the incidence of crime across racial groups are true, racial profiling in policing holds some responsible for the misconduct of others, and affects everyone's attitudes towards the group in question, undermining the social bases of self-respect. The clearest case in which generalizations are considered inappropriate even if true is criminal trials. Statistical facts about the various groups to which I belong are not sufficient to convict me of a crime; there must be evidence that *I* committed the crime, not just evidence that people like me often commit such crimes. The question is how far this demand for individualized treatment should be extended outside of the criminal law. When we talk of equal protection of the law, as in s.15 of the

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3. Although any adult can legally marry, gays included (just not someone of the same sex), most gays cannot honestly or fully marry someone of the opposite sex, any more than a straight person can honestly and fully marry someone of the same sex. From this perspective, the legal definition of marriage as opposite-sex-only effectively prohibits gays from marrying, in much the same way that prisoners were once prohibited from marrying in some jurisdictions.

4. A descriptive generalization is true if the claimed correlation or association is the real correlation. Whether the correlation is big or small, whether there is readily available any better predictor, and whether the association represents a causal effect of one variable on the other are all separate questions. I will avoid speaking of "accurate" generalizations, because the term is ambiguous between the accurate representation of the correlation between X and Y (usually less than 1), and X being an accurate predictor of Y (a correlation near 1).

Charter or the 14th Amendment to the U.S. Constitution, are we talking about a guarantee of individualized equal treatment at the hands of government? Or, should these equality provisions be understood to establish an anticaste principle, which does not impose a blanket restriction on the means governments use, but instead imposes a particular end – that no group of citizens should be the subject of visible, systemic disadvantage, and hence commonly perceived and treated as second class citizens.

The first section of the paper uses Iris Marion Young's critique of William Galston's instrumental defense of the two-parent family to distinguish a variety of different objections to family-structure-based policy. The second section argues that the Law Commission of Canada's 2001 report "Beyond Conjugality" was heavily invested in one particular objection, which I call the anti-aggregative objection, or the demand for individualized treatment, and that this demand is libertarian rather than an egalitarian in the limitations it places on state action. The third section explains how this demand puts marriage itself in question, same-sex or otherwise, and why an anticaste principle provides a better account of constitutional guarantees of equality than does an across the board principle of individualized treatment. The fourth section contrasts beyondmarriage.org's focus on the direct expressive meaning of policy with an anticaste principle's focus on the full range of direct and indirect effects policy can have on the ways citizens perceive each other, and argues against the view that any average-based disadvantage implies a form of second-class citizenship.

1. Galston's 'Functional Traditionalism'

In 1991 the American political theorist William Galston put forward "A Liberal-Democratic Case for the Two-Parent Family" (Galston 1990, 1991). Republican thinkers such as Machiavelli have long argued that self-government requires self-discipline, or civic virtue – the wilingness to contribute to important public projects without the threat of sanctions, the unwillingness to take advantage of the public purse even when secure against punishment. Galston added to this line of argument the claim that the two-parent family was the structure most likely to inculcate the necessary virtues of self-reliance and respect for law in children.[5] His defense of the two-parent family thus involved “functional” rather than “intrinsic” traditionalism (Galston 1991, 280). Rather than arguing that families based on two parents who stay together have intrinsic virtues that others lack, Galston argued (for example) that a stable intact family is “the best anti-poverty program for children” (Galston 1991, 284).

In her 1995 critique of Galston’s functional familialism, Iris Marion Young denied that self-reliance or independence was a civic virtue. Women staying home to raise children might be unfairly economically dependent on their husbands but they were not by virtue of that

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5. As Andrew Sabl points out, Galston provided little evidence for his claim about the link between family structure and civic virtue (Sabl 2005, 213-14). There is evidence, however, that children of two-parent families do better on a range of indicators of well-being than do children of other family types, controlling for variables such as race and parental education. See, for example, McLanahan and Sandefur 1994.

dependence any less socially responsible. Young also took issue with Galston's claim that a liberal state should be supporting and promoting the "intact," two-parent family as the preferred mode of child-rearing.

> There are family values, the ends and purposes of family life, and individual virtues that enact them. There is no doubt that some families better instantiate them than others. Along with many others today using family values rhetoric, however, Galston is wrong to assert that a particular kind of family best embodies these values for children - the intact, two-parent, by implication heterosexual family. These family values can and often are realized in a plurality of family forms: gay and lesbian families, single-parent families, blended families, nuclear families, extended families. Public policy should promote and encourage the ends and purposes of families. Contrary to what Galston argues, however, public policy should not prefer particular means of realizing these ends. It is wrong, that is, for public policy to encourage particular family forms and discourage others... [T]he state can properly interevene in or punish particular actions or inactions within families... but this is quite different from punishing or favouring families based on their composition alone. Such preference is simply discrimination, inconsistent with liberal pluralist principles of giving citizens equal respect whatever their culture of way of life. (Young 1995, 553)

We can discern in this passage three separate objections to Galston's pro-traditional-family policy.

