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# Love and (Polygamous) Marriage?

## *A Liberal Case Against Polygamy*

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### Abstract

Opponents of same-sex marriage suggest that legalizing same-sex marriage will start a slide down a “slippery-slope” leading to the legalization of all kinds of salacious family arrangements including polygamy. In this paper, I argue that because previous attempts by liberal political theorists to combat such slippery-slope arguments have been unsuccessful, there are two options left open to political liberals. Either one could embrace polygamy as a logically consistent implication of extending civil liberties to same-sex couples or one could find a new strategy for blocking the slide down the slope. I take the second option arguing that we ought to devise a harm principle for domestic partnerships. Once this principle has been established, it becomes clear that the risk of exploitation for those potentially occupying the multiple side of the marriage is sufficient reason to reject polygamous marriage arrangements. I conclude that, contrary to appearances, holding both (a) same-sex marriage is permissible and (b) polygamous marriage is impermissible is at the same time consistent and consistently liberal.

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## Keywords

exploitation – harm principle – political liberalism – polygamy – same-sex marriage

### 1 Introduction

Opponents of same-sex marriage employ a “slippery-slope” argument charging that legalizing same-sex marriage will lead to more permissive family arrangements like polygamy. In this paper, I argue that previous attempts to combat the “slippery-slope” argument within the framework of liberal political theory have been unsuccessful. If I am right that these responses fail, one option is simply to embrace polygamy as a logically consistent implication of extending civil liberties to same-sex couples. However, I defend a new strategy for blocking the slippery-slope argument that can account for the permissibility of same-sex marriages, while casting serious doubt on the permissibility of polygamous marriages. More importantly, my strategy remains solidly within a liberal political framework striking the proper balance between respecting autonomy and protecting individual citizens from harm.

Liberal theorists historically have been divided about whether family arrangements belong within the purview of a theory of political justice. Interpreters of Rawls’ early work widely read him as relegating family life to the private sphere since he explicitly excludes the family from the basic structure of society,<sup>1</sup> while Susan Moller Okin<sup>2</sup> famously challenges the idea that domestic relationships have no bearing on questions of political justice. Heeding Okin’s warning, many contemporary liberal theorists recognize the family not, as a natural, pre-political, hierarchical private association,<sup>3</sup> but rather as a

1 *A Theory of Justice* (Belknap Press of Harvard University Press, 1971).

2 *Justice, Gender, and the Family* (New York: Basic Books, 1989).

3 Rawls does disavow this charge in *Justice as Fairness: A Restatement* (Belknap Press of Harvard University Press, 2001) saying that the idea that his two principles of justice do not apply to the family is a misconception. In fact, in his later writings he goes so far as to agree with Okin that there is an implicit critique of gender-structured social institutions, e.g., the family, in *TJ* (p. 162–168). Additionally, in “The Idea of Public Reason Revisited,” Rawls is even more specific about the proper relationship between the state and the family saying “in a democratic regime the government’s legitimate interest is that public law and policy should support and regulate...the institutions needed to reproduce political society over time. These include the family (in a form that is just), arrangements for rearing and educating children, and institutions of public health generally.... Given this interest, the government would appear to have no interest in the particular form of family life, or of relations among the sexes, except

socially-constructed, or at least partially socially-constructed, union that is an appropriate target of political justice.<sup>4</sup> I also take it as a starting point that family structures play a crucial role in the fair treatment of citizens within liberal democratic societies. For that reason, I think states ought to play some, albeit limited, role in overseeing the structure of marriage and the family.

There have been two general conceptions concerning the role of state oversight: a “contract-based approach”<sup>5</sup> and a “rights-based approach.”<sup>6</sup> On the “contractual” model, the law treats civil marriage as it treats any other contractual association. The value of individual autonomy reigns, the members of the partnership are free to set the terms of the contract, and the state does not interfere unless there is some clear threat to minor children or to individuals outside of the family association or there is some reason to think that at least one partner has not made a fully autonomous decision. Thus, the threshold for harm that justifies state intervention on this view is set relatively high. As a result, rejection of polygamy by adherents to this view is contingent on identifying a harm specifically linked to polygamous marriage. Because I think the most persuasive case for a harm that could play this role is the argument that polygamy limits female autonomy, I explore below whether the female autonomy objection could also stop the slide down the slippery slope successfully drawing the distinction between same-sex marriage and polygamous marriage.

On the other hand, theorists who adopt the “rights-based” approach think that the contractual model, because of its focus upon autonomy to the detriment of other important liberal values, fails to recognize or prevent serious injustices. Modeled on Rawls’ difference principle, the rights-based view says that we ought to derive principles for guiding marriage and family law from a basic commitment to equality of freedom for each individual member of society. So this account takes as operative a relatively lower threshold for harm triggering state intervention. The best objection to polygamy coming out of

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insofar as that form or those relations in some way affect the orderly reproduction of society over time” (*The University of Chicago Law Review* Vol. 64, No.3 (Summer 1997), p. 779).

4 For a helpful survey of work in legal and political theory about the relationship between the liberal state and the family, see Martha Minow and Mary Lyndon Shanley’s ‘Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law,’ *Hypatia*. Vol. 11, No. 1 (Winter 1996), pp. 4–29. More recently, Christie Hartley and Lori Watson offer a general account, based on the fundamental interests of citizens, of how political liberals should determine whether legal marriage is a matter of basic justice (‘Political Liberalism, Marriage and the Family,’ *Law and Philosophy* Vol. 31, No. 2 (2012), pp. 185–212).

