IS THERE REALLY ANY GOOD ARGUMENT AGAINST PLURAL MARRIAGE?

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By Ronald C. Den Otter

This paper is about the quality of the main arguments that opponents of plural marriage have put forth in defense of their position. Americans are finally becoming accustomed to the concept of same-sex marriage and even though plural marriage lies on the horizon, commentators have not yet discussed the topic with the kind of care that it deserves. That is not to say that Americans, including judges, are unaware of the possibility that rationales used to deny or support a constitutional right to same-sex marriage may be equally applicable to plural marriage. In his dissent in *Romer v. Evans*, Justice Antonin Scalia favorably compared laws that discriminate against gays and lesbians to those that prohibit polygamy. In his dissent in *Lawrence v. Texas*, he claimed that the Court’s decision to recognize a constitutional right to same-sex sex acts between consenting adults implies that bans on bigamy are invalid. Scalia is not alone in calling attention to how slippery the slope from recognizing the constitutional rights of gays and lesbians to allowing plural marriage may be. Robert Bork has written “If homosexuality may not be discouraged by state constitutions, it is difficult to see how the provisions of various state constitutions banning polygamy can stand.” These slippery-slope arguments are predicated upon a *reductio ad absurdum*: if recognition of same-sex

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2 “Polygyny” is a man with multiple wives and “polyandry” is a woman with multiple husbands. “Polygynandy” is group marriage. “Polyamory” is a more neutral term, and the one that I prefer, but for convenience, I will use “plural marriage” to cover all of these possible relationships.


marriage leads to plural marriage, which is supposed to be ridiculous, then the premise that there is a right to same-sex marriage must be false.\(^6\)

Perhaps this approach is a rhetorical scare tactic, and that is probably why those on the left, who advocate same-sex marriage, have not been nearly as enthusiastic about its plural counterpart.\(^7\) My concern in this article, though, is whether there is a principled distinction between them. I begin by elaborating on why the slippery-slope argument is more cogent than many people on the left believe, and also why its conclusion is not as ridiculous as almost all people on the right believe.\(^8\) After all, one way to respond to a slippery slope argument is to show that the state of affairs that is supposed to come about inexorably is not as terrible as it initially appears to be. At minimum, the recognition of a constitutional right to same-sex marriage raises the question of what kinds of reasons would justify redefining civil marriage to make it more inclusive. Americans then could do something that is long overdue: evaluate the quality of the arguments for and against plural marriage on their merits.

Unfortunately, there is little academic literature on the topic, and most of it opposes the idea of allowing someone to marry more than one person.\(^9\) Nevertheless, the strength of the reasons for such opposition is not obvious. The lack of an adequate explanation of why polygamy is illegal and why persons who want to have such


\(^8\) A lot of what I argue may imply that civil marriage should be disestablished or that adults, who are related by blood, also may marry each other. I do not deny either of these implications. However, my purpose is simply to show that if civil marriage continues to exist, then it is not evident why the right to it may be denied to those who seek to marry more than one person or wish to marry a person who is already married to another person. I thank Sonu Bedi for encouraging me to be clear about my ambitions for this paper sooner rather than later.

relationships may be treated unequally in the eyes of the law is surprising in a society that usually demands much stronger justification for laws that arguably discriminate against discrete and insular minorities or deny individual rights. As one commentator remarks, “It seems perfectly possible for someone to have the most serious religious or personal reasons for wanting [plural marriage].”

My aims are more negative than positive: to sketch the case that opponents of plural marriage have advanced and to explain why it is not compelling. In assessing that case, I will not explore the claim that there is a constitutional right to plural marriage on religious or cultural grounds. I leave that important discussion to another day. The administrative changes to family law that the legal recognition of plural marriage would necessitate are also beyond the scope of this article. Instead, I devote a substantial portion of what follows to what I take to be the two strongest arguments against plural marriage. First, many opponents of plural marriage claim that polygamous relationships have an asymmetrical power structure and thus, women will not be equals in such relationships. Second, some opponents of plural marriage allege that such marriages are likely to involve coercion or facilitate other crimes.

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11 Susan Moller Okin has raised the legitimate concern that by recognizing the “group rights” of minority cultures and by allowing “cultural defenses” of certain inegalitarian practices and carving out exceptions for them, the state reinforces patriarchy. In effect, “leaving well enough alone,” in the name of tolerance, leads to the oppression of women. Susan Moller Okin, Is Multiculturalism Bad For Women? in IS MULTICULTURALISM BAD FOR WOMEN? SUSAN MOLLER OKIN WITH RESPONDENTS 9-24, 117-131 (Joshua Cohen, Matthew Howard, & Martha C. Nussbaum eds., 1999). It is also important to note the cultural traditions do not speak for themselves; they must be interpreted. Thus, there is likely to be reasonable disagreement about whether the practice in question really is a part of the tradition of that culture.

12 For an excellent discussion of these changes, see Diane J. Klein, “Plural Marriage and Community Property Law,” unpublished paper.
13 This is known as the “equal status view.” Mary Lyndon Shanley, Just Marriage: On the Public Importance of Private Unions, in JUST MARRIAGE 3, 16 (Joshua Cohen & Deborah Chasman eds. 2004).
I shall argue that no one yet has formulated an argument that successfully establishes that civil marriage ought to have a numerical limitation and that the burden is on the state to demonstrate that the failure to recognize plural marriage is consistent with the principles of freedom and equality that underlie fundamental rights and equal protection clause jurisprudence. Those who oppose plural marriage, if they want their view to have the force of law, must do a better job of elucidating why the definition of civil marriage should exclude polygamy. My point is not that they could not do so but rather that they have not done so and in fact, have not come close to doing so. In addition, their being induced to provide such an explanation would stimulate the kind of political and constitutional discourse that should take place in a society that cares about treating all of its members fairly.

The article will be divided into the following sections. First, I contextualize the question of plural marriage. I do so by giving a brief account of the politics of plural marriage, the role of feminist political thought in exposing gender inequality, the campaign against Mormon polygamy in the nineteenth century, and the analogy between same-sex and plural marriage. Second, I spell out the case against plural marriage. In particular, I focus on two of its features: that plural marriage reinforces or exacerbates gender inequality and that such marriages are often coercive in a number of respects. Third, I discuss liberal neutrality, the value of choice, and the possibility of disestablishing civil marriage (for everyone). Fourth, I return to plural marriage and make the case that the issue is best understood as not being about the limits of tolerance but about the limits of the state’s pursuit of gender equality and saving adult women from themselves. Americans not only value equality but also value choice, and to be a liberal
is to accept constitutional limits on the power of the state. Even if plural marriage were
to pose more of a problem for gender equality than its monogamous counterpart, the case
against plural marriage still is not as strong as its proponents believe. I conclude with
some thoughts on why Americans, who pride themselves on being tolerant of difference,
have such a difficult time extending that attitude towards plural marriage.

I. A Brief History of Plural Marriage

A. Strategic Concerns

According to a recent Gallup Poll, 90% of Americans believe that the practice of
polygamy is immoral.14 That figure indicates that the polyamory movement faces a
daunting task: to not only encourage Americans to see plural marriage as a morally
acceptable practice but also to persuade legislators and judges to change laws that ban
plural marriage or treat polyamorists unequally. A crucial part of the movement’s
rhetorical strategy has been to draw parallels between same-sex and plural marriage.15 At
present, this strategy has had only limited success, and it is not evident that any
alternative strategies are more promising in today’s political climate. As Eugene Volokh
puts it, “pro-polygamy forces are in a lousy political position.”16

One of the explanations for the lack of support for plural marriage among those
who advocate same-sex marriage is pragmatic. A lot of them have not embraced the
cause of plural marriage because their opponents will use the possibility of such marriage
as evidence that there is no logical stopping point when Americans tinker with the

15 Jeffrey Michael Hayes, Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists, 3
traditional definition of civil marriage. The attempt to make the electorate overlook the possible connection between same-sex and plural marriage is understandable when many Americans still will not endorse a right to same-sex marriage even when they do not reject alternatives like civil unions or domestic partnerships. One of the lessons to be drawn from the recent passage of Proposition 8 in California, which amended the California Constitution to ban same-sex marriage, is that it may be more difficult to frame an issue as a civil rights issue than many people on the left had anticipated.

I am not unsympathetic to the strategic concerns of the advocates of same-sex marriage, but this article is about whether there is a principled distinction between the two kinds of marriages. I do not limit my analysis to narrow legal or constitutional arguments because in challenging constitutional cases, judges have considerable latitude in deciding whether a particular argument is sound or better than its rivals. Invariably, they will have to assess what the state’s interest is, whether it is sufficiently compelling, and how well the legislative means fit the legislative end. Surely, that task demands more than applying precedents in a rule-like manner, and cases like Romer v. Evans and

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18 33% of Americans favor same-sex marriage and 27% favor civil unions. CBS News Poll, March 12-16, 2009. N=1,142 adults nationwide, MOE + or – 3%. www.pollingreport.com
19 On November 4, 2008, the voters of California passed Proposition 8, which overturned the California Supreme Court’s decision recognizing a constitutional right to same-sex marriage. In Strauss v. Horton, the California Supreme Court declined to invalidate Proposition 8 on the ground that it was a constitutional revision. At present, an effort is underway to obtain enough signatures to put the question of same-sex marriage back on the November, 2010 ballot.
20 Recently, Cass Sunstein has given his theory of Burkean minimalism a distinctly utilitarian or consequentialist justification. Cass R. Sunstein, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE 72 (2009). In this paper, however, I do not discuss the consequences of a court’s recognizing a right to plural marriage. I leave that important discussion to another day.
Grutter v. Bollinger indicate that even the ostensible standard of review that the law in question triggers may not pre-determine the outcome of the case.22

B. Contemporary Feminism

Anyone who addresses the question of whether the state ought to recognize plural marriage is bound to have some ambivalence about reform, especially when Mormon polygyny serves as the archetype. After all, can any state that permits such marriage also be committed to gender equality? The traditional concern has been that the state may not use its coercive power to discriminate against women and deny them the rights that men are able to exercise.23 In the 1970s, the Court developed a special standard of review, intermediate scrutiny, for legislative classifications based on gender.24 A related concern is that the state cannot fulfill its responsibility of ensuring gender equality in public life simply by ceasing to discriminate against women. Rather, the state must actively try to eradicate the worst forms of gender equality, including those that are more difficult to detect in the private sphere. Only relatively recently have most political theorists come to see the importance of feminism in understanding politics and developing a vision of a society that is free of gender domination.25