- *Public reason*: Young claimed to agree with Galston that, contrary to the main tenets of liberal political theory, the state cannot be "neutral" between conceptions of the good or ways of life, (Young 1995, 535, 552-53). Liberal neutrality was never intended to be an absolute guarantee of equal treatment, however, let alone equal outcomes, but only a constraint on the kinds of reasons that could justify the exercise of political power (Kymlicka 1989,883-84). Young's claim that preference based on composition is discriminatory because "inconsistent with liberal pluralist principles of giving citizens equal respect whatever their culture or way of life" suggests this idea of "justificatory" neutrality. One argument that Young could be making, therefore, is that preference based "on composition alone," and in particular preference for the "intact" i.e. two-biological-parent and hence opposite-sex family is based on and expresses religious views that are not legitimate grounds for public policy in a secular society. Galston's instrumental or "functional" traditionalism involves no such claims, however, relying instead on causal claims about the contribution of the two-parent family to legitimate public objectives.
- *Consequences for general welfare*: An important part of Young's argument is that Galston is wrong about the strength of the causal connection between family structure and the underlying ethical characteristics of family life that interest us: whether the parents are loving and responsible, for example. The only effect of family structure that Young acknowledges is the effect of divorce and single-parenthood on family income, which could be alleviated by fairer social and economic policies, she argued. It is therefore inefficient, perhaps even counter-productive to use family type as the basis for policies trying to improve the lives of children.
- *Anti-Aggregative*: Even if Galston's arguments for favouring the two-parent family are based on legitimately public values and do not rest on false empirical claims, one might object to the fact that these empirical claims involve generalizations, or imperfect correlations. Suppose it is true that a certain family type is generally not as good for children, and that this is true across a

broad range of alternate family policies and legal frameworks. Still, it is not true of all such families; good family values often are realized in non-traditional family forms, as Young puts it. Therefore one might argue that if I am in a well-functioning but non-traditional family, it is unfair to make me pay for the faults of other non-traditional families simply because such families share an easily observable characteristic and are on average worse for children.

Distinct from these three concerns, however, is what following Cass Sunstein I will call the *anticaste* objection to family structure based policy (c.f. Sunstein 2001pp.155-83). Although I will explain this idea in more detail later, the basic idea is that we should judge laws and social policies in terms of their consequences for the level of systemic disadvantage suffered by minorities, particularly visible minorities and those that historically suffered legal discrimination or segregation, because such disadvantage easily becomes common knowledge, creating a public perception of second-class status that affects how citizens treat each other and how they see themselves. The anti-aggregative objection to family-structure-based policy can be cast as a demand for equal treatment, but it is not equivalent to the demand for policy whose ultimate effect will be to reduce social inequality or fight caste. In fact, the requirement of equal treatment as an individual limits the means the state can legitimately employ to achieve goals such as reducing inequality in life changes, or eliminating systemic disadvantage.

Now, it may seem implausible to speak of an anticaste objection to family-structure-based policy, since (as I will later argue) single-parent families and cohabiting elderly sisters do not constitute subordinate castes. However, there is a plausible case that the policy of opposite-sex-only marriage contributed to a status for gays and lesbians that can reasonably be described as second-class citizenship, even if not a caste system equivalent to that which formerly prevailed in the case of race and gender. The case against opposite-sex-only marriage is overdetermined, in this respect, since it can rely on considerations of general welfare, public reason, individual treatment, or anticaste equality. What's wrong with opposite-sex-only marriage is not only that it denies gays and lesbians access to a beneficial public institution, thereby undermining the institution itself by encouraging gays to develop alternative forms of personal relationshps, that it rests on religious views that are not properly the basis for public policy, and that it makes all gays and lesbians pay for the problems allegedly associated with some same-sex relationships, but that it reinforces and legitimizes popular prejudice against homosexuals, since it conveys the implication that gays and lesbians are not capable of commitment, or not worthy of marriage, and therefore indirectly contributes to anti-gay violence. Opposite-sex-only marriage is thus a badge of and a cause of second-class citizenship, even if the relative ease of hiding one's sexual orientation and the lack of general economic disadvantage means that gays and lesbians do not form a true caste.