5 For example, see Will Kymlicka’s ‘Rethinking the Family,’ *Philosophy and Public Affairs* Vol. 20, No. 1 (1991), pp. 77–98.

6 For example, see Okin’s *JGF* (1989).

this approach is what I call the asymmetry of power objection. The claim here is that polygamy violates the rights of those individuals entering into marriage on the multiple side (whether male or female), who are expected to share a role and the rights and responsibilities that come with that role.

The disagreement between advocates of the contractual approach and the rights-based approach to civil marriage tracks a more general ongoing debate among liberal theorists; however, I do think that finding the right distinction between harmful and non-harmful types of marriage is key to blocking the slippery-slope objection to same-sex marriage. Ultimately, what is needed is a 'harm principle' for domestic partnerships and I construct such a principle here.

My argument in the remainder of the paper proceeds as follows: in the next section, I show how both the contractual and the rights-based models fail to stop the slide down the slippery-slope offered by opponents of same-sex marriage. In particular, I reject two standard liberal objections to polygamy: (O<sub>1</sub>) the female autonomy objection put forth by proponents of the contractual model and (O<sub>2</sub>) the asymmetry of power objection put forth by proponents of the rights-based model. But, in section III, I show how a third objection to polygamy, (O<sub>3</sub>) the risk of exploitation, actually succeeds in stopping the slide and forms the basis for my 'harm principle.' In the fourth section, I forestall three objections to my view. The first two purport to show that my argument proves too little and the last purports to show that my argument proves too much. I conclude that holding both (a) same-sex marriage is permissible and (b) polygamous marriage is impermissible is at the same time consistent and consistently liberal.<sup>7</sup>

## 2 Marriage Equality and Polygamy: Can You Have One Without the Other?

Opponents of same-sex marriage, looking to capitalize on the intuition that some types of domestic unions ought to be prohibited because of the potential

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7 Matthew B. O'Brien argues that true liberals cannot be in favor of redefining civil marriage to include same-sex unions because Rawls' political liberalism actually prohibits same-sex marriage. Since all of the arguments in favor of recognizing these unions as civil marriages stem from controversial doctrines about the good, such a policy would violate the ideal of public reason ('Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family,' *British Journal of American Legal Studies* Vol. 1, No. 2 (2012), pp. 411–466). O'Brien's argument, then, challenges the claim that my view is solidly grounded in a liberal perspective. The scope of this paper does not permit me to develop a competing interpretation of Rawls' view. But even if O'Brien's interpretation of Rawls is correct on this point, I suspect that many liberals would choose to abandon Rawls in favor of marriage equality.

for harm to the individuals involved, offer the following slippery-slope argument against legalizing same-sex marriage:

- (1) Legalization of same-sex marriage would provide a principle for legalization of other, similar types of 'non-traditional' domestic partnerships (e.g., polygamy, bestiality, adult incest).
- (2) We, as a society, agree that these other types of 'non-traditional' domestic partnerships are licentious.
- (3) Providing a principle for legalization of licentious domestic partnerships would virtually guarantee that such practices would increase.
- (4) The harm caused by the increase in such practices is sufficient to justify outlawing that which would provide the principle for legalization.
- (5) Therefore, same-sex marriage ought not be legalized.

There are, of course, many problems with this argument, but the main problem lies in specifying and demonstrating the harm caused by these non-traditional relationships (premise (4)) and establishing the link between that alleged harm and legalization of same-sex marriage (premise (3)). Even were we to concede that *some* of the types of arrangements on the list are harmful and so ought to be prohibited, this would not impeach *all* types on the list. Thus, the argument, as stated, is invalid or at the very least, incomplete. Nonetheless, there are defenders of this type of argument<sup>8</sup> and their main line of defense is an appeal to an assumption that underlies premise (1): that same-sex marriage is analogous to polygamy in that these types of unions are all in some respect harmful or licentious. In this section, I begin to test the plausibility of this analogy. More specifically, I examine whether either of two objections to polygamy suggests a harm principle that could be used to deny the analogy and hence, to stop the slide down the slope.

There are two prominent objections to polygamy: (O<sub>1</sub>) the female autonomy objection and (O<sub>2</sub>) the asymmetry of power objection. Let us examine each objection in turn.

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8 Justice Antonin Scalia offers an argument along these lines in his dissent to the Supreme Court decision in *Lawrence v. Texas* (2003). The court decided in a 6-3 ruling to strike down Texas's sodomy law making same-sex sexual activity legal. Scalia referencing bigamy, adult incest, bestiality, and obscenity, says, "The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable.'" He agrees that laws against such behavior protect a legitimate state interest and that the court's decision "effectively decrees the end of all morals legislation" (Section IV). See also, Andrew Sullivan's (ed.) *Same-Sex Marriage: Pro and Con* (Vintage 2004), especially, chapter 8, p. 273-294.