By now, it is evident that feminism will have a lasting impact on many academic disciplines, including political science and law, and that most scholars will be more careful than they used to be about assuming that what takes place in the public sphere

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23 See JANE J. MANSBRIDGE, WHY WE LOST THE ERA 2 (1986) (declaring that the (failed) Equal Rights Amendment (ERA) only applied to government, not to private individuals or corporations).
does not affect what takes place in the private sphere or vice versa.\textsuperscript{26} At the same time, it is misleading to pretend that feminist insights have only just arrived on the scene. It is more accurate to say that many scholars are far more receptive than they used to be to their intellectual value. In the history of political thought, before the term “feminism” was minted, some theorists already had written about the political relevance of the family and marriage.\textsuperscript{27} Unfortunately, few of them addressed the question of unconventional forms of marriage like plural marriage, and those who ventured into these uncharted waters did so without the kind of sophistication that we would expect of anyone who writes about the topic today.\textsuperscript{28}

Assuming that the state has a duty to minimize gender inequality in personal relationships, must it therefore prohibit plural marriage? Or is it possible that one can have a feminist sensibility and still permit such marriage? Those who will not accept that possibility may ultimately be justified in their refusal, but they owe a clear explanation to the rest of us about why plural marriage is so odious. That explanation will have to involve more than a mere appeal to definition, tradition, conventional morality, or public opinion. That is, it will have to single out at least one intolerable feature of plural marriage or at least one awful consequence of its existence, such as the kind of power

\textsuperscript{26} Feminism as a theory of justice and as a social movement also has prompted an anti-feminist reaction from those who insist that feminists do not acknowledge the “reality” of natural differences between men and women. These anti-feminists claim that natural differences based on gender do not imply the inferiority of women but rather that these differences set the limits of what is socially possible, and laws and policies that ignore these limits are misguided. \textit{See, e.g.}, Harvey C. Mansfield, \textit{MANLINESS} (2008). This anti-feminist reaction from Straussians is not new. \textit{See also} Allan Bloom, \textit{THE CLOSING OF THE AMERICAN MIND} (1987).


\textsuperscript{28} \textit{See, e.g.}, John Stuart Mill, \textit{On Liberty, in ON LIBERTY AND OTHER WRITINGS 91-92} (Stefan Collini ed., 1989) (1859). Mill’s position was ambivalent. He describes the “Mormonite” doctrine as a “direct infraction” of the principle of liberty yet shortly thereafter, he concedes that in some sense, women involved in such arrangements have made a choice.
that men exercise over women in polygamous relationships. If women are often physically or psychologically harmed in such relationships, then those who believe that the state should “leave well enough alone” would have their justificatory work cut out for them. That is not just a point about liberalism or Mill’s harm principle but reflects widely-held beliefs about the proper limits of the law. In other words, opponents of plural marriage must appeal to justifications of gender equality or non-coercion. They may not base their exclusion of plural marriage on reasons that are unrelated to these two principles. Part of the explanation for why most arguments against same-sex marriage are so unconvincing upon closer inspection is that they usually rely on premises that are controversial. By contrast, an appeal to equality or non-coercion is likely resonate with reasonable people, regardless of their respective deeper religious or secular convictions.

Today, no person wants to concede that his or her political or legal position is predicated on gender inequality or would have the effect of depriving women of equal opportunity in their professional or personal lives. In raising important questions about how the public-private distinction conceals unequal power relations, feminists have illuminated how patriarchal institutions subordinate women and have made us more aware of why practices that we take to be natural, normal, fair, or universal may be problematic. They have extended this critique in many directions, including marriage and its unequal division of domestic labor. Susan Moller Okin has likened polygamy to clitoridectomy and forced marriages. Mary Lyndon Shanley has written that “[v]igorous state action is needed to promote spousal equality” and “withdrawing the

29 Okin, supra note 11, at 14.
state from the pursuit of justice from marriage and the family moves us in the wrong
direction.”

For the sake of argument, I assume that the state has an interest in minimizing
inequality in personal relationships, especially those that involve one man and multiple
women and therefore are inclined to subordinate women. I do not know whether this
claim about the higher probability of gender inequality is true, not only because the
empirical situation is uncertain, but also because the equality part of gender equality is
anything but easy to define other than in highly abstract terms. At any rate, the first
assumption about the state’s aforementioned interest underlies feminist critiques of plural
marriage, and I will take its truth for granted. The second assumption is likely to be true
in the near future because most plural marriages are polygynous. If, after
experimenting with such marriages, we later learn that they do not further gender
inequality or only have a trivial impact, then the case for a constitutional right to plural
marriage would be even stronger.

At present, many progressive academics reject the idea or practice of plural
marriage. But there are a couple of notable exceptions, like Laurence Tribe and
Sanford Levinson, who have come out in favor of a constitutional right to such
marriage. Richard Posner insists that in theory, plural marriage with the consent of all
of the women involved would turn out to be a superior arrangement for them by

30 Shanley, supra note 13, at 20, 28.
31 In a majority of cultures in the world, polygamy is an option. See PHILIP L. KILBRIDE, PLURAL
33 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 521-528 (2d. 1988); Sanford
Levinson, The Meaning of Marriage: Thinking About Polygamy, 42 SAN DIEGO L. REV. 1049, 1055-
1058 (2005).
enlarging their choices.\textsuperscript{34} In addition, not all feminists are categorically opposed to plural marriage. According to Martha Nussbaum, polygamy may be acceptable under some circumstances.\textsuperscript{35} However, as she writes, “polygamy is a structurally unequal practice.”\textsuperscript{36} For her, the most persuasive argument against polygamy is that “men are permitted plural marriages, and women are not.”\textsuperscript{37} Just as there is not a single feminist position on other important theoretical and political issues, there is not a single feminist position on plural marriage. Still, all thoughtful persons are concerned that such marriages would be inconsistent with a commitment to gender justice and preparing children for future democratic citizenship inasmuch as those marriages exemplify unequal relations and set a bad example that may be emulated.

There is a tendency for those who believe that plural marriage is intrinsically inegalitarian or at least likely to be so in a patriarchal society like our own to conclude that its unequal nature implies that such marriage should be illegal or at least not recognized by the state. As Shanley writes, “In order to decide whether plural marriage should be legalized, one must address the question of whether polygamy can be reformed along egalitarian lines.”\textsuperscript{38} It is important to distinguish between the justification for prosecuting people who attempt to create such marriages and the justification for not including plural marriage in the definition of civil marriage. The former probably requires a stronger justification than the latter, and I will return to this point later in the

\textsuperscript{34} RICHARD A. POSNER, SEX AND REASON 257 (1992).
\textsuperscript{35} MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 230 (2000).
\textsuperscript{36} MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 98 (1999).
\textsuperscript{37} MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 197 (2008).
\textsuperscript{38} Shanley, supra note 13, at 18.
paper. The standard position against plural marriage presupposes that the state has an important or compelling interest in ensuring decent treatment in personal relationships, including civil marriage. In one sense, this presupposition is true. Unquestionably, the state can enact laws against domestic violence and spousal rape. The state also may create a community property regime or equitable divorce laws requiring spousal and child support to reduce the likelihood that women and children are left economically vulnerable upon dissolution of the marriage. Few persons would insist that the state should leave well enough alone when one person is harming another, even if they happen to be married, or that the state must be indifferent to the probability that the husband takes his earning power with him in the event of divorce.

In another sense, however, this presupposition is more contentious. Although the state may legislate to require employers to grant parental leave, to subsidize childcare, or to prevent sexual harassment in the workplace without violating the Constitution, laws that try to force equality upon those who would prefer to have an unequal marital relationship is troubling because Americans have valued and continue to value choice in their most important aspects of their personal lives. The feminist challenge to the public-private dichotomy does not entail that all behavior is subject to the authority of the state because that understanding would leave no room for privacy. To claim that people may not choose to have an unequal relationship is to undermine the liberal principle that the state should not interfere with people’s most intimate decisions unless it has a compelling justification for such interference. The liberal will respond that it is not obvious that the

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39 In almost all instances, there is an important difference between a civil disability and a criminal penalty. I thank Matt Moore for encouraging me to make this point more explicit.

40 Some feminist positions have undeniably illiberal implications. In criticizing the privacy rationale of *Roe v. Wade*, Catharine MacKinnon writes, “The right of privacy is the right of men ‘to be let alone’ to oppress
state’s interest in preventing harm, as in the cases of domestic violence or spousal rape, is on par with ensuring that marriages are as equal as they can be or at least not too inegalitarian. Neither of the extremes --the pursuit of gender equality whatever the price or a wholesale refusal to use the power of the state to create a more just family-- is attractive.

C. The Mormons

In Mormon theology, polygamy is also known as the celestial law of plural marriage, patriarchal marriage, or as the principle. Polygamy was not one of the original tenets of the Mormon faith but originated in Joseph Smith’s “Revelation on Celestial Marriage” in 1843 and remained secret for another ten years. The persecution of Mormons for the practice of polygamy is tragic episode in American history. The American government was not the only agent of such persecution. As Sarah Barringer Gordon writes, “Like other antipolygamists, novelists connected Mormonism to other non-Protestant faiths, drawing on popular prejudices to argue that any radical departure from Protestantism would corrode true liberty.” Even today, there have been a number of non-academic accounts of Mormon fundamentalism that have painted a bleak picture of the lives of the women involved in the practice. In 1878, in Reynolds v. U.S., the United States Supreme Court ruled that the free exercise clause of the First Amendment

women one at a time.” CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 102 (1987).