2. Beyond Conjugality?

The importance of distinguishing these different objections to family-structure-based policy can be seen in the Law Commission of Canada's 2001 report Beyond Conjugality, which endorsed the principle that “governments must respect and promote equality between different kinds of relationships” (2001, 13) without recognizing the possibility that such a principle of equal treatment could restrict government's ability to promote social equality more generally.

The general thesis of the Law Commission's report is that in many cases the state ought not use relationships as a criterion for regulating behaviour or delivering benefits, but focus instead on individuals, and that where a relationship is relevant to the achievement of legislative objectives, government ought to ensure that the relationship targeted is precisely the one of interest, not merely an imperfect proxy for some other relationship. The Commission therefore argued (for example) that individuals rather than families ought to be the basis for taxation, and that individuals ought to be able to designate which relationships required them to take bereavement and caregiver leave. If emotional and financial interdependence exists in a relationship, it merits support, and those involved need protection against abuse and domination, whether or not the relationship is conjugal – hence the title "beyond conjugality."

Part of the rationale for the Commision's various proposal is simply efficiency in the achievement of the various objectives of our public policies. There was a time when emotional and financial interdependence was very largely concentrated in marital relationships. Now, however, interdependence often exists outside marriage, and not always within – and the same holds for conjugal versus non-conjugal relationships.

> By focusing mainly on conjugal relationships, governments have made statutes both under-inclusive and over-inclusive - that is, the statutes may not cover all the people intended, or they may apply to people they were not intended to cover. There are many instances where the law imposes rights and responsibilities on the basis of a particular kind of relationship, rather than examining the nature of that relationship. In other words, rights and responsibilities are imposed on the basis of the status rather than the function of a relationship. (2001, xxiv)

Our laws have thus lost touch with "contemporary realities" (2001, xxiv), because conjugality is no longer an "accurate marker" of interdependence (2001, 15). The Commission described the problem of over and under-inclusion as one of incoherence that might lead to inefficiency (2001, 23), but it is clearer to say that the weakening correlation between conjugality and interdependence makes our family policies less effective than they previously were, and hence also potentially less efficient than they could be, if there are low-cost ways of tailoring these policies so as to focus on the fundamental variables of interest (counting financial costs, invasion of privacy, and whatever other costs are involved in this tailoring).

The Commission' s fundamental concern is not effectiveness or efficiency, however, but equality. Equality is one of the two "fundamental values" the Commission identifies as a guide to the legal treatment of personal relationships; efficiency is merely one of a number of "Other Principles and Values" (2001, iii). The value of equality it divides into equality *within* relationships and equality *between* relationships, or "relational equality." Equality within relationships is primarily a matter of preventing one partner from abusing the other, but it is also connected with an anticaste understanding of social equality, as is clear from the way the Commission explains this goal.

> We are still seeking to overcome a long history of state regulation of personal relationships that has contributed to the subordination of women, persons with disabilities and other members of disadvantaged groups. State policies need to be framed to avoid replicating inequalities based on gender, race, disability, sexual orientation and other prohibited grounds of discrimination. (2001, 13)

Domination can arise within same-sex couples, same-race couples, and double-disabled couples.

However, particularly in the case of opposite-sex couples, the prevalence of domination within relationships can contribute to the subordination of women in general, married or not. Opposition to domination within relationships is thus related to but distinct from a more general opposition to domination between social groups – the desire to live in a society of equals, in which there are no groups that are visibly generally disadvantaged, and thus commonly perceived and treated as second class citizens.