### 2.1 (O<sub>1</sub>) *The Female Autonomy Objection to Polygamy*

(O<sub>1</sub>) says that the practice of polygamy oppresses and subordinates women. The reasoning for the objection is as follows: because the overwhelming majority of polygamous relationships occurring in the US and other liberal democracies have been *polygynous* (i.e., occurring between one man and multiple women) and, for the most part, have occurred within deeply patriarchal religious communities, decriminalizing such practices would provide legal cover for a form of female oppression. The men, who currently oppress women in these relationships, would take decriminalization of polygamous marriage as a signal that society condones their treatment of women. This would have two further effects: (a) it would increase the number of individual women in polygamous relationships and thus, the number of individual women being oppressed; and (b) it would foster the inappropriate attitude that women deserve to be treated as second-class citizens, thus damaging the self-respect of women as a group. Insofar as citizens generally associate polygamy with oppression and subordination of women, legalizing it not only harms individual women, but also sends the message that we, as a society, are not all that interested in ending discrimination against women.<sup>9</sup>

Now if it is true that legalizing polygamy would cause an increase in the practice as polygyny and that such a policy would be understood as expressing a lack of concern for the oppression and subordination of women, (O<sub>1</sub>) seems to imply a slide-stopping response to the slippery slope: political liberals ought to oppose polygamy because they generally ought to oppose any type of contract that increases oppression. Put in terms of the contractual model, were we convinced that permitting polygamous marriage contracts would *not* encourage the attitude that women ought to be oppressed and treated as subordinate to men, then we could, with good conscience, allow such contracts. However, because it does not seem unreasonable for citizens to see the state's act of condoning polygamy as an expression of a reprehensible attitude toward women, the state ought to prohibit citizens from forming such contracts. By contrast, because it is patently unreasonable for citizens to see the state's act of condoning same-sex marriage as supporting the oppression and subordination of one gender by another, (O<sub>1</sub>) the female autonomy objection seems to draw the distinction between harmful and non-harmful domestic partnerships at exactly

9 Elizabeth Anderson makes a similar point about commercial surrogate motherhood arguing that liberal democratic institutions ought not to enforce surrogacy contracts because such contracts treat labor that is unique to women as a mere commodity and so institutionally supporting these contracts encourages disrespect for women ('Is Women's Labor a Commodity?', *Philosophy and Public Affairs* Vol. 19, No. 1 (Winter, 1990), pp. 71–92).

the right point. The political liberal wishing to accept marriage equality, but to reject polygamy seems to have the argument she needs.

However, there are problems with (O<sub>1</sub>) that prevent it from being a viable strategy against the slippery-slope. First, some proponents of the contractual account challenge the antecedent at the beginning of the preceding paragraph. They argue that since polygamy is currently treated as criminal activity, it would be nearly impossible to offer empirical evidence demonstrating a significant increase in the practice due to legalization. Similar to the problem with accurately stating the number of illegal immigrants living the US, because those who live in polygamous arrangements do so under a shroud of secrecy, it is difficult to get accurate numbers. Yet, we can be certain that legalization would provide vulnerable women with the resources they desperately need to emerge from the shadows and to gain the legal protection afforded by the law. Thus, there are reasons to think that legalizing polygamy, rather than leading to a decrease in female autonomy overall, would allow government better to regulate the practice so as to protect vulnerable individuals in these relationships whose autonomy and power is currently being unjustly limited primarily because the practice is criminalized.<sup>10</sup>

Additionally, they argue that whether legalization of polygamy would be taken as displaying a dismissive attitude toward the subordinate status of women in general largely depends upon the details of the legislation, the circumstances surrounding legalization, and the actual attitudes of actual legislators being expressed through the act of striking down or replacing the law. If this is correct, then many harms that we associate with polygamy seem to belong to polygamy only *as practiced* and we cannot overlook the fact that polygamy is practiced within the context of being labeled as criminal activity. Therefore, since it is far from obvious that citizens would see the act of legalization as expressive of a lack of concern for female oppression and since legalization would almost certainly increase the autonomy of those currently being subordinated and labeled as criminals, advocates for legalization of polygamy argue that continuing to outlaw the practice would do more harm than good.<sup>11</sup>

10 For more on this perspective, see Margaret Denike's "The Racialization of White Man's Polygamy"; *Hypatia* Vol. 25, No. 4 (Fall 2010), pp. 852–874.

11 It is important to separate concerns about social institutions that violate women's rights from the question of whether disallowing such institutions would unjustly restrict female autonomy. Marilyn Friedman argues that liberal societies should tolerate minority cultural practices that violate women's rights so long as women choose autonomously to live according to those practices (see *Autonomy, Gender, Politics (Studies in Feminist Philosophy)* (Oxford: Oxford University Press, 2003). Later, I argue that what is worrisome about allowing polygamous relationships is not that they violate women's rights, but that

Adding more fuel to the decriminalization advocate's fire, since (O<sub>1</sub>) is an objection to polygamy *as practiced*, the structure of the societies in which polygamy commonly has been practiced is relevant to understanding the nature of how it restricts female autonomy and how deeply cuts the objection. Because any social institutions involving gender roles will be tainted by the patriarchal attitude in society, we ought to keep in mind that one could argue that heterosexual marriage arrangements perpetuate the oppression of women as well.<sup>12</sup> In the same way that we might see traditional marriage in the US prior to the 1960s as having enabled the devaluation of 'feminine' roles and the subordination of women, we might see polygamy as enabling these things within societies where such attitudes are prevalent. But this is not evidence that polygamy is itself harmful or that it specially perpetuates female oppression and so is uniquely harmful to women.<sup>13</sup> Whether it is polygamy or the background conditions against which polygamy is practiced that is the main culprit in restricting female autonomy is difficult to disentangle. However, I limit my discussion to decriminalization of polygamy within the context of liberal democratic societies. In such societies, where there is an effort to use the law to promote gender equality and to break down traditional gender roles, polygamy, were it legal, would not necessarily be practiced primarily as polygyny or ruled by strong notions of hierarchical gender roles placing women in subordinate positions.

I agree with the decriminalization advocates here. Those appealing to (O<sub>1</sub>) the female autonomy objection assume that decriminalization would have no

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even if women autonomously choose to enter into polygynous relationships these arrangements increase the risk of exploitation due to unequal bargaining positions.