42 Id. at 22-23.

44 Gordon, supra note 41, at 33.

does not protect the practice of plural marriage.\textsuperscript{46} In 1883, the Edmunds Act banned polygamy and unlawful cohabitation and set up a federal commission to administer test oaths compelling voters to swear that they were neither bigamists nor polygamists; Mormons who refused to take those oaths were barred from public service and voting.\textsuperscript{47} During the 1880s, the federal government prosecuted more than 1300 Mormons for the religious practice of polygamy.\textsuperscript{48} In 1887, the Edmunds-Tucker Act disinherited the children of plural marriages and disenfranchised Mormons who advocated polygamy even when they did not engage in the practice.\textsuperscript{49} In 1890, due to intense pressure from the federal government, the Mormon Church formally repudiated the practice of polygamy.\textsuperscript{50}

Part of the unease within contemporary political and legal thought with respect to plural marriage in the United States can be traced to the historical association of such marriage with Mormonism. As Elizabeth Emens puts it, “when Americans hear the term ‘polygamy,’ or try to picture relationships of more than two, they typically think of traditional polygyny.”\textsuperscript{51} Today, there are between 30,000 and 50,000 fundamentalist Mormons who still practice polygamy.\textsuperscript{52} No doubt, the above association of plural marriage and Mormonism has a lot to do with the unique history of the United States, but Mormon plural marriages are only one subset of plural marriage and confining ourselves to that example clouds our thinking about the forms that plural marriage could take in a society that did not force such persons to conceal their relationships. One of my aims in

\textsuperscript{46} Reynolds v. U.S., 98 U.S. 145 (1878).
\textsuperscript{47} JILL NORGEN & SERENA NANDA, AMERICAN CULTURAL PLURALISM 100 (2d. 1996).
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 101.
\textsuperscript{50} Id. at 108.
\textsuperscript{51} See Emens, supra note 9, at 282.
\textsuperscript{52} NORGEN & NANDA, supra note 47, at 110.
this article is to encourage readers not to assume that plural marriage must take the form
of Mormon polygyny or that such marriage is obviously inferior to monogamous
marriage. After all, some people could be happy in unconventional relationships or at
least happier than they would be in monogamous ones. Furthermore, some kinds of
plural marriage might serve as examples of how traditional, opposite-sex monogamous
couples could improve their own relationships. The point here is not to assess whether
plural marriages do or would have a net positive or negative effect on American society,
which turns not only on difficult-to-measure causal claims but also on which effect(s)
people believe to be most morally salient. Rather, I hope that the reader entertains the
possibility that such relationships, both to the individuals who participate in them and to
the society that permits them, may have more value than many people imagine.

According to Mormon constitutional theory, plural marriage was protected by the
principle of federalism and the religion clauses of the First Amendment. In Reynolds,
Chief Justice Morrison Waite conceded that the practice of plural marriage was rooted in
sincere religious convictions but distinguished between beliefs and actions based upon
those beliefs. The former fell within the protection of the free exercise clause but the
latter did not. Today, there is no question that the belief-action distinction that Waite
relied upon is historically flawed and that such a narrow understanding of the free
exercise clause eviscerates its meaning. Indeed, the word “exercise” indicates that the

53 See Emens, supra note 9, at 284; David Chambers, Polygamy and Same-Sex Marriage, 26 HOFSTRA L.
54 For example, advocates of polyamory call attention to the social importance of its five main principles:
self-knowledge, radical honesty, consent, self-possession, and the avoidance of emotions like jealousy. See
Emens, supra note 9, at 283, 320-331.
55 Gordon, supra note 41, at 89.
57 See Nussbaum, supra note 37, at 101.
free exercise clause was not intended to be limited only to beliefs. Waite also claimed that women who were involved in plural marriages were victims of a self-delusion. This claim is an analogue of the false consciousness argument that still exists, where women who participate in such arrangements are the victims of brainwashing or are not in touch with their real selves. In other words, if they really knew what was in their own best interest, then they would not choose to be a part of such relationships. At the time the Court decided Reynolds, the kind of patriarchy that characterized plural marriage was considered worse than that of a typical traditional monogamous marriage of the era.

The Court has never overturned Reynolds. However, many people have criticized its reasoning, and no thoughtful person today would accept its racist, ethnocentric, and empirically untested claims that plural marriage is contrary to “social duties and good order” and “odious among the northern and western nations of Europe.” As Sarah Song writes, “The Reynolds court both drew upon and reinforced… [a] discourse of racial and cultural superiority of whites over others, casting the

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58 In the wake of the infamous peyote case, the issue is more complicated than it used to be. As long as the state has enacted a law of general applicability —i.e.- one that does not intentionally discriminate against a religious minority-- its disparate impact is constitutionally irrelevant. See Employment Division v. Smith 494 U.S. 872 (1990).
60 There are deep philosophical questions about what it means to make a genuinely autonomous choice that are beyond the scope of this paper. Nevertheless, it is worth noting that it is not evident that most American women make personal decisions according to a thick or substantive standard of autonomy in the midst of so much social pressure to look, be, or act a certain way. There is a tendency for those who criticize the lack of autonomy on the part of women in non-Western cultures to not turn as critical a gaze toward the social pressures to conform in their own cultures. See Anna Elisabetta Galeotti, Relativism, Universalism, and Applied Ethics: The Case of Female Circumcision, 14 CONSTELLATIONS 91, 102 (2007).
63 Id. at 164.
American-born Mormon religion as foreign and other."\textsuperscript{64} When the law does not make room for plural marriage, this omission restricts the freedom of those who are denied the option of marrying the person of their choice. Some restrictions are uncontroversial: those that involve people who are too young to consent or non-human animals that are incapable of consent. Others, like bans on interracial marriage, are unacceptable today.\textsuperscript{65} Others, such as those that do not permit same-sex marriage, are more disputed.\textsuperscript{66} In the end, the baseline question is whether a restriction on the right to choose a particular partner is sufficiently justified to override a general presumption in favor of letting people make their own decisions about the most important aspects of their personal lives. Such a justification, then, would have to prove that plural marriage, unlike other forms of marriage, has serious harmful effects.

C. Court Cases

The United States Supreme Court has declared that the right to marriage is “one of the vital personal rights essential to the orderly pursuit of happiness.”\textsuperscript{67} That declaration alone indicates that the denial of such a right to those, male or female, who want to marry multiple persons, must be based on more than mere moral disapproval, visceral dislike of the people or conduct in question, or stereotypes. The rationale behind the use of strict scrutiny in fundamental rights and equal protection cases is that the state may not deprive people of their personal freedom or treat them unequally without

\textsuperscript{64} SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 148-149 (2007).
\textsuperscript{65} Loving v. Virginia, 388 U.S. 1 (1967)
\textsuperscript{66} According to a March 12-16, 2009 CBS News Poll, 35% favor legal marriage for same-sex couples, 27% favor civil unions, and 35% favor no legal recognition. N=1,142 adults nationwide. www.pollingreport.com
\textsuperscript{67} Loving v. Virginia, 388 U.S. 1, 12 (1967).
excellent reasons for doing so. 68 In the past, though, most judges have not been receptive
to arguments that support a right to plural marriage and have been much less critical than
they ought to have been towards the strength of the state’s interests in not having plural
marriage as an option. In upholding the Mann Act, Justice Douglas once wrote, “the
establishment or maintenance of polygamous households is a notorious example of
promiscuity.” 69

At present, no state permits plural marriage, and no state is likely in the near
future to recognize such a right. Nor do any domestic partnership or civil union laws in
this country allow multiple partners to register. 70 Almost all states criminalize polygamy,
with the exception of Hawaii, where the second marriage is merely annulled. 71 These
states criminalize remarrying, attempting to remarry, purporting to remarry, or
cohabitating as man and wife, when a former marriage has not been terminated and the
former spouse is still alive. 72 The lack of such a right to marry multiple persons may not
be surprising, but over time, the Court has extended the right to marry by ensuring that
states may not restrict that right without adequate justification. A person who owes
court-ordered child support need not obtain permission from the state to remarry. 73
Those who are incarcerated also have a constitutional right to marry. 74 These decisions
reveal that there is a constitutional right to marry for just about anyone who wants to
marry one person of the opposite gender. It follows that the state could not deny the right

68 Cf. SONU BEDI, REJECTING RIGHTS (2009) (Bedi’s thesis is that courts should focus on the reasons
that the state offers as justification for its public laws, and only some reasons count as good-enough reasons
to do the justificatory work).
70 Emens, supra note 9, at 361.
71 Samantha Slark, Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of
72 Id.
to marry to those who have been convicted of the most heinous crimes, such as child molestation and murder.

In *Meyer v. Nebraska*, the Court first announced that marriage must be treated as a fundamental right.\(^{75}\) In *Loving v. Virginia*, Chief Justice Warren elaborated on the importance of a person’s being able to choose his or her spouse.\(^{76}\) In the context of the debate over same-sex marriage, however, each side disagrees about what the holding is. One may read Warren’s majority opinion narrowly and conclude that there is only a fundamental right to interracial marriage. According to this view, *Loving* stands for the principle that the state may not deny the right to marry to someone who seeks to marry a person of a different racial or ethnic group. The only reason that the state could have for such a prohibition is racist and thus, illegitimate.\(^{77}\) In *Loving*, Warren did not find that the so-called “equal application theory,” where under state law white and black persons are “punished to the same degree,” could be separated from invidious racial discrimination.\(^{78}\) Throughout his majority opinion, Warren’s focal point is race.\(^{79}\) In a relatively short opinion, he mentions “race” or “racial” numerous times in elaborating on why the legislative classification in question is not subject to the rational basis standard of review that Virginia had asked for.\(^{80}\)

Alternatively, one could construe the principle of non-discrimination that underlies *Loving* more broadly and not limit its scope to restrictions on marriage that

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\(^{77}\) The Virginia Supreme Court had found that the state’s purposes of preserving “the racial integrity of its citizens” and preventing “the corruption of blood” were legitimate. As Warren points out, these reasons are an “endorsement of the doctrine of White Supremacy.” *Id.* at 7.

\(^{78}\) *Id.* at 8.

\(^{79}\) On the meaning of “racism,” see LAWRENCE BLUM, I’M NOT A RACIST BUT… THE MORAL QUANDARY OF RACE 1-32 (2002).