The more controversial element of the Commissions's analysis of equality is its commitment to equality between relationships. The commission considers this a second dimension of our commitment to equality, but doesn't acknowledge the possible conflict between these dimensions. To be sure, in many cases relational equality will support social equality more generally. Providing many of the benefits and mutual rights and obligations of marriage to same-sex cohabiting couples protects those gays and lesbians at risk of domination in their personal lives; allowing same-sex couples to marry helps to overturn the social stigma associated with homosexuality. Imagine, however, that Claudia Card were right that marriage is a dangerous kind of a relationship, because when roped together in marriage, people and particularly heterosexual men are more likely to explode in bouts of "murder and mayhem," contributing to the inequality of women (Card 1996). An anticaste understanding of equality would suggest that we discourage marriage, if these were the sociological facts. We might abolish the institution, and refuse to enforce certain aspects of private marital contracts, in that case. I do not support such a policy, because I think it is based on false empirical claims, and because there are other ways of tackling violence within relationships. If it were true, however, that marriages between men and women do tend to be more violent and abusive than other kinds of intimate relationships between men and women, and do contribute in an important way to the subordination of women (relative to the alternatives), that would be a good reason for discouraging marriage. Yet the Commission's principle of equal treatment of relationships would rule out this argument for social equality. Governments should "treat adult conjugal relationships with equal concern and respect," which requires that in writing legislation the state not use "the formal status of relationships, or personal characteristics that are not related to legislative objectives," such as marital status and sexual orientation, but instead focus on "the factual attributes of relationships – their actual characteristics and the roles they perform" (2001, 14). Even if married heterosexual relationships did tend on average to be more violent, as Card asserts, not every such relationship would be violent and abusive. Government ought not focus on marital status or sexual orientation, the Commission would be constrained to argue, but on violence and domination, which are the true variables of concern. For in denying a benefit or imposing a burden on my non-abusive, opposite-sex marriage, the state would not be responding to its factual attributes and the roles it successfully performs, but unfairly using marital status and sexual orientation as indicators of abuse and domination, even though these variables are only correlated with marital status and sexual orientation.

Consider, for example, the Commission's interpretation of the value of autonomy, its second "fundamental value," but also the value that underlies its commitment to relational equality. The Commission argues that *any* differential treatment of relationships infringes on autonomy, except for those that are exploitative or abusive.

> Autonomy is compromised if the state provides one relationship status with more benefits and legal support than others, or conversely, if the state imposes more penalties on one type of relationship than it does on others. It follows then that an important corollary of

> the value of relational autonomy is a principle of state neutrality regarding the form or status that relationships take. The state ought to support any and all relationships that have the capacity to further relevant social goals, and to reman neutral with respect to individuals' choice of a particular form or status. (2001, 18)

The Commission is quick to point out that relational neutrality or equality does not mean that government must treat *all* relationships the same, but only that its laws must be framed in terms of "the qualitative attributes of relationships." The state is justified in trying to "discourage the formation of exploitative or abusive relationships and to protect adults who are vulnerable to economic exploitation or physical or emotional abuse in their close personal relationships" (2001, 19). The presence of violence is a "qualitative attribute" that merits differential treatment; marital or conjugal status is not.

The Commission's principle of relational equality (or neutrality, as it says in relation to autonomy), is not the idea of liberal neutrality, the principle that the state should be neutral between ways of life, conceptions of the good, or religious and philosophical doctrines. The Commission also supports this kind of neutrality. "Governments in a secular state cannot pass laws for the purpose of aligning them with the views of any particular religious denomination," the Commission asserts. Although it justifies this view by appealing to the illegitimacy of state religious *indoctrination*, its expansive understanding of the Charter's s.2a's guarantee of "freedom of religion and conscience" seems to involve a general requirement that laws be justifiable independently of specific religious doctrines. "Canadian understandings of religious freedom and equality require that the state not take sides in religious matters. Government actions must not in their purpose or effects favour some religions over others" (2001, 22-23). It would be illegitimate, therefore, when debating civil marriage, to argue that God himself determined that marriage should only be between a man and a woman. Yet the Commission's principle of relational equality acts as a constraint on law-making even when the purposes involved are entirely secular. What it rules out is legislation based on true but imperfect correlations between relationship-type and other variables of legitimate, secular, interest, such as the presence of violence in the relationship, or the quality of the child-rearing environment in the family.

The principle of relational equality is thus better described as a requirement of *individualized* treatment, a term that is useful in order to avoid ambiguities in the more familiar phrase "equal treatment." The idea of equal treatment is ambiguous between the idea of treating two people *the same*, and treating them as equals, deserving equal concern and respect (Dworkin 1977, 227). Sometimes, equal concern and respect requires that people be treated the same, as for example in according everyone the vote, or the right to enter enforceable contracts. In many cases, however, it is clear that treating people the same is unnecessary (letting young children vote) or even wrong (giving children an unrestricted right to work for wages; spending $ X on the transportation needs of each person, disabled or not; taxing each citizens $ X , be they rich or poor). Laws cannot and must not always treat everyone the same in every respect. The crucial question, then is which distinctions involve unequal concern and respect. The problem with the phrase "treatment as an equal", however, is that it can cover cases in which it is justified to treat people differently based on group averages (i.e. imperfect correlations). Dworkin, for example, argues that there is no right to attend university, and hence that preference can be given to minority applicants to medical school simply on the ground that on average they are more likely to become doctors in underserved areas, for example (Dworkin 1985, 295-99). It is useful, then, to

have a term to refer to those cases in which being treated with equal concern and respect (or respect for individual autonomy, or some other value) requires treatment based solely upon individual characteristics, not groups averages, and this is what I mean by "individualized treatment."