- 12 In fact, the female autonomy objection may work better as an objection to the institution of marriage more broadly. If it can be shown that the practice of traditional marriage itself tends to increase discrimination against or oppression of women in liberal societies, then it is possible to apply the objection more broadly.
- 13 Although the TV series *Big Love* is fictional, the creators of the show take themselves to be making a feminist statement, which seems quite plausible (NPR interview 'Big Love's Creators Deconstruct the Show's Finale' March 21, 2011). The women involved in the polygamous marriage are portrayed as viewing their relationship as empowering in a number of ways. For example, they are able to distribute childcare and other domestic chores among themselves, the burdens of which statistically still fall more to wives than husbands in traditional families. This enables the wives more freedom to work outside of the home or pursue other independent interests. The women are also portrayed as having more bargaining power when they side against their husband on particular issues. So, it seems at least conceptually possible that polygamous arrangements could increase female autonomy both within and without the family.



measurable effect on the number of plural marriages taking the form of polygyny relative to the number of plural marriages taking the form of polyandry. But this assumption seems wrong. If under the law men and women were equally supported in forming plural marriages with multiple partners of the opposite sex, then concern about the threat of substantial harm to women would fall away. Consequently, it looks as if there is no reason to fear, on the basis of (O<sub>1</sub>), consensual polygamous partnerships being practiced under a law respecting gender equality.<sup>14</sup>

Of course, creating formal rules does not magically dissolve unjust informal practices. Still, it does seem that the most worrisome element regarding the existing practice of polygamy, i.e., oppression and domination of women, would tend to wither under the bright light allowed in by the transparency of a democratic legal system. There is little doubt that more cases of polyandry (i.e., one wife having multiple husbands) would occur were polygamy legal and open to both sexes equally. So it is at least as plausible to think that legalization would hasten the erosion of gender inequality, as it is to think that legalization would reinforce gender inequality. Within communities whose members may not have even seriously considered challenges to their traditions, history has shown that changing legislation can force a change in attitude. Thus, given that any successful slope-stopping objection must show how polygamy is uniquely and inherently harmful in a way that same-sex marriage cannot be, the prospects for using (O<sub>1</sub>) the female autonomy objection to block the slippery-slope argument look to be slim.

## 2.2 (O<sub>2</sub>) *The Asymmetry of Power Objection to Polygamy*

On the other hand, though, are political liberals, e.g., Thom Brooks,<sup>15</sup> who reject polygamous marriage not because of the mistaken concern about the decrease in female autonomy, but because of a more fundamental concern about polygamy. This more fundamental concern can be expressed as (O<sub>2</sub>) the asymmetry of power objection. Polygamy threatens equality on a deeper level. The argument here is that polygamy, as practiced, not only threatens to

14 I take myself to be largely in agreement here with: Cheshire Calhoun, 'Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy,' *San Diego Law Review* Vol. 42 (2005), pp. 1023–1042; Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008); and Adrienne Davis, 'Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality,' *Columbia Law Review* Vol. 110, No. 8 (December 2010), pp. 1955–2046.

15 'The Problem with Polygamy,' *Philosophical Topics* Vol. 37, No. 2 (2009), pp. 109–122.

increase subordination of women in both the private and public spheres, but also, on a more intimate level, the power imbalance inherent in polygamous arrangements threatens the equality between the partners *within* the marriage regardless of the gender make-up. From the rights-based perspective, we could say that the inegalitarian or hierarchical structure of polygamous relationships is fundamentally adverse to marriage equality and consequently, the threat to the right to equality of those who would choose to enter into a polygamous marriage contract is enough to make such contracts impermissible.

Consider the situation in a typical polygynous relationship. The inegalitarian or hierarchical structure lends itself to an unequal division of labor in which the man ends up with more power than each of the women involved. Certainly, domestic partnerships need not be tied to specific sexual relationships or sexual norms, but the sexual habits of those in typical polygamous unions (i.e., those taken to fall within the purview of certain religious sects) regularly do reveal an asymmetry of power. Only the husband has polygamous sexual relations; the sexual relations of the sister-wives are monogamous. Also, Brooks points out that only the man has unilateral power to introduce new wives or to divorce any one of his wives. Sister-wives do not have equal power unilaterally to divorce any of the other wives. Though the sister-wives are married to one another in some sense, the horizontal contract among them seems to be distinct in kind from the vertical one between the husband and each of his wives. This, says Brooks, shows that polygamy includes, as a fundamental element, an inherently unequal power structure that cannot be attributed to the patriarchal attitudes of those typically involved. On this view, harmful marriages are those that have *as a fundamental element* an unequal power structure. Furthermore, since this is a worry unique to marriage forms where one person occupies a single role, while multiple others share a single role, (O<sub>2</sub>) seems to offer a slide-stopping response showing how we might draw a line between polygamous marriages and same-sex marriages, which do not take this form.

However, there are two problems with using an unequal power structure as the criterion for stopping the slide. First, it assumes that there is something *necessarily* harmful about inegalitarian or hierarchical power structures. But liberal societies permit many inegalitarian arrangements and institutions that seem unproblematic. To cite just one example, we do not normally worry about the parent-to-young-child relationship, which is clearly hierarchical in nature. In fact, we find it more worrisome when such a relationship is *not* hierarchical. Now Brooks might respond here that there are certain natural hierarchies that are permissible because they are beneficial to everyone and that hierarchical marriages are neither natural nor beneficial to anyone. But there are other

hierarchical arrangements, e.g., between seller and buyer, which are not obviously natural in character, but which we nonetheless find acceptable as well. Unless equality among interpersonal relationships is necessary for the well-being of parties to the contract, there is no reason to think that inegalitarian relationships, arrangements, institutions, or contracts are inherently harmful or that the costs of being on the bottom end of the hierarchy *necessarily* outweigh the benefits. The harm, instead, arises, when it does, because individuals within interpersonal relationships that have this hierarchical structure likely started out from unequal bargaining positions prior to the arrangement. Later I will show that the harm that some attribute to polygamy should be understood as stemming from an increased risk of exploitation rather than from the hierarchical structure of the relationship. The context in which hierarchical agreements are made makes a difference.