\(^{80}\) *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967).
involve race but stretch it to cover all classifications where the state does not have adequate reasons to discriminate against particular persons. Therefore, all laws restricting marriage ought to be subject to strict scrutiny, which is a fancy way of saying that it must have very good reasons for treating some persons differently than others when it denies only some persons the right to marry. No constitutional right is absolute, and even when strict scrutiny is not always fatal in fact, there is a very strong presumption against restricting any constitutional right unless the state can produce adequate reasons for such a restriction. The implication of the use of this analytical framework is that the immorality or strangeness or offensiveness of certain kinds of marriages, even in the eyes of most people, cannot do sufficient justificatory work. As Evan Gerstmann observes, “If the fundamental right to marry did not protect some things that shock and repulse most people, it would be a uniquely narrow right.” At present, that a particular kind of behavior allegedly corrupts public morals or causes others distress but does not harm them is not likely to rise to the level of an important or compelling interest. Politically, one might even take Mill’s position that the state should promote unconventional behavior on the ground that such a policy creates opportunities for experiments in living. D. The Analogy

As I noted in the introduction, the issue of same-sex marriage also implicates plural marriage because Americans must decide whether to expand the meaning of marriage beyond its traditional definition. During the hearings that preceded the passage

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81 GERSTMANN, supra note 32 at 109.
82 See H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) (explaining the weaknesses of arguments that purport to justify the legal enforcement of morality).
of the Defense of Marriage Act, some members of Congress and some witnesses equated polygamy with same-sex marriage.\textsuperscript{84} In \textit{The Weekly Standard}, Stanley Kurtz predicted that plural marriage will follow in the wake of the legalization of same-sex marriage.\textsuperscript{85} As early as 1978, Justice Potter Stewart voiced his concern that the Court’s recognizing a fundamental right to marry would impede the ability of the states to ban unconventional kinds of marriage.\textsuperscript{86} In 2003, the Massachusetts Supreme Court became the first state supreme court to recognize the right to marriage for same-sex couples.\textsuperscript{87} In 2008, the California Supreme Court addressed the question of whether the failure to “designate the official relationship of same-sex couples as marriage,” even with the option of domestic partnerships for same-sex couples, violates the California Constitution, and answered in the affirmative.\textsuperscript{88} Even more recently, the state supreme courts of Connecticut and Iowa have followed suit.\textsuperscript{89}

In this section, I want to explain why Scalia’s slippery slope may be slippery after all.\textsuperscript{90} Slippery slope arguments are probably the most misused arguments in the history of informal fallacies yet in the case of plural marriage, a right to such marriage may follow from a right to same-sex marriage.\textsuperscript{91} The reasoning that underlies the

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\textsuperscript{84} Chambers, supra note 53, at 53.
\textsuperscript{88} In re Marriage cases, 43 Cal. 4d 757, 780 (2008) (George, J., majority)
\textsuperscript{90} There is very little empirical evidence that shows that the legal recognition of same-sex marriage inexorably leads to the legal recognition of plural marriage. In fact, in the United States, the reverse may be true. Stacey & Meadow, supra note 7, at 190-192.
\textsuperscript{91} Typically, slippery slope arguments are not logical but psychological. The concern is that even if A and B can be distinguished logically, at some time in the future people will end up not distinguishing them. See Volokh, supra note 16, at 1156. That consequence is contingent on many other factors that may be very difficult to identify or measure. Whether the slope between same-sex and plural marriages is likely to be
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constitutional right to same-sex marriage seems to be similar to that of the California Supreme Court in the *In re Marriage* cases. The principle of non-discrimination without adequate justification on behalf of the legislative classification in question always can be taken in a number of unanticipated directions. That can occur not because a judge necessarily acts in bad faith but because the meaning of that principle may transcend its particular context. The more abstract the principle, the more likely this is to happen. The application of abstract principles to concrete circumstances is not strictly deductive in the sense that a premise implies a conclusion. In hard cases, the application of a legal rule is bound to turn on considerations that are not explicitly contained in the rule itself. Constitutional interpretation often requires judges to bridge

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92 On May 15, 2008, The California Supreme Court decided that same-sex couples have a right to marry under the California Constitution. However, on November 4, 2008, the California voters passed Proposition 8, which amended the California Constitution to limit civil marriage to opposite-sex couples.


the gap between highly abstract constitutional language and the actual particulars of the case. 95

Judges can do that bridging in a number of ways, and they normally try to decide the case in a manner that is more or less consistent with past decisions. As a result, analogical reasoning is central to legal reasoning in a common law system. 96 As it turns out, such reasoning is more complicated than it may seem to be. 97 To draw an analogy between two or more entities is to indicate one or more respects in which they are similar. 98 The most important feature of analogical reasoning is the existence of the analogized item of some particular characteristic that allows one to infer the presence of that item of some particular other characteristic that may not be initially apparent. An analogical inference proceeds from the similarity of two or more things in one or more respects to the similarity of those things in some further respect. 99 For instance, a, b, and c have properties X and Y. a and b also have property Z. Therefore, c probably has property Z as well. Analogical arguments, which cannot be deductively valid, can still be more or less cogent depending on the degree to which their conclusions are justified. 100 Because the two items compared can be alike or unlike in an almost infinite number of ways, there has to be an additional constraint on analogical reasoning: relevance, which depends on how the person characterizes the details of the context of the comparison. To

95 See RONALD DWORIN, TAKING RIGHTS SERIOUSLY 136 (1977).
96 See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).
98 IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 472 (10 ed. 1998).
99 Id. at 473.
100 Id. at 477.
draw an analogy between two or more entities, then, is to indicate one or more respects in which they are relevantly similar.\textsuperscript{101}

Legally, if there is an earlier case that is sufficiently similar to the case at hand and one set of reasons had outweighed the other set in that earlier case, then one can argue that consistency dictates the same result in the present case. However, that conclusion would require an argument to support the claim that the two cases compared are sufficiently similar to be analogous. The harder the case, the more likely there will be at least one plausible counterargument that supports the opposite conclusion, namely that the two cases in question are not sufficiently similar. In fact, we ought to expect new cases to differ in some respects from previous cases and for the strength of reasons to vary according to their context and the extent to which they are stronger or weaker in combination with other reasons. Although fairness demands that we treat like cases alike, the unique details of new cases may put into doubt whether an earlier case is sufficiently similar to the case in question. The challenge is to determine when two cases are close enough in the relevant respects to warrant the same kind of treatment. Judges have a great deal of work to do, then, in figuring out whether two cases are really analogous. In a common law system, when a judge or lawyer appeals to precedent, she is claiming that the previous rationale for treating A in one manner is a good enough reason for treating a subsequent case like A in the same manner. The relevance of an earlier precedent depends on how the judge characterizes the material facts of the earlier case. No two appellate cases are factually identical down to the last detail but they may be sufficiently similar in the relevant legal respects for a judge to decide that the holding of a previous case also controls the new case.

\textsuperscript{101} Id. at 472.
Those who are in favor of same-sex marriage have gone out of their way to demonstrate that the legal recognition of same-sex marriage will not inevitably lead to the legal recognition of plural marriage. Their standard move is to assert that certain social dangers, like sexual abuse and incest, which are present in polygamous relationships, are not likely to appear in same-sex relationships. Jonathan Rauch insists that there is no slippery slope from same-sex marriage to incestuous or plural marriage. As he writes, “People who insist on marrying their mother or several lovers want an additional (and weird) marital option. Homosexuals currently have no marital option at all. A demand for polygamous or incestuous marriage is thus frivolous in a way that the demand for gay marriage is not.”

According to Evan Gerstmann, polygamy differs from same-sex marriage because the would-be polygamist can still marry the person of his first choice. As he puts it, “There certainly seems to be a difference between a right to marry who you want and marrying however many people you want.” Thus, the situation that a gay or lesbian person confronts is worse than that of any straight person.

Along similar lines, Andrew Sullivan claims that “Almost everyone seems to accept, even if they find homosexuality morally troublesome, that it occupies a deeper

106 GERSTMANN, supra note 32, at 104.
107 Id.
108 Not all gays and lesbians believe that the right to same-sex marriage would improve their lives or serve the cause of gay liberation. In fact, some gay and lesbian opponents of same-sex marriage insist that the recognition of such a right would have the opposite effect. See, e.g., Paula L. Ettelbrick, Since When is Marriage a Path to Liberation?, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 257-261 (Robert M. Baird & Stuart E. Rosenbaum eds., 2d. 2004).
level of human consciousness than a polygamous impulse.” A person, male or female, who seeks to marry more than one person, can at least marry one person that he or she loves, and that is an improvement over being denied the right to marry the person that you love.

Is there, then, a principled distinction between same-sex and plural marriage? On the one hand, these two forms differ in the following respect: the right to marry someone at all seems to differ from the right to marry multiple persons. Rauch is right when he claims that “The gay situation is unique.” However, he is wrong when he refers to a demand to marry more than one person as frivolous. A couple that wants to have more than one child is not necessarily making a frivolous demand; its frivolity would depend on its underlying reasons. What is allegedly frivolous to one person is not necessarily frivolous to another when it comes to living a good human life and to refer to what someone wants to do as “weird” is surely more than a mere observation. Nor is Sullivan’s use of the word “impulse” an accurate way to describe what is really at stake, as if wanting to marry more than one person were akin to wanting to buy a sports car or sleep with a stranger. In addition, a person who seeks to marry someone who is already married is being denied his or her first choice. One can concede that the situation of gays and lesbians is worse --and perhaps even much worse-- than that of people who want to have a plural marriage and also conclude that there is a right to such marriage. One can believe that there are much better reasons in favor of defining civil marriage to include same-sex couples and still believe that there are sufficient reasons to support plural marriage. This distinction is important. As one commentator puts it, “The relevant issue

110 RAUCH, supra note 104, at 127.
is whether there are sufficiently weighty paternalistic reasons to ban polygamy (or certain forms of polygamy), without there being sufficiently weighty paternalistic reasons to ban same-sex marriage.”