The effect of a principle of individualized treatment is to limit aggregation of values across individuals. Individualized treatment constrains the distribution of the costs and benefits of social cooperation, such that I cannot be made to bear particular costs or denied particular benefits unless I have done something (wrong) that makes me liable for these costs. Individualized treatment is thus an anti-utilitarian principle. When men drink, for example, they tend to brawl and rape; successfully limiting access to alcohol would plausibly reduce the incidence of crime and in particular violence against women. But not every drunken man rapes. An aggregative approach would involve weighing the inconveniences of prohibition to the many responsible drinkers against the harm to the few victims of drunken crime, counting the numbers of people involved on either side, such that enough men being mildly inconvenienced could outweigh the rape or killing of a few women. The alternative, non-aggregative view would be that it is unfair to impose costs on responsible drinkers because of the crimes of irresponsible drinkers. Why should I, a responsible drinker, who has never and will never rape anyone, be forbidden to drink because of the irresponsible drinking of others (Mill 1859, 148-49)? On the fairness interpretation, it is not the case that the inconvenience to drinkers *in general* outweighs the harm to victims of alcohol-induced violence. It is rather that *responsible* drinkers cannot fairly be prohibited from drinking because they are not to blame for the violence in question. It may be counterproductive to ban the sale of alcohol, of course, but the aggregative or utilitarian case for limiting access to alcohol could be quite strong, because the utilitarian does not acknowledge any issue of fairness in the distribution of the costs of such a policy. It is everyone's responsibility to maximize utility, the utilitarian claims; the distribution of resources and opportunities simply falls out of that maximization. If I can best contribute to maximizing utility by not drinking (as much), that is my duty.

This anti-utilitarian, anti-aggregative idea is, I believe, one of the main animating impulses of the Law Commission's report. Now, I do not doubt that utilitarianism should be rejected as a comprehensive theory of institutional design and public morality. The question is how far we want to extend the requirement of individualized treatment outside the field of criminal law. It is one thing to say that people should be imprisoned only when they do something wrong, not merely because it is on average socially beneficial to imprison people of type X. It is another thing to say that people should never in any context be the subject of differential treatment on the basis of group averages or imperfect correlations. Such a principle would be highly libertarian, by which I would mean that it would be extremely hostile to state action.

3. Relational Equality and Marriage

In its report, the Law Commission did not come out in favour of abolishing marriage, but the principles it enunciated would support this result. In having an institution of civil marriage, the state is not interfering in what people can do anyway – it is not forbidding people from having sex, or living together, or raising children together. Yet it is creating a public status, to which

are attached a set of mutual rights and obligations for the married couple but also social benefits that involve costs and obligations for third parties. The most obvious benefit is public recognition, but there is also immunity from having to testify against one's spouse, for example. What can justify this differential treatment of relationships? Prima facie, the Commission's principle of relational equality or neutrality would suggest that we should abolish marriage as a special, privileged institution.

To demonstrate the existence of a conflict between the principle of relational equality and civil marriage, I want to rehearse briefly some of the arguments for having an institution of marriage that are based on what we might call "ordinary social benefits." The idea here is that marriage benefits, in ordinary, relatively uncontroversial ways, not only those who end up marrying but also those remain unmarried. It is not implausible to think that marriage (and the mere possibility of marriage) settles men down, making them less likely to commit violent crime, for example. It is also plausible to think that children benefit from being raised in a stable, two-parent home, on average, and that marriage promotes such stability. The benefits of the two-parent family relative to other structures may have often been exaggerated, as Young claimed in response to Galston, and as Stacey asserted in response to Blankenhorn (Stacey 1996; Blankenhorn 1995), but even when we control statistically for factors such as race and parental education, children of two-parent families do better on a range of uncontroversial indicators of well-being than do children from other kinds of families (McLanahan and Sandefur 1994). True, the size of the benefits to children of their parents getting and staying married depend on the structure of surrounding social institutions.[6] The reality, however, is that were are not going to socialize childrearing any time soon. The fact that marriage would be much less important to the welfare of children in a society with socialized childrearing is irrelevant to a society that is not going to socialize childrearing. Given these constraints, measures that further weaken marriage are likely to hurt children, particularly among the least well off. Wealth and all that comes with it (better schools, networks of personal friendships with professionals with special expertise and access to institutions, *etc*.) can go some way to make up for disrupted family life. Children born to parents without such resources are in a much more vulnerable position, and much more at risk from family breakdown. Given the limits of likely social transformation, therefore, a concern for the position of the least well off would tend to suggest that we avoid further destabilizing marriage.[7]

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6. In a society with little public spending on welfare, health care, and education, people will clearly be much better off if they form stable care-giving couples, and if they have the good luck to be born to such couples. In a society with more ample social insurance and better access to education, however, it wouldn't be so risky to remain single, or to be born to single-parents, or to experience the divorce of one's parents. The real causal question is not about the benefits of the individual decision to marry, given existing institutions, but about the benefits of the social decision in favour of one set of marital and childrearing policies rather than another.