The second problem with using the (O<sub>2</sub>) asymmetry of power objection to stop the slippery-slope is that it looks as if a response similar to the one raised against (O<sub>1</sub>) would work here also. Just as we found that the female autonomy objection only shows what is harmful about polygamy *as practiced* within strongly patriarchal societies and that there is reason to think that legalizing polygamy would allow liberal democratic societies to regulate the practice controlling for those harms, the same is true for the harms associated with asymmetrical power structures. Recall Brooks' example concerning the asymmetrical ability to divorce. It seems that legislation could be designed to accommodate multi-party contracts with equal terms for all participants.<sup>16</sup> Divorce law would simply need to be rewritten to apply to polygamous marriage contracts. Under such laws all members would have an equal right to dissolve the marriage creating reasonable exit options for all parties to the contract. In order to illustrate this idea, consider the following scenario: Cleopatra, who is the head-of-household, marries Mark Antony, Julius Caesar, and Genghis Khan. Subsequently, Genghis who is deeply disappointed in Mark Antony for losing the Battle of Actium to Octavian, decides he wants to divorce Mark Antony, but he still wishes to remain married to the others. So under the new divorce law, Genghis, Julius, and Cleopatra would create a new marriage contract, while Mark, Julius, and Cleopatra would create another new marriage contract. The original marriage would be dissolved and two new marriage contracts drawn up.

Now, other than creating a headache for divorce attorneys and judges, there seems to be little objectionable about this type of legislation. Such a law would

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16 Gregg Strauss has a good discussion of two ways to modify polygamy to avoid this objection in 'Is Polygamy Inherently Unequal?', *Ethics* Vol. 122, No. 3 (April 2012), pp. 516–544.

protect everyone's rights. Indeed, there is already in place legislation for multi-party business contracts and there seems to be no, in principle, reason to rule out the possibility for using similar standards for multi-party marriage contracts. So long as one person could participate in more than one marriage, legislation could accommodate what is fundamentally harmful about the asymmetrical power to divorce in polygamous unions. Again, what seemed a necessarily harmful feature of polygamous marriage turns out to be separable from the concept of polygamy.<sup>17</sup>

Perhaps Brooks would respond that such a strategy cannot work because it would fundamentally transform the institution of marriage, as we know it. Given that according to the *status quo* each individual is allowed to participate in only one marriage at a time, a divorce splitting one polygamous marriage into two must be unacceptable because several members then would be simultaneously participating in two marriage contracts. However, it is not clear why we should follow the *status quo* on this matter. Perhaps the law would need to include provisions against conflicts of interest, but this qualification is not impossible to meet. Why should we think there is something uniquely bad about participating in more than one marriage at any given time? Were Brooks to come up with a plausible answer to this question, perhaps he could jury-rig that into an explanation for why we have good reason to prohibit structurally inegalitarian domestic relationships, but as it is, the candidates for showing how polygamy could be harmful fall away. So, it looks as if (O<sub>2</sub>) the asymmetry of power objection fares no better than (O<sub>1</sub>) in identifying a harm that is unique to polygamy and thus, capable of stopping the slide down the slippery slope.

Let's pause here and take stock of the implications of these two conclusions, before looking at a third objection to polygamy, which I claim is decisive. Given

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<sup>17</sup> The asymmetrical power to divorce is not Brooks' only objection to polygamy, however. He also discusses empirical evidence showing the risk of harm in practice to women, children, and men (p. 4–7), and says that polygamy discriminates against non-heterosexuals (p. 14). So, although a change to divorce law that better accommodates consent in plural marriage would be relatively easy to achieve, there might remain a structural asymmetry and imbalance of power because the options open to Cleopatra and her men would still differ because of gender inequalities. For example, Brooks says "studies have found that only a small fraction of women in polygamous marriages work outside the home" (p. 5). Assuming the limited ability to work outside the home can be attributed primarily to the power imbalance rather than to, for instance, implicit or explicit religious teachings about gender inequalities, such harms would remain even under laws designed to mitigate or to eliminate specific gendered options. Finding out whether this assumption has legs, though, would require deeper analysis of the empirical evidence to separate out harms caused by the structural asymmetry itself.

that both (O<sub>1</sub>) the female autonomy objection and (O<sub>2</sub>) the asymmetry of power objection identify harms associated with polygamy that nonetheless can be avoided using legislative means, it seems that the political liberal is left with only one option: accept the (libertarian) mantra—‘let a thousand flowers bloom.’ Whereas opponents of same-sex marriage see premise (1) of the slippery-slope argument—legalization of same-sex marriage would provide a legal principle for legalization of other, similar types of ‘non-traditional’ domestic partnerships (e.g., polygamy)—as a *reductio* upon any argument for legalizing same-sex marriage, the libertarian treats premise (1) as an implication of the *correct view* of marriage as being purely a matter of individual taste. Embracing the analogy between same-sex marriage and polygamous marriage, but denying that any autonomous choice concerning interpersonal relationships could be so harmful as to outweigh the benefit of increasing personal freedom, libertarians endorse a radically permissive policy on domestic partnerships.<sup>18</sup> Thus, it appears that a consistent political liberal must say that so long as legislation is in place guaranteeing (a) the position of head-of-household is equally open to all, regardless of gender, and (b) all adult members of a household have an equal right to terminate or to modify the marriage contract, then polygamous unions would be as harmless as any other type of marriage including same-sex marriage. It seems that the liberal who wants to argue for marriage equality *and* reject polygamy is out of luck. Fortunately, there is a third objection that saves the position, which I introduce in the following section.