II. The Case Against Plural Marriage

A. The Argument from Gender Inequality

There is no question that many American associate plural marriages with the subordination of women, and this association is not baseless. For Joseph Smith, polygamy strengthened the patriarchal nature of Mormon marriage and enhanced the status of the exclusively male priesthood by creating an extended family. \(^{112}\) Even today, because it usually takes the form of polygyny, polygamy incorporates the gendered division of labor that many feminists identify as the primary cause of the subordination of women. Although she never details how a plural marriage is more inegalitarian than a traditional one, her critique of it would single out the power that the male has in such relationships. In any marriage, social goods like paid and unpaid work, power, prestige, and self-esteem, opportunities for self-development, and physical and economic security are essential to the well-being of the persons involved in that relationship. \(^{113}\) In a typical plural marriage, the concern would be that the distribution of such goods is skewed in favor of the husband inasmuch as social norms reinforce the notion that women are the primary caretakers of children and responsible for the unpaid domestic work in the household. \(^{114}\) These expectations are likely to affect the career choices that women make when they realize it will be difficult to be both a wife/mother and have a career that

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112 NORGEN & NANDA, supra note 47, at 98.
114 Id. at 138-139.
requires a substantial amount of time away from home.\textsuperscript{115} Because of this situation, women are rendered vulnerable not only in the marriage itself but also in the event of its dissolution, especially when they have children.\textsuperscript{116}

This reconstruction is an oversimplification, and I have not done justice to the complexity of her argument, but my intention is to connect what makes a traditional family unjust, according to Okin, and the apparently even more troubling gendered division of labor that is likely to characterize a plural marriage. Empirically, not everyone agrees that a traditional division of labor will work against the interests of women. As Cheshire Calhoun reminds us, gender inequality is a contingent, not a conceptual, feature of polygamy.\textsuperscript{117} She uses the following example. Elizabeth Joseph, a lawyer in Utah who lives with her husband and his eight other wives, has formulated an allegedly feminist argument for plural marriage.\textsuperscript{118} Joseph claims that polygamous arrangements promote a more efficient division of labor through the sharing of childcare and other domestic work.\textsuperscript{119} Thus, some of the women in such a relationship are more likely to be able to pursue a career.

Of course, Joseph’s situation is probably exceptional, and there is no guarantee that most plural marriages will be as egalitarian as hers is supposed to be, at least for her in terms of her enhancing her professional options. In the end, it is conceivable that polygamy could be reformed along egalitarian lines.\textsuperscript{120} On the other hand, I doubt that anyone who is sympathetic to the cause of plural marriage wants to rest his or her case on

\textsuperscript{115} Id. at 142-144.
\textsuperscript{116} Id. at 139.
\textsuperscript{117} See Calhoun, supra note 17, at 1038.
\textsuperscript{118} Emens, supra note 9, at 314-315.
\textsuperscript{119} SONG, supra note 64, at 159.
\textsuperscript{120} Rosenblum, supra note 61, at 80.
that possibility alone. Okin has more to say about polygamy in her more recent *Is Multiculturalism Bad for Women?*, where she criticizes the French government for ignoring “women’s views on polygamy for so long” and tolerating the practice.\(^\text{121}\) She also lumps polygamy in with other antifeminist practices that are often defended on multicultural grounds, such as female circumcision, the marriage of children, and other kinds of forced marriages.\(^\text{122}\) What is missing from her account is a full-fledged defense of the claim that polygamy is likely to be premised on gender inequality. Okin assumes this claim to be virtually self-evident and it is not difficult to imagine why this is so. In the past, many feminists have insisted that as long as polygamy was practiced, there could be no equality for women.\(^\text{123}\) No doubt, the purpose and effect of plural marriage, in some places and at some times, is to control women, as Okin claims. One might believe that it is more likely to be true that such marriages contribute to gender inequality in number of different ways, especially by normalizing a traditional gendered division of labor and limiting the career options that women have.\(^\text{124}\) Okin is correct in seeing the family as “an important locus for the development of a sense of justice.”\(^\text{125}\) In her words, “if the relationship between a child’s parents does not conform to basic standards of justice, how can we expect that child to grow up with a sense of justice?”\(^\text{126}\)

More or less, Mill made the same observation in his *The Subjection of Women*.\(^\text{127}\) For most political theorists, he is the only male member of the canon who has anything

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\(^\text{121}\) Okin, *supra* note 11, at 10.
\(^\text{122}\) *Id.* at 14.
\(^\text{123}\) Chambers, *supra* note 53 at 65.
\(^\text{124}\) KILBRIDE, *supra* note 31, at 77-78.
\(^\text{125}\) OKIN, *supra* note 113, at 135.
\(^\text{126}\) *Id.*
like a modern-day feminist sensibility. Nevertheless, according to Okin, even Mill does not seriously question the traditional division of labor within the family. As she often points out in her writings, in the history of political thought, theorists are fond of using an idealized concept of the family in rationalizing why it falls outside the scope of justice. Alternatively, there is also a danger, which is just as serious, of arguing from the worst possible case scenario. As Bonnie Honig writes, it is not obvious that for a feminist, polygamy is worse than monogamy. In a patriarchal society, gender inequality is just as likely to exist in monogamous relationships. Furthermore, in a society like our own, many more people will be involved in monogamous relationships than in plural ones. That said, it is also probably true that plural marriages, at least initially, will exacerbate gender inequality, and it may be difficult for such marriage to be compatible with the kind of equality that is supposed to exist in a democracy. The same could be said, though, for any familial relationship that is premised upon or incorporates a gendered division of labor or other sexist behaviors. In other words, such an argument proves too much. After all, the law is largely silent on “what should go on inside the marriage.”

128 The earliest and most famous argument in favor of the abolition of the family, if it can be taken at face value, is found Plato’s *Republic*, in the section following the discussion of the equality of women. Plato argues that for the guardian class to be sufficiently unified, the common sources of human conflict must be reamed. Thus, guardians may not have traditional families. Rather, like other kinds of property, women and children must be held in common, there are communal living arrangements, parents and children will not know each other’s identities, and the philosopher-kings control sexual relations for eugenic purposes. *PLATO, THE REPUBLIC OF PLATO* 155-168 (Francis MacDonald Cornford trans., 1945).

129 SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT 226 (1979).


131 See Rosenblum *supra* note 61, at 80.

much more inegalitarian than a monogamous one that it can be treated as an exception to the principle that the unequal practices or statuses that exist in a personal relationship usually do not render it susceptible to a legislative remedy.

If one wants to take a slightly different tack and contend that plural marriages set a bad example for children, the obvious response is that unfortunately, parents set bad examples for their own children (and for the children of others) all of the time, through behaviors like alcohol and drug abuse, violence, racism, intolerance, infidelity, and crass consumerism. That said, those who oppose plural marriage have a point: we should not be eager to permit practices that encourage the subordination of women, put the apparent imprimatur of the state upon them, and place those practices entirely beyond the reach of the law. As Brian Barry exclaims, “The whole idea of egalitarian polygamy is manifest nonsense.”134 For him, the inequality problem with plural marriage would not be solved by permitting women to marry multiple men, even if they exercised this option, no more than the inequality inherent in racial slavery in the antebellum period would have been solved by allowing African-Americans to own whites.135 Any intellectually honest defense of plural marriage must come to terms with the likelihood that its practice would still be unacceptably inegalitarian.

I would concede this point to Barry but maintain that opponents of plural marriage still have not demonstrated why the inequality in such marriages is worse than that of traditional marriages and other manifestations of gender inequality elsewhere. Very few people believe that a man and a woman, who wish to have a marriage incorporating a traditional division of labor, should be unable marry on that ground alone.

135 Id.
No American court has ever conditioned the right to marriage on its equality. Thus, those who insist that there is no constitutional right to plural marriage have the burden of proof of showing that the kind of gender inequality that is likely to exist in a plural marriage is not only unique but worse than other kinds that our society already tolerates.

B. The Argument from Coercion

In this section, I would like to articulate and evaluate the “argument from coercion,” which usually takes two forms. First, many people fear that most plural marriages will be traditional polygynous marriages, involving girls or young women, with little choice, in the setting of traditional, patriarchal religious views about the so-called proper relations between men and women. An underage girl who is pressured by her parents or her community to marry a man who is twice her age and then fathers his children over and over again is not the kind of difference that most multiculturalists have in mind when they seek to extend the boundaries of tolerance and resist Western cultural imperialism.

It is hard not to be sympathetic to this “protecting children” rationale. As Okin observes, polygamy involves controlling the sexuality of young girls and enhancing the power of older males by creating a significant age gap between husbands and wives.136 Sadly, children are vulnerable to being harmed and exploited in so many different ways. The flaw in this argument is that many of these problems are not about plural marriage per se but about permitting girls or young women to be married against their will. That problem may be hard to police, but it is not evident that the legalization of polygamy would make it any more difficult for the state to investigate and prosecute people for such crimes. The occurrence of these abuses in some polygamous communities is inevitable,

136 See Okin, supra note 11, at 15.
but those abuses occur in other places as well, and those who commit such abuses should be criminally liable for their behavior.

It is not clear how the decriminalization and concurrent recognition of plural marriage is at odds with the objective of protecting children from sexual predators. Indeed, common sense suggests that it would be easier to protect children from such exploitation if plural marriages were not forced underground. Some commentators insist that decriminalization will better protect the women and children in polygamous families, prevent coerced and underage marriages, and reduce welfare fraud.\textsuperscript{137} Law enforcement officials in communities where polygamy exists are in an unenviable position. On the one hand, most Americans would prefer not to see another Short Creek raid, where the Arizona National Guard took 263 children from polygamous families and made them wards of the state.\textsuperscript{138} Americans do not want to see the state take away children from their parents, even those of polygamous families, without compelling reasons like the prevention of child abuse. On the other hand, the “don’t ask, don’t tell” policy that currently seems to be in effect invites sexual predators in polygamous communities to commit the most horrific of crimes and escape detection.