7. Similar arguments are also used against same-sex marriage, but in that context they are less plausible because there is little reason to think that allowing same-sex couples to marry will lead opposite-sex couples not to, and in any case it would be unfair to force gays and lesbians to shoulder the consequences of heterosexual irresponsibility. Functionally-traditionalist arguments based on child welfare and the welfare of the least well off that are implausible in the case of the move to same-sex marriage are more

One problem with this argument for the existence of civil marriage, even if the empirical claims upon which it rests are correct, is that what I have called the ordinary or ideal-independent benefits of the institution (given the range of feasible alternatives) accrue only on average, not in each particular case. It is not true that every child would be better off if her parents had married or had stayed together. When confronted with any disadvantageous treatment, however, children of other family types whose families do not fit the norm for that type could assert that the laws in question are not focused on the qualitative attributes of their family, nor on the functional roles it successfully plays. Why should we be disadvantaged in any way, they could say, just because families that have the same composition or formal status are not as successful on average?

We fail to see the potential conflict between the demand for individualized treatment and social justice because in one set of important cases, social justice requires strictly individual treatment. What is wrong with discrimination on grounds of race or gender? One argument would be that such discrimination is based on prejudice. But many instances of discrimination based on race and gender do not involve prejudice, in the sense of mistaken generalizations rooted in bigotry, and this is one of the reasons the market alone does not eliminate discrimination, despite the fact that a "principled" unwillingness to hire or sell to members of a particular group acts as an implicit tax upon those holding that principle. As Cass Sunstein argues, race and sex discrimination can be a rational response to true if imperfect generalizations about groups, in the context of limited time and information. "It can be hard to make distinctions within categories, and sometimes people make the category do the work of a more individualized and sometimes more costly examination into the merits of the particular employee" (Sunstein 2001, 159). Reliance on some imperfect but true generalizations is an ordinary and legitimate part of everyday life. Test scores and level of education are correlated with job performance, and hence useful in hiring decision, but they are imprecise. The same is true in many instances of race and gender, as proxies for other variables. It may well be true that on average women are more likely to take time off from work to care for children, or that blacks are more likely to commit certain kinds of crimes, if only because of the correlation between race and poverty. What's wrong with racial or gender profiling is not that it is necessarily caused by prejudice[8] but that it contributes to the maintenance of what is in effect a caste system.

What is distinctive about race and gender is that these characteristics are highly visible, and they were in the past used as the basis for explicit, legally-enforced as well as socially-sanc-

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plausible in the case of the proposal to abandon marriage.

8. Sunstein distinguishes a number of senses of "prejudice", including (1) false generalizations (such as the view that all or many members of a particular group have a particular trait, when in fact only a few do), and (2) " reliance on fairly accurate group-based generalizations when more accurate and reasonably cheap classifying devices are available or when (in other words) there is a more efficient classifying device" (159). In contrast, statistical discrimination occurs "when the generalization, though inaccurate, is less costly to use than any subclassifying device" (160). Statistical discrimination will be efficient for employers to use, hence it will persist in markets, without collective intervention, and this can perpetuate social inequality.

tioned inequality. Sunstein argues that the 14th and 15th Amendments to the American Constitution were established what he calls an "anticaste" principle, which would have forbidden laws and social practices "from translating highly visible and morally irrelevant differences into a systemic source of social disadvantage..." (Sunstein 2001, 155). "Caste" involves predictable and visible disadvantage in multiple dimensions, particularly those related to one's participation as a citizen in a democracy, dimensions such as education, susceptiblity to suffer violence, longevity, and so on (170). When such systemic disadvantage exists for members of a visible group, it cannot help but become common knowledge. At that point, those in the subordinate group tend to suffer stigma and humiliation, in their daily interactions; they are denied, in other words, the social bases of self-respect. Police targeting black drivers thus involves more than just unfair inconvenience and risk for those responsible citizens targeted simply in virtue of a correlation (itself a product of injustice, at least in part). It contributes to a general social stigma, and inevitably involves a humiliation above and beyond the more concrete costs in terms of time, money, risk of incarceration or violence at the hands of the police, and so on.