### 3 Try, Try, Try, and You Will Only Come to this Conclusion

In this section, I construct a harm principle for domestic partnerships based on the liberal value of fairness. Although Brooks is onto something with (O<sub>2</sub>) the asymmetry of power objection pointing out that polygamy has a worrisome hierarchical structure, he is wrong to think that this feature alone is sufficient to justify the law against entering into a polygamous marriage contract within a liberal democratic society. I argue that polygamy should remain illegal, but only because the perception that the hierarchical structure of such arrangements is less desirable than monogamous arrangements uniquely increases the risk of exploitation for especially vulnerable groups who are

18 Andrew F. March adopts this view in ‘Is There a Right to Polygamy? Marriage, Equality, and Subsidizing Families in Liberal Public Justification,’ *Journal of Moral Philosophy*, forthcoming. A draft is available online on PhilPapers.

most likely to enter into polygamous marriages on the plural side. So while I agree with Brooks' conclusion, I also sympathize with the libertarian argument since it reveals Brooks' reasoning to be incomplete. It is not simply the asymmetry of power that justifies a law prohibiting polygamy. Individuals ought to be free to enter into asymmetrical power relationships so long as they are choosing to do so from a relatively equal bargaining position. In order to block the slippery-slope argument, we need a more complete account of harm that shatters the alleged analogy between same-sex marriage and polygamous unions. I argue that hierarchical contracts, like polygamy, are only harmful if they are exploitative or if they significantly increase the risk of exploitation among a population. Unfortunately, I also think, given the structural inequality that exists within most liberal democratic societies, the conditions are such that legalization of polygamy would in fact increase the risk of exploitation. Therefore, (O<sub>3</sub>) the risk of exploitation objection succeeds in blocking the slippery-slope argument.

The first step in my argument is to explain the concept of harm stemming from the liberal value of fairness. The concept of harm under examination here is broader than that which is understood in the context of either the contract-based approach or the rights-based approach to the family. Regardless of whether someone would voluntarily and intentionally enter into a contract that would clearly cause her harm, society ought to reject contracts that violate the rights of those who would choose to enter into them. This is the intuition I capture with my third objection to polygamy: (O<sub>3</sub>) the risk of exploitation objection.

Examples such as sweatshops and surrogacy are instructive when thinking about how the bargaining positions of potential parties to a contract intuitively affect our judgment of the justice involved. Even if there are people living in the US who, e.g., because they are homeless or have been unemployed for years, would benefit from having the option to take a job that pays less than minimum wage and that would require them to work under harsh conditions, such a benefit falling to a person only because he is significantly disadvantaged as a result of structural injustice cannot justify permitting such contracts. The intuitions that resist policies allowing contractual agreements involving sweatshops and surrogacy, then, go beyond worries about informed consent or even a standard reading of Mill's harm principle,<sup>19</sup> since we could easily envision

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19 The harm principle as stated on p. 9 of *On Liberty* (Indianapolis: Hackett Publishing Co., 1978) suggests that the only justifiable reason for limiting one's freedom is to prevent harm to others. So, the standard reading of Mill's harm principle cannot explain why exploitative contracts are wrong since many of them do offer a net benefit to those who are being exploited.

how making such agreements could be both rational and result in a net benefit for a person whose quality of life is significantly below some minimal standard of decency. It does not seem that the rights-based account completely captures what is wrong with contracting to work at a sweatshop or to serve as a surrogate mother. So, neither the contract-based nor the rights-based account of justice adequately explains our intuitions about these types of contracts.

What is wrong is that such contracts increase the risk of exploitation of vulnerable populations. The worry about such contracts arises when we think about the individuals who would most likely agree to these contracts and what they all have in common. It is only rational to enter into usurious contracts when one sees some benefit to entering into the arrangement. Now there are many potential reasons that one could end up in a position to benefit from a contract most see as usurious; some reasons are benign (e.g., extraordinary sympathetic feelings or altruism), but others are the result of structural injustice (e.g., the lack of an accommodation for a disability). The best indication of whether individuals generally enter into a particular hierarchical arrangement motivated by benign reasons or because of structural injustice is to consider whether the parties to the contract begin from radically unequal bargaining positions. Were women entering into surrogate motherhood being primarily motivated by sympathy for women who are unable to bear their own children, then we would not see a disproportionate number of poor women acting as surrogates for wealthy “social parents.”<sup>20</sup> Presumably, poorer women have not cornered the market on sympathetic feelings. But it is rare for a woman to bear a child for a complete stranger purely out of sympathy. Our suspicions about contracts between parties starting from radically different positions of power stem from our intuitions about the overall increased risk of exploitation that would arise were such contracts legally enforced. Hence, concerns about fairness give rise to policies prohibiting contracts that are harmful in this broader sense, i.e., contracts that, in principle, may or may not threaten the rights of the parties to the contract, but nonetheless do increase the risk of exploitation for disadvantaged members.