There are two more or less obvious responses to the concern that plural marriage facilitates child abuse. First, it is not acceptable to proscribe an otherwise legitimate practice merely because it “tends to encourage” other kinds of crimes.\textsuperscript{139} As Emens points out, the penal code can address the worst problems associated with polygyny, such

\begin{itemize}
\item \textsuperscript{137} See, e.g., Emily J. Duncan, \textit{The Positive Effects of Legalizing Polygamy: ‘Love is a many Splendored Thing,’} 15 DUKE J. GENDER L. & POL’Y 315-337 (2008).
\item \textsuperscript{138} “Short Creek,” on the Utah-Arizona border, is now known as “Colorado City.” Krakauer, \textit{supra} note 45, at 15-17.
\item \textsuperscript{139} Slark, \textit{supra} note 71, at 458.
\end{itemize}
as underage girls being coerced into marriages and physically abused.\textsuperscript{140} Those who commit such crimes should be prosecuted, like anyone else who commits the same crime.\textsuperscript{141} The argument about secondary effects reminds me of just about every American television program that I have seen about the drug trade and prostitution. The dangers of these lines of work are depicted in graphic detail but are never put in context. One does not have to be a libertarian to see that many of the bad secondary effects of such activities stem from their illegality.\textsuperscript{142} A more enlightened national policy with respect to sexual services and controlled substances surely would reduce the exploitation and violence associated with them. Similarly, the decriminalization of plural marriage is likely to serve the ends of reducing incest, child abuse, and statutory rape. The disposition to criminalize polygamous relationships to prevent other crimes, while understandable, “evades the real issue of how best to protect the women who either choose or accept a polygamous lifestyle.”\textsuperscript{143}

The second version of the “argument from coercion” involves adult women who are allegedly coerced to enter into and stay in plural marriages. In one sense, open marriages and plural relationships already exist, when people have more than one sexual partner, and the existence of marital infidelity in our society indicates that some Americans may be more in tune with the ideal of plural marriage than they may realize or admit. In the zeal to call attention to what is wrong with plural marriage, there is a temptation to romanticize monogamous marriage by minimizing its flaws and then

\begin{thebibliography}{99}
\bibitem{140}Elizabeth F. Emens, \textit{Just Monogamy?} in \textsc{Mary Lyndon Shanley, Just Marriage} 75, 76 (2004).
\bibitem{143}Michele Alexandre, \textit{Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?} 18 \textsc{Hastings Women’s L.J.} 3, 5 (2007).
\end{thebibliography}
presenting it in its ideal form as a contrast to the worst kinds of plural marriages. This is not fair, and the relevant basis of comparison is either the ideal form of both kinds of marriages or their real forms. The trouble with the latter is that the dynamics of plural marriages are bound to be distorted by their illegality and the secrecy that surrounds them. As a statistical generalization, it is probably true that polygynous marriages are unequal and oppress women to a greater or lesser extent. As such, Emens is probably wrong when she asserts that whether “polygyny is oppressive to women is contingent.”

Although she may be overly optimistic about its egalitarian prospects, she has an important insight, namely that what plural marriage is like today is not necessarily the form that it has to take, especially when polygamy is not synonymous with polygyny but could, in the future, also include polyandry, where one woman marries multiple men.

The reality is that if the state fails to recognize plural marriages, marriage-like relationships involving more than two persons will continue to exist but without the legal rights and duties associated with marriage. A woman who wants to leave a plural marriage but is not a wife in the eyes of the law is not entitled to any spousal support even when she has performed unpaid domestic labor for years. That prospect should bother those who do not believe that any woman should be pressured to remain in a bad marriage out of economic necessity. The relevant legal question, then, is how to protect those who are involved in such relationships from being exploited, abused, or forced to remain in them because there is no viable option to exit.

Surely, it should not be illegal for a man to live with multiple women, for a woman to live with multiple men, or for more than one woman to live with more than one

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144 Emens, supra note 9, at 77.
145 HART, supra note 82, at 39-40.
man. But that does not necessarily mean that the state has to recognize every relationship between or among people as a civil marriage and create the same legal rights and duties for those involved in such relationships. Normally, for a right as important as the right to marry, even for someone who wants to marry someone who is already married, we would expect the state to produce reasons that reasonable persons would accept if the state refuses to extend that right to all persons. To deny the right of marriage to those who are too young to consent or to make such an important decision is easy to defend. A reasonable person would understand why an age restriction would be rationally justified, but as I have tried to show, the kinds of justifications for the banning of plural marriage fall far short of what we expect in other contexts. The argument “from coercion” does not work with respect to adult women either, unless one defines “coercion” very broadly. Historically, there is little evidence that Mormon women were coerced into polygamous marriages. Instead, it is more accurate to describe what occurs as people of both genders in a particular religious tradition being socialized in a way that makes plural marriage more appealing than it otherwise might be.

Perhaps I am being far too charitable here. What I am referring to as socialization is closer to brainwashing, and a child who has been brought up in such an environment is not likely to make autonomous choices with respect to marriage, career, and the decision whether to have children. The danger of presupposing an idealized form of plural marriage that is not intrinsically inequalitarian is that such a presupposition glosses over the possibility that such marriages often would not involve fully autonomous

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146 It would probably be unconstitutional for the state to ban a man from living with multiple women or a woman living with multiple men. See Moore v. East Cleveland, 431 U.S. 494 (1977) (whose holding is limited to extended family members).
147 Rosenblum, supra note 61, at 78.
decisions by the participants. As one commentator claims, “the use of religious indoctrination undermines the free will that the consenting part of consenting adults presupposes.” What could consent mean under circumstances where there are few or no other real options? At the same time, for consent to be legitimate only when asymmetries of power are absent is to set the bar too high. In individual cases, the lack of real options may undermine consent, and how a person is raised, for better or for worse, is bound to affect how she understands her identity and what is most important to her. She may be taught to critically reflect upon every aspect of her life or she may be led to believe that reason undermines religious faith. The life experiences of most people fall somewhere in between these two extremes. The concern in the context of Mormon polygyny is that children will be taught traditional gender roles, never critically evaluate them, and then live according to them. The most important personal decisions that they ever make will be based on beliefs that they might reject if they were more autonomous or at least had been brought up, so to speak, to make their own decisions.

Morally, this a legitimate concern, but politically and legally, the issue is more complicated. Almost by definition, to be a liberal is to be hesitant to use the coercive power of the state to endorse a particular way of life as being the best kind of human life. It may be a tragedy that people who grow up in such environments are much less autonomous than those who are raised by parents who encourage them to engage in Millian experiments in living, but it is not evident that the state can (or should) do anything about this problem by legislating against it. After all, the same could be said of how most people are socialized in most religious or even secular traditions. Just as it is a

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mistake to proceed from an idealized version of plural marriage, it is a mistake to work from an idealized version of consent. Almost all women who were not socialized in this manner would not see plural marriage as a religious duty, but that does not mean that the woman in question has not consented to the arrangement in the legal sense of the word. This distinction between consent in a perfect world without asymmetries of power and the kind of consent that is good enough in the real world is essential when opponents of plural marriage claim that coercion is an inherent part of the practice. For purposes of determining how the power of the state may be employed, the standard of consent cannot be what her “real self” would have chosen if she had been raised in a more egalitarian environment without preconceptions about the so-called proper place of women.

As I see it, this lack of critical reflection is to be regretted, and this world would be better if this did not happen as often as it does. Short of draconian measures, though, I do not see how the law can address such concerns. We are understandably disturbed by how some or even many parents bring up their children. The line is drawn at serious physical or emotional abuse, and the state may not remove children from such homes in the absence of such abuse. The consequence is that parents may inculcate in their children whatever values they believe to be most important. They may bring up their children to believe that white people are superior to black people (or vice versa), that AIDS is a plague from God, that the earth is at the center of the solar system, that

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149 Arguably, the decision to marry a man who is already married to at least one other person may be more autonomous than many opponents of polygamy believe, at least in some circumstances, depending on how one defines “autonomy.” The decision to enter into a plural marriage could conceivably be based on a number of different reasons, including economic security or companionship, and there is no question that some people enter monogamous marriages for exactly the same reasons. At any rate, it would be helpful to have more data that would illuminate why a woman would become a second or third wife, why a first wife would accept another woman into the household, and what strategies of resistance women employ in such situations.

homosexuality causes earthquakes, that African slavery in the antebellum period did not exist, that the CIA killed Kennedy because he was going to remove American troops from Vietnam, and that abstinence-only sex education is more effective than any of the alternatives. That is the price of living in a society that not only takes the free exercise of religion seriously but also respects the almost absolute rights of parents to control the upbringing of their children.

III. Liberal Neutrality

A. Lawrence Revisited

As I mentioned earlier, it is important to distinguish between criminalizing the practice of plural marriage and the state’s refusal to include such relationships in its definition of civil marriage. The former would seem to require a much stronger justification than the latter. However, in Lawrence, Justice Scalia did not draw this distinction, and he implies that the right to autonomy articulated by Justice Kennedy in his majority opinion might force the state to recognize bigamy. The failure to distinguish these two issues weakens Scalia’s slippery slope argument that the decriminalization of laws that banned consensual same-sex sex between adults invariably leads to a constitutional right to plural marriage. A closer examination of Lawrence reveals that the Court did not equate a privacy right to engage in same-sex sexual intercourse with same-sex or plural marriage. Indeed, Justice Kennedy wrote that this case “does not involve whether government must give formal recognition to any relationship that homosexual persons seek to enter.”

\[151\] As he also explained, the constitutional concern in this case was that in the eyes of the law, those who engaged in such sex acts were criminals.\[152\] In

\[152\] Id. at 567.
her concurrence, Justice O’Connor also stated that there still could be a rational basis for prohibiting same-sex marriage. The obvious way to distinguish the privacy right recognized in *Lawrence* from a right to plural marriage is that there may be plausible or even compelling reasons to justify a ban on plural marriages that simply do not support the criminalization of same-sex sex acts.

At the same time, we now live in a post-*Lawrence* world, and Justice Scalia at least has a point about human psychology: it seems that over time, people will become more accustomed to attempts to define marriage more broadly when the Court refuses to permit the state to restrict freedom on the basis of traditional morality. Mere moral disapproval of same-sex consensual sex is no longer enough to make that act a crime in the eyes of most people. Instead, the rationale for such a law will have to include a much more compelling reason than the purported sinfulness of the behavior or group of people in question or the moral distress that that behavior may cause others. The privacy rationale of *Lawrence* is less controversial than it used to be, and the notion that the state should not interfere in people’s most important personal choices is no longer limited to the question of whether the state may criminalize certain sorts of activities. A liberal state is also supposed to be neutral in its policies towards the reasonable conceptions of the good of its members. When the purpose of the state’s recognizing civil marriage is “to express the view that married life is an especially virtuous or valuable way of life,”

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153 *Id.* at 585 (O’Connor, J., concurring).
then the state may have violated the principle of liberal neutrality by basing "civil marriage on a controversial conception of the good."\textsuperscript{156}

It is not evident, then, how it can be legitimate to employ the coercive power of the state to advance marriage on the ground that it is better to be married than unmarried, especially when plenty of reasonable people reject this idea. A woman might not want to marry because she sees marriage as a patriarchal institution or because she wants to have the option of extricating herself from such any romantic relationship if it begins to deteriorate. A man might not want to marry to avoid commitment or to protect his assets in a community property state. The point is not that any of the reasons are necessarily good reasons but that different people have different reasons to marry or not to marry and they are in a better position to evaluate these reasons than anyone else is.