If the fundamental value lying behind the ideal of "equal protection of the laws" is an anticaste principle, it is evident that affirmative action will, in general, be a perfectly legitimate or even mandatory policy.[9] There is no sharp discontinuity between affirmative action and laws banning statistical discrimination, Sunstein argues, because such laws do not ban actions with bigoted motives, but rather actions that have the harmful long-term consequence of perpetuating group-based inequalities (Sunstein 2001, 161.). Race and gender are special cases, however. It is crucial to ban discrimination based on race and gender precisely because they are so visible, and there is a long history of official mistreatment along these lines. Antidiscrimination law is properly based on an anticaste principle, which therefore supports affirmative action (assuming it can be effective). If we were to interpret antidiscrimination law in terms of a general principle of individualized treatment, however, it would *not* support affirmative action, precisely because affirmative actions relies on averages in its targetting of those who receive the benefit (e.g. the claim that members of minorities are more likely to serve underserved minority communities; the fact that all members of the minority benefit, not just those who experienced or who are descended from those that experienced injustice at the hands of the state in the past, and so on).

Sunstein's anticaste principle applies primarily to the fairly narrow circumstances of systemic disadvantage on the basis of visible characteristics, resulting in commonly recognized second-class status. Gays and lesbians occupy an ambiguous status in his analysis, therefore. Not every group that suffers discrimination is a subordinate case; asians, jews, and homosexuals are not systematically below other groups in their standing on basic indicators of well-being, though they suffer discrimination, and judaism and homosexuality are not necessarily apparent to others (Sunstein 2001, 178, 183). Yet gays and lesbians do face discrimination in multiple do-

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9. On an anticaste account of constitutional guarantees of equality, "there should be no constitutional objection to genuinely remedial race- and sex- conscious policies, at least as a general rule. If a basic goal is opposition to caste, affirmative action policies are generally permissible as a matter of constitutional law (a conclusion that is largely uncontroversial in South Africa, Canada, and India, though against the tide in the United States)" (Sunstein 2001p.180; see also 181).

mains, and even when they have succesfully hidden their orientation and passed for straight, they can still experience humiliation because what people say to and about others. Sunstein's conclusion is that "even though gays and lesbians do not entirely qualify as a lower caste, the anticaste principle raises serious questions about discrimination based on sexual orientation" (Sunstein 2001, 183). In Canada, such considerations have rightly overturned opposite-sex-only marriage. It does not follow from the rejection of opposite-sex-only-marriage that it is illegitimate for the state to make any distinctions between families based on easily-observable traits usefully though imperfectly correlated with less easily observable variables of direct interest to legitimate public objectives. What the Law Commission and groups such as beyondmarriage.org are in effect suggesting is that the requirement of individualized treatment be extended from cases of historically and visibly marginalized groups (race, sex, and to a lesser extent sexual orientation) to all groups composed of different personal relationship types. This extension cannot be justified on anticaste grounds, unless one greatly waters down one's conception of "caste," which could mean sacrificing the public responsibility for fighting real instances of caste.

4. Beyond (Same-Sex) Marriage

The argument so far has proceeded on the assumption that the main concern underlying a general principle of individualized treatment of relationships is a distributive concern that those responsible for social problems bear the full costs of the policies designed to prevent or alleviate these problems. Why should I, the responsible drinker, be made to bear the costs of the irresponsible drinking of others? Why should I, the child of cohabiting parents, be disadvantaged in any way, even if only via the less than equal legal recognition of my parents' relationship, simply because some other children would have done better if their parents had married? Yet we have also seen that the anticaste principle (which supported a local antidiscrimination principle, focused on visibly and historically officially marginalized groups) involved an important symbolic or expressive dimension. Policies that exacerbate or fail to alleviate systematic disadvantages contribute to the public perception that those disadvantaged in this way are second class citizens, who need not be treated with equal concern and respect. The concern with social meaning is also evident in the "families of choice" movement, and comes out particularly clearly in the 2006 manifesto "Beyond Same-Sex Marriage" (2006).