I think similar concerns also come into play when we consider marriage contracts. What advocates of the contract-based approach to marriage and the family fail to see is that liberal democratic societies ought to promote other liberal values in addition to freedom and autonomy and these additional values are relevant to deciding which domestic partnerships are consistent with

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20 Again, for more about why enforcing such contracts increases the risk of exploitation for women, see Elizabeth Anderson's article on surrogacy ('Is Women's Labor a Commodity?', *Philosophy and Public Affairs* Vol. 19, No. 1 (Winter 1990), pp. 71–92).

aspiring to create a more ideal liberal democratic society. Far from being purely a matter of personal preference, marriage is a liberal institution that can affect overall justice in society. That entering into domestic partnerships involves hybrid considerations both private and social in manner does not show that respect for the privacy of individuals should trump the harmful social implications of allowing domestic partnerships that would increase the risk of exploitation of vulnerable individuals. Insofar as the rights-based approach takes seriously values that many liberals find appealing and applicable to contracts in non-domestic contexts, it better captures contemporary liberal intuitions about blending the private and the social aspects of marriage contracts as well; however, the rights-based approach cannot explain why increasing the risk of exploitation for a vulnerable population could be enough to reject contracts as well. Thus, we see that where one party to a contract stands to gain a great deal more than the other, the minimal condition of voluntary and intentional agreement among parties to a contract and protection against the violation of the rights of the parties is not sufficient to allay all of our worries about at least certain types of agreements.<sup>21</sup>

If we think of the marriage market as analogous to the labor market or to the market for surrogate mothers, we see that the same worries that arise in the latter two cases also crop up when it comes to marriage. Just as those who are at a significant disadvantage relative to other potential workers in the labor market are most willing to work in sweatshops, those who are at a significant disadvantage relative to other potential mates would be most willing to become a third wife or a fourth husband. Intuitively, we bristle at these other types of non-domestic arrangements that involve parties in vastly unequal bargaining positions, even though it is often difficult to identify a particular harm to the individual resulting from the practice itself, and we recognize that there ought to be limits to such contracts. As a result, at least some liberal democratic societies outlaw sweatshops and refuse to enforce surrogacy contracts. Beyond this, they pass laws making it possible for the creation of institutions, such as labor unions and adoption agencies, to protect the most vulnerable members of society from being exploited. So unless and until analogous institutions are in place to protect the choices of the most vulnerable in the marriage market, I contend that it would be a mistake to decriminalize polygamy.

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21 I also think this rule should apply to certain types of unequally bargained monogamous relationships. For instance, I think that arranged marriages ought to be illegal because there is good reason to assume that (a) such marriages are not entered into voluntarily and that (b) certain vulnerable groups suffer most often under such arrangements.



To further demonstrate this, we need only examine more carefully who might be tempted to enter into a polygamous marriage on the multiple side were we today to decriminalize polygamy in the US. I submit that polygamy would be most attractive to those who face a greater risk of or increased personal cost to never marrying. The vulnerability these individuals face manifests itself in a variety of ways. One could be under more social pressure to reproduce due to her identity with a particular ethnic group or simply because one's family puts more emphasis on marriage and procreation than is the norm within society. Beyond social pressure, there is of course economic pressure to marry and to be a part of a family. Were polygamy to become legally available, presumably members of such associations would be entitled to certain economic benefits from the state, since currently there are benefits attached to traditional forms of marriage in liberal societies. This means that were polygamous marriage a legal live option, it would be almost certainly preferable to homelessness and perhaps preferable to accepting state welfare or to becoming a single parent. But the point is that in order for legal polygamy in a liberal society to seem a tempting prospect for an individual who is for some reason (probably economic, but perhaps social as well) prevented from becoming a head-of-household himself or herself, some outside pressures must make one think, 'I'll take my chances in a polygamous marriage.' In order for polygamy to be preferable to one's current situation, one first must be disadvantaged by the background conditions of his choice. Thus, I argue that although there is nothing *per se* wrong with contracts involving an asymmetry of power, there is something wrong with asymmetrical contracts between parties that start out in vastly unequal bargaining positions relative to the content of the contractual agreement.<sup>22</sup>

To clarify my position: what distinguishes harmful marriages from non-harmful ones is not merely a matter of the tendency of one type of structure (i.e., one marriage partner occupying a single power position, while several other partners share a single power position) to reinforce societal injustices or to exacerbate harms that already exist in the background structure. Instead, my concern is that so long as one form of marriage is perceived as being more desirable than another, only those at a distinct bargaining disadvantage

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22 Notice that simply having less social standing than one's bargaining partner, does not automatically place one in an unequal bargaining position. The inequality of bargaining position is highly contextual. Consider a simple example: suppose that Joe owns a thrift store and that someone happens to have inadvertently donated a rare antique to the store. Now Paul, who owns a Fortune 500 company, happens also to be an antiques collector and is willing to pay almost anything to acquire the antique. Although Joe belongs to a lower social class than Paul, Joe occupies the dominant bargaining position in this case.

relative to others will choose to enter into the less desirable arrangements. This means that regardless of whether such a choice actually ends up harming the individual, i.e., the individual ends up worse off than she would have been if she had chosen not to enter the marriage, the risk of harm does fall disproportionately on the least advantaged. Therefore, decriminalizing these types of contracts would be wrong because of the resultant general increased risk of exploitation.