Not all liberals take this position. Stephen Macedo insists that the "argument for marriage claims that more stable commitments promote public as well as private welfare."\textsuperscript{157} It follows that the state may favor marriage over nonmarriage by offering "public inducements," provided that marriage is available to all.\textsuperscript{158} Here, Macedo has in mind same-sex couples and on its face, this proposal seems to be mild. From the standpoint of liberal neutrality, the problem is that in offering both legal benefits and burdens, the state has made a judgment that being married is better than the alternatives and thus has put its imprimatur on a conception of the good. It may be true that marriage promotes more stable relationships, and that more stable relationships are better for the development of children and "encourage responsible conduct, planning for the future, and

\textsuperscript{156} See Wedgwood, \textit{supra} note 10, at 227.
\textsuperscript{158} \textit{Id.} at 99.
concern for others.”

But that claim also might be false, and even if it is accurate, there are probably some people who are not prepared for the responsibilities of marriage. In such situations, the promotion of marriage by the state may end up pushing people into situations that do not benefit anyone. In these kinds of pro-marriage arguments, there is usually an assumption that both of the people in the marriage are functional and mature. The truth is that some people will never be good husbands or good wives (or good fathers or good mothers), and the state’s creating incentives, such as tax breaks, for couples to marry may have the consequence of making their lives worse than they otherwise would have been. Anyone who has been in a bad marriage knows that it can be a serious mistake to marry. It is not obvious to me that the state’s interest in promoting marriage, on empirical grounds, is nearly as strong as Macedo makes it out to be.

B. The Value of Choice

Just as importantly, there is a serious and perhaps unacceptable cost in formulating public policy in the nonliberal manner that Macedo advocates. In a liberal society, there is a presumption in favor of letting people decide for themselves what kind of romantic or familial relationships they want to have, even if those relationships are unconventional or hard to fathom. And no person should “have to marry to reap specific and unique legal benefits.” Unless it is obvious that marriage serves compelling state interests, the state should not treat couples that cohabitate and choose not to marry differently than those who decide to marry. As one commentator puts it, freedom is

159 Id. at 94.
the default position in a liberal democracy.\textsuperscript{162} In the communitarian critique of liberalism, it was not uncommon for communitarians to characterize liberalism in terms of contracts among atomistic individuals that weaken the deeper bonds that are essential to human flourishing.\textsuperscript{163} By now, I hope that it is clear that this particular criticism of liberalism is without merit. For most liberals, the whole point of distinguishing between the public and private spheres is to leave room for the kinds of relationships that communitarians allege liberals do not appreciate.

Nevertheless, the allegation that liberalism is hostile to community continues to survive in the academic discussions involving the nature of marriage. Initially, Mary Shanley put forth an “anti-contractualism” view premised on the idea that “[t]he individualism and emphasis on rational bargaining that are at the heart of contracts rest on misleading models of the person and of the marriage relationship.”\textsuperscript{164} As she noted, part of the appeal of a contractualist understanding of marriage is that it serves as an ally in the battle for the legal recognition of same-sex marriage.\textsuperscript{165} In a liberal society, out of respect for privacy and personal choice, people should be permitted to marry the person that they want to marry and have the state enforce the terms of that contract or those of a prenuptial agreement that supplements or alters the marriage contract. Shanley’s concern is that replacing a “regime of marriage law with a regime of private contracts” leads to an impoverished understanding of marriage, where the institution is reduced to its distinct components.\textsuperscript{166} According to her, contracts do not account well for other obligations that

\begin{itemize}
\item \textsuperscript{162} ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 27 (2000).
\item \textsuperscript{163} See MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).
\item \textsuperscript{164} Shanley, supra note 13, at 15.
\item \textsuperscript{165} \textit{Id.} at 14.
\item \textsuperscript{166} \textit{Id.} at 14-15.
\end{itemize}
may arise “from unforeseen circumstances” during the course of the marriage, like caring for one’s spouse when he or she is sick or disabled.\textsuperscript{167}

In one sense, this claim about an overly formalistic understanding of the nature of marriage is hard to dispute. A couple that thought of their rights and duties exclusively in legalistic terms would lack the mutual affection that makes a happy marriage possible.\textsuperscript{168} Jonathan Rauch is right when he writes that the married couple makes a care-giving commitment and the public expects the couple to honor that commitment by imposing it on third parties.\textsuperscript{169} The law lets everyone know that these two persons are married and must be treated accordingly.\textsuperscript{170} There is no doubt that I would be a lousy husband and awful human being if I were off having an affair while my wife was dying of breast cancer. It is not clear, though, that the state should be able to sanction me for such morally repulsive behavior. Shanley believes that “contractualism” means that the state does not have an interest in shaping the institution of the marriage.\textsuperscript{171}

Again, this description is somewhat misleading. Among contracts, the marriage contract is unique. A more contractualist understanding of marriage is rooted in the idea that the couple should have the right to define the terms of their relationship by tailoring them to their specific needs even if the state would prefer them to accept the rights and duties of the traditional marriage contract. As it stands, couples are not free to structure their marital relationship however they please, despite the fact that there are well-known

\textsuperscript{167} Id. at 16.
\textsuperscript{169} RAUCH, supra note 104, at 35.
\textsuperscript{170} Id. at 40.
\textsuperscript{171} Shanley, supra note 13, at 16.
objections to the traditional marriage contract.\textsuperscript{172} The purpose of having prenuptial agreements, for example, is to allow couples to contract around the rights and duties that the state believes that a married couple should have with respect to one another. That option may be unromantic, and it may seem to undercut the mutual trust that a happy marriage presupposes, but a prenuptial agreement also makes more explicit their mutual expectations.\textsuperscript{173} In the absence of its possibility, fewer persons would marry, and there remains a serious concern about whether most people who marry fully understand the legal implications of their decision.

C. The Disestablishment of Civil Marriage

It is not hard to see why the disestablishment of civil marriage follows from a commitment to liberal neutrality.\textsuperscript{174} The most appropriate way for the state to respect the freedom and equality of all of its members is to cease giving traditional monogamous marriage a privileged status and to permit the parties involved to specify its terms in a private contract. That is not to say that there are not some other good reasons to prevent people from contracting around legal norms that involve the custody of children and visitation rights. A regime of private contract with respect to civil marriage does not mean that the state must enforce every provision of a contract, especially those that are unconscionable or negatively affect third parties. Shanley moved a bit closer to the disestablishment position when she later concluded that the state should have universal

\textsuperscript{172} These objections include an invasion of marital privacy, discrimination on the basis of gender, and a denial of diversity.

\textsuperscript{173} Even without a prenuptial agreement, whether they realize it or not, they have entered into an unwritten contract. LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: A GUIDE TO LIVING WITH LOVERS AND SPOUSES xvi-xvii (1981).

\textsuperscript{174} For examples of the view that the state should abolish civil marriage and replace it with contracts between the two parties, see MARTHA A. FINEMAN, THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). See also Tamara Metz, Why We Should Disestablish Marriage, in MARY LYNDON SHANLEY, JUST MARRIAGE 99-105 (2004).
civil unions for same-sex and opposite-sex couples and reserve the term marriage for religious ceremonies.\textsuperscript{175} In the language of liberal neutrality, if the state seeks to be neutral towards all reasonable conceptions of the good life, it should not recognize any sort of relationship as being superior to any other kind of relationship that adults choose to create. That position is not based on moral skepticism.\textsuperscript{176} Rather, the concern is that when the state gives special recognition to traditional opposite-sex and even to same-sex marriage, it is favoring the conception of the good of some over others.

The concern is that such favorable treatment is akin to establishing a conception of the good under conditions of moral pluralism, where disagreement over the human good is not only reasonable but inevitable. A neutral state simply cannot do so, even if social benefits result from assigning special status to only some of marriages, when it is committed to respecting the freedom and equality of all of its members.\textsuperscript{177} If social scientists suddenly learned that there are serious negative externalities associated with interracial couples, there would still be a constitutional right to interracial marriage. Nevertheless, the current political climate in the United States indicates that Americans or their elected representatives will not be abolishing civil marriage anytime soon. No state has ever tried to abolish monogamous civil marriage for opposite-sex couples and its doing so probably would be unconstitutional.\textsuperscript{178} Some form of civil marriage will remain a public status and that is why this paper is about whether a constitutional right to marriage extends to plural marriages, either those that involve one man and multiple

\textsuperscript{175} Shanley, \textit{Afterword, supra} note 13, at 112.
\textsuperscript{176} See RONALD DWOKIN, A MATTER OF PRINCIPLE 203 (1985).
\textsuperscript{177} This is a point that Shanley fails to address. \textit{See} Andrew Lister, \textit{How To Defend (Same-Sex) Marriage}, 0 POLITY 1, 15 (2005) (Review Essay).
\textsuperscript{178} See Loving v. Virginia, 388 U.S. 1, 12 (1967).
women or those that involve one woman and multiple men, which is not to say that this would be the only form a plural marriage could take.