> To have our government define as “legitimate families” only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships. For example, who among us seriously will argue that the following kinds of households are less socially, economically, and spiritually worthy?
>
> - Senior citizens living together, serving as each other’s caregivers, partners, and/or constructed families
> - Adult children living with and caring for their parents
> - and other family members raising their children’s (and/or a relative’s) children
> - Committed, loving households in which there is more than one conjugal partner
> - Blended families
> - Single parent households
> - Extended families (especially in particular immigrant populations) living under one

roof, whose members care for one another
- Queer couples who decide to jointly create and raise a child with another queer person or couple, in two households
- Close friends and siblings who live together in long-term, committed, non-conjugal relationships, serving as each other's primary support and caregivers
- Care-giving and partnership relationships that have been developed to provide support systems to those living with HIV/AIDS

Marriage is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others. While we honor those for whom marriage is the most meaningful personal – for some, also a deeply spiritual – choice, we believe that many other kinds of kinship relationship, households, and families must also be accorded recognition. (2006)

The concerns expressed in the paragraph are not primarily about material resources or concrete rights. The main issue is about social recognition. What is missing at present, is "systemic affirmation," and "the right to be honored and valued within our communities". To be sure, the manifesto tries to couch these concerns about recognition in the language of individual liberty – "an end to repressive attempts to control our lives" – and egalitarianism.[10] Yet, with the notable exception of laws against polygamous relationships,[11] family law today does not force people to do much of anything; people are free to cohabitate, have sex, have children, and so on. What the "Beyond Same-Sex Marriage" signatories object to is the expressive, symbolic slight in government implying that one kind of relationship is better than another. Even though a functionally-traditionalist policy based on claims about the consequences of family structure for uncontroversial indicators of child well-being does not make any claims about higher ideals or intrinsic virtues, it still involves some symbolic or material benefits that accrue as a matter of explicit policy to a particular family status and not to others. The justification is that such a policy creates incentives for people to behave in desirable ways, or makes it easier for people to behave in those ways. Even if "desirable" is cashed out in terms of the ordinary interests of third parties (chil-

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10. "Right-wing strategists do not merely oppose same-sex marriage as a stand-alone issue. The entire legal framework of civil rights for all people is under assault by the Right, coded not only in terms of sexuality, but also in terms of race, gender, class, and citizenship status. The Right's anti-LGBT position is only a small part of a much broader conservative agenda of coercive, patriarchal marriage promotion that plays out in any number of civic arenas in a variety of ways – all of which disproportionately impact poor, immigrant, and people-of-color communities. The purpose is not only to enforce narrow, heterosexist definitions of marriage and coerce conformity, but also to slash to the bone governmental funding for a wide array of family programs, including childcare, healthcare and reproductive services, and nutrition, and transfer responsibility for financial survival to families themselves" (2006).

11. Multi-person conjugal unions in Canada and many American states are officially illegal, even where no bigamy is involved. The crime of polygamy is not fraudulently to enter into a civil marriage with more than one person, but simply to live in a conjugal-type relationship or to undergo a religious marriage ceremony with more than 2 people at the same time (Bala 2005, 28). This criminalization of conduct seems to me unjust, whether or not it is unconstitutional, but not recognizing polygamous conjugal relationships as valid marriages is not the same as declaring them illegal.

dren), government may still seem to be passing judgment on the personal life choices of others, and this is what beyondmarriage.org objects to. In a sense, it is making a demand for a radical kind of neutrality. The state must not only avoid laws that say or imply that one religion is better than another, it must avoid laws that say or imply that one personal life choice is on average better or worse than another. Even if the government's case is based on empirical generalizations about uncontroversial indicators of child welfare, rather than religious doctrine, the policies in question are stigmatizing and humiliating to those involved, it alleges.

By this point, however, we have come a long way from the view that we have a positive duty to use state power to overcome and prevent social hierarchy. An anticaste principle would focus on policies that contribute in any way to the creation or maintenance of social stigma and humiliation rooted in visible, predictable and systemic disadvantage. In contrast, beyondmarriage.org's principle focuses on policies that express or imply less than full approval and endorsement, even where the groups involved are not visibly disadvantaged across multiple domains. "Close friends and siblings who live together in long-term, committed, non-conjugal relationships" do not form a subordinate caste. Denying same-sex couples the right to marry does carry a significant symbolic slight and contribute to the maintenance of homophobic views that expose gays to discrimination, humiliation, and even violence. According opposite- and same-sex marriages some public status not accorded to non-conjugal cohabitational relationships does not have the same meaning or the same effect. We should not water down the idea of caste to the point where any group suffering any differential treatment can reasonably claim just by that fact to be "second-class citizens". Beyondmarriage.org's underlying principle is libertarian, not egalitarian, since it involves a blanket guarantee of individualized treatment, and a prohibition on perceived social criticism of relationship choices.

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