IV. Return to Plural Marriage

A. The Limits of Tolerance

So far, I have not said much about the positive case for recognizing a constitutional right to plural marriage, and when I have done so, it has usually been in the context of exposing the weaknesses of the case against such marriage. A commitment to liberal neutrality implies equal treatment of all persons similarly situated unless the state can explain why that unequal treatment is warranted. This is the principle that underlies the idea of heightened standards of review in equal protection jurisprudence. In the end, the burden of proof is on the state to articulate why the harm that is allegedly present in plural marriages is worse than that of a traditional patriarchal marriage with a rigid gendered division of labor. One of the premises of the argument from gender equality is that toleration for different forms of gender equality equates to approval or at least indifference to the oppression of women. As such, the state reinforces gender inequality by failing to attack it. As I have tried to show, this argument is not as clear or as strong as its proponents have made it out to be. That is not to say that such an argument cannot be made but it is to say that it has not been made yet, especially in a society where there is a strong presumption in favor of letting people make their own choices about how they are to form, revise, and pursue their respective conceptions of the good. That presumption exists for a number of reasons, not least of which is that it is far too easy for society to look at the “other” with contempt and act on the basis of prejudice. As Martha Nussbaum writes, “But to rule that marriage as such should be illegal on the grounds that
it reinforced male dominance would be an excessive intrusion upon liberty, even if one should believe marriage irredeemably unequal.\footnote{Martha C. Nussbaum, Taking Money for Bodily Services, in SEX AND SOCIAL JUSTICE 276, 295 (2009).}

I find the question of plural marriage fascinating because it forces us to think carefully about how far we are willing to use the law as a device to combat gender inequality and other morally undesirable behaviors. The decision to marry (or not) is part of living a good life, and probably is one of the most important personal choices that any person will encounter. Some people make good choices and others make poor ones. In the end, the state can only do so much in protecting people from the consequences of the latter. I cannot help but think that at least part of the widespread hostility to plural marriage that exists today in the United States can be traced to a romantic notion of traditional opposite-sex marriage that has less basis in reality than many people care to admit. Almost twenty years ago, Okin warned against confusing ideal families with real families.\footnote{See OKIN, supra note 113, at 26-33.} People marry for a wide variety of reasons: due to their immigration status, for a lavish lifestyle or economic security, to conceal their sexuality, for companionship, and as a response to familial or social pressure. The list of possible reasons could continue almost indefinitely, and the list of wrong reasons for marrying is as long as it is disheartening. People tend to conflate what marriage is with what it is at its best or what it ought to be. Real marriages tend to fall far short of the ideal, and there is no way of knowing how unequal a traditional opposite-sex marriage really is.

The issue of plural marriage divides reasonable people because all of us can understand why a person, who is committed to gender equality, would not want the state to recognize relationships that contribute to gender inequality. As I have argued, that
plural marriages are likely to be inegalitarian in a number of important respects is simply not a sufficient reason for the state to treat such relationships differently than other relationships that are also similarly inegalitarian. In an opposite-sex marriage, a couple could live according to rigid, traditional gender roles where the division of labor in that marriage is premised on what men and women are supposed to be naturally suited for or according to the dictates of a religious text. They could even base their marriage on the dominance or submission of one of the persons as part of an alternative lifestyle. It is probably true that polygamy would exacerbate gender inequality if many people exercised that option, and it is also true that polygamy would be more acceptable if all parties to a plural marriage had consented and women had equal opportunities to form polyandrous marriages.

There are limits to what the state can do to prevent such subordination from occurring when an adult wants to be a part of a plural marriage or any other kind of inegalitarian personal relationship. That is where the line has to be drawn. In a liberal society, we have to take personal choice seriously, and that might entail that we respect the choices of those who wish to be involved in plural marriages, even if those marriages are inherently or likely to be inegalitarian. A commitment to genuine equality between or among spouses should be an essential feature of any marriage. Morally, couples should aspire to an egalitarian marriage but that does not mean that the state may give the “equal status view” the force of law. As Sarah Song has forcefully argued, the criminalization of plural marriage in the nineteenth century not only failed to help Mormon women, it diverted attention from equally morally troubling practices of the dominant culture that
also reinforced the subordination of women.\textsuperscript{181} The same could be true today, despite how dramatically the historical context seems to have changed. Any morally thoughtful person must be concerned with eliminating the antifeminist practices and attitudes that exist in his or her society. But in a constitutional democracy, the state is not authorized to discriminate against those who want to live a life that incorporates gender inequality. As Justice Blackmun wrote in his dissent in \textit{Bowers v. Hardwick}, “We protect those rights not because they contribute... to the general public welfare, but because they form so central a part of an individual’s life.”\textsuperscript{182}

Plural marriage was not what Mill had in mind when he spoke of experiments in living but what should count as such an experiment should not be confined to what was considered legitimate in the past. It is possible not only that some people will be happier in such marriages, but also that they will develop into better human beings insofar as they become more open, self-aware, emotionally mature, tolerant, and better at communicating and resolving conflicts.\textsuperscript{183} The jury is still out because we do not have sufficient data and never will until Americans are willing to countenance plural marriages and learn more about them.\textsuperscript{184} Ultimately, I suspect that some plural marriages will turn out to be more like traditional monogamous marriages than many people anticipate, with both the good and the bad. The success of a plural marriage is bound to be contingent on

\begin{itemize}
\item \textsuperscript{181} \textsc{Song, supra} note 64, at 143.
\item \textsuperscript{182} \textit{Bowers v. Hardwick}, 489 U.S. 772 (1986).
\item \textsuperscript{183} RYAM NEARING, LOVING MORE: THE POLYFIDELITY PRIMER 24-27 (1992).
\item \textsuperscript{184} Most people assume that plural marriage is synonymous with polygyny and thus, it is necessarily or likely to be heterosexual. This assumption is understandable, given American history, but need not be true. There are a number of possible relationships that could constitute a plural marriage. As Stanley Kurtz writes, “[I]ndeed, almost any combination of partner-number and sexual orientation is possible in a polyamorous sexual grouping.” A “triad” is where all of the partners are sexually connected. A “hinge” or “pivot” is where only one of the partners has a sexual relationship with the other two. Stanley Kurtz, “Here Come the Brides,” \textit{The Weekly Standard} Vol. 11, Issue 15, (2005), page 3 on website.
\end{itemize}
the circumstances. In that respect, it does not differ from its monogamous counterpart. The point is not to judge plural marriage on its merits but to acknowledge the value of choice and in doing so, appreciate the extent to which a good human life is in the eye of the beholder.

Conclusion

In the preceding pages, I have tried to take Scalia’s slippery slope seriously, to sketch the two main arguments that opponents of plural marriage have made and continue to make, and to show that neither of them is compelling. They must articulate why the state has a substantial or a compelling interest in preserving equality in personal relationships and why the lack of such equality in a plural marriage means that the state may deny the right to marry on that basis. They also must be able to demonstrate that such marriages are likely to be similarly inegalitarian. There seems to be an unarticulated premise in the argument from gender inequality that all plural or at least most plural marriages would have the same problems with gender inequality, but as I have speculated, a society that permitted such marriages and did not stigmatize polyamorists would probably learn sooner rather than later that individual plural marriages would be as variable as their monogamous counterparts. The apparent differences between them might turn out to be less significant than opponents of plural marriage have alleged, and that would be a devastating blow to their position. After all, their opposition is premised not only on the inherent difference between the two kinds of marriages but on the serious negative externalities associated with that difference. Their other option is to condemn traditional monogamous marriage for the same reasons, but I doubt that that is a road that they want to go down.
The debate about plural marriage is unavoidable when Americans must decide whether to extend marriage beyond its traditional definition in the name of fairness. The challenge, then, is to frame this question in a manner that captures its complexity and acknowledges the tension between gender equality and choice. Some of the old fears about plural marriage live on, and this question is not as easy as that of same-sex marriage because in the eyes of many people, a society that is committed to ensuring that women have all of the opportunities that men have does not have a place for an institution that seems to be premised upon exactly the kind of gender inequality that ought to be eradicated.

All of us have to be careful not to accuse those with whom we disagree of bad faith or of being prejudiced. Otherwise, a rational exchange of ideas is not possible. Without question, people can be biased or obtuse and thus have the wrong sorts of reasons either for being in favor of or against a practice or for not being as open to an unconventional practice as they would be without the wrong preconceptions. Just as the sky is not going to fall when same-sex couples are permitted to marry, the same is probably true if Americans were to permit those who want to marry multiple persons to do so. If plural marriage were permitted, some women would probably benefit and others probably would not. It is true, of course, that technically, all people have the right to marry at least one person, and one could claim that a person who seeks to marry more than one person has not been denied the right to marry but has only been denied the right to marry additional persons when he or she is already married. This kind of argument reminds me of those who claim that gays and lesbians have not been denied the right to marry because a gay man may marry a woman and a lesbian may marry a man. Such an
argument is not only disingenuous; it also misses the point. When someone is asking for
the right to marriage, she is asking for the state to treat the relationship that she chooses
to form equally in the sense that it is no better or no worse than any other relationship,
legally speaking.

In the end, it does not look like the state’s interest in ensuring gender equality or
preventing secondary effects is strong enough to justify treating plural marriage
differently than other forms of civil marriage. Even if the legal recognition of plural
marriage would exacerbate gender inequality, which is what makes the case of such
marriage more difficult than it otherwise would be, the state has not demonstrated that the
kind of inequality that is likely to exist in plural marriages is unique or worse than that of
traditional patriarchal monogamous marriages. In other contexts, the burden is on the
state to show that its treatment of its members is not arbitrary when it makes legislative
classifications. As it stands, the state has not come close to producing the kinds of
reasons that it should be required to produce when it denies the right to marriage to those
who would exercise that right if it were available to them. What I have tried to show is
that there are not obviously compelling reasons to deny legally recognition to the
relationship of three or more people, regardless of their gender and the nature of that
relationship.

The evils of plural marriage may turn out to be real, but at this moment, most of
the reasons that critics of plural marriage have put forth in defense of this position are
much weaker than most people realize. It would be unimaginable to use the same
reasoning with respect to traditional monogamous marriages and conclude that the state
may not permit them. The double standard here has yet to be satisfactorily defended.
Absent compelling reasons to the contrary, the meaning of marriage, as much as possible, should be left to individuals who often have very different ideas about what a marriage should be. After all, if we learned that traditional monogamous marriages were inherently unequal or frequently involved less than fully autonomous choices, to ban them on that basis alone clearly would be an unacceptable infringement upon the liberty of the two persons who want to marry each other. Maybe the same can be said for plural marriage as well and in the preceding pages, I hope to have shown why that is so. There may be better arguments against plural marriage that its opponents could produce but it is incumbent upon them to formulate arguments that are not based upon prejudice, stereotypes, fear of difference, secondary effects, and unsupported empirical claims. This is especially important when even the most open-minded of us are socialized in a society that too often condemns practices as odious in the absence of adequate information or understanding.

185 In opposing plural marriage, William Eskridge has claimed that such marriage threatens the social safety net and creates confusion over custody decisions, who would make medical decisions for the husband if he were unable to do so himself, and so on. See Eskridge, supra note 102, at 148-149. The legal recognition of plural marriage would pose some administrative challenges, but I doubt that they would be insurmountable. Normally, administrative difficulty alone will not justify the denial of a constitutional right or unequal treatment.