If I am right about this third objection to polygamy, the contract-based and rights-based approaches to marriage are only plausible after other sources of injustice and inequality in society have been addressed. Only then can we rest assured that all parties to a hierarchical marriage contract begin from a relatively equal bargaining position and no one makes the choice to enter into a polygamous marriage only because he sees it as the most rational choice out of several bad options. To clarify further, I do not mean to suggest that no one in his (or her) right mind could voluntarily and intentionally choose to enter into a polygamous marriage as the second or third husband (or wife); there are potentially good reasons to prefer such an arrangement, e.g., true love.<sup>23</sup> But I do think that within a structurally inegalitarian society, we have a *prima facie* reason to be skeptical that such arrangements have been entered into for good reasons. Therefore, I argue that polygamy and perhaps other types of hierarchical marriage arrangements that threaten to increase the risk of exploitation ought to remain illegal within structurally inegalitarian liberal democratic societies.

#### 4 Objections

In this final section, I forestall three objections to my argument. The first two objections claim to show that my argument proves too little and the third claims to show that my argument proves too much. I address each objection in turn. First though, a clarification of terms: my definition of polygamy is admittedly quite narrow. I do not mean to catch in my net polyamorous

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23 This would be my reply also to Fundamentalist LDS women who are in plural marriages and insist that they are not and have never been exploited. I do not mean to suggest that every wife in a plural marriage is being exploited or must have been in a disadvantaged bargaining position when she entered into the marriage. But as a matter of public policy, the only way to be sure that decriminalization of polygamy would not significantly increase the risk of exploitation of the most vulnerable citizens, is first to guarantee that structural injustice is addressed.

arrangements that are not obviously structurally hierarchical in nature; for example, if a heterosexual couple were to decide to marry their three homosexual friends, that would not necessarily count as a harmful marriage on my view because I think the perception that polygamous marriages are less desirable primarily results from worries about the structural hierarchy. At least, as I envision the distinction between polyamory and polygamy, the power sharing in the former is much less hierarchical in nature. Perhaps it is accurate to say that there is no clear head-of-household in a truly polyamorous relationship. If this is correct, then it does not make sense to describe members of these types of arrangements as sharing a particular role, at least not in a way that is problematic according to my view. Because I identify power sharing among subordinates as the source of the hierarchy and the potential for exploitation inherent in polygamous unions, I am only concerned with interpersonal arrangements of a fairly specific type: where one person owns a particular role, i.e., head-of-household, while several others share another subordinate role.<sup>24</sup> Only these have the potential objectionably to exploit vulnerable individuals on my view.

Now, here, my interlocutor may protest that I have simply propped up a strawman to pummel. My definition of polygamy is based upon a caricature of real marriage since no household actually operates along such strictly hierarchical rules. Even in a traditional heterosexual marriage where both partners might label the male as the head-of-household, the division of labor typically is such that it hardly makes sense to call it hierarchical, unless we are viewing things through a purely gendered or at least a purely market-oriented prism where, e.g., being tasked with doing the finances is treated as being more valuable than doing the cooking and the one playing each role stays exactly the same throughout the entire marriage. In reality, husbands, wives, and partners often trade-off different household tasks, so we would expect the same, even more so, to be true of households in which there are multiple husbands or multiple wives. Further, the concept 'head-of-household' is an antiquated term belonging to a bygone era. Thus, to say that these sorts of hierarchical arrangements are harmful, even if true, is like warning people that covered wagons are harmful.

My response to this first objection is as follows: first, the claim that most households do not operate according to a hierarchical structure would need to be settled, at least in part by empirical evidence. But the idea that

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24 Perhaps, there is a particular ratio that might help us to define hierarchy. If, for example, two people had vastly more power than ten others involved in a polyamorous relationship, the worry about exploitation would perhaps arise once again.

hierarchical marriage arrangements are rare seems naïve at best. Now it may be true that only polygynous relationships, as opposed to polyandrous relationships, tend to be hierarchical in nature due to the prevalence of gender discrimination, which means that (O<sub>3</sub>) the risk of exploitation objection could reduce to (O<sub>1</sub>) the female autonomy objection; however, this claim definitely requires empirical evidence for which there is not enough data to be conclusive.<sup>25</sup> In order for such an empirical claim to deflect my argument, we would need to compare polygynous to polyandrous marriages taking place against the background of various social structures. Second, I think the conceptual evaluation of my objector's claim falls to my favor. Even if I grant that within most two-adult households, the adults trade-off responsibilities, (a) there is more to being a head-of-household than performing the 'more valuable' responsibilities (e.g., always having the option to choose which responsibilities to undertake while other household members never or rarely get to choose) and (b) I deny that the addition of more adults would lead to a more equal sharing of power. The power asymmetry comes from adding adults on one side of the relationship (i.e., adding adults whose role in the household is as an additional wife or an additional husband) and from the fact that the adults on that side have a different type of power relationship with one another than they have with the person on the opposite side of the relationship.

Now the second objection to my view continues the line of argument begun by the first. Not only is my definition of polygamy too narrow, but also my argument is trivial in another respect: (O<sub>3</sub>) the risk of exploitation only impales polygamous marriages between parties who are members of different social classes. (O<sub>3</sub>) is only a problem for parties that are in vastly different bargaining positions; so presumably if the parties considering such an arrangement have similar social statuses, the risk of exploitation would not increase since my worry about background inequality would not apply. Therefore, my argument cannot show why we should have a blanket law against polygamy, even were we to accept my narrow definition of polygamous marriage as between one person owning a role and multiple people sharing a role. It seems that the concern only arises for an even smaller sub-section of polygamous relationships.

I respond to this second objection by appealing to the nature of law. If we take into account that I began the paper intending to discuss whether liberal democratic societies ought to decriminalize polygamous marriage

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25 Adrienne Davis discusses empirical evidence showing that even in cultures where women have been on the single side of polygamous marriages, a non-gendered imbalance of power within such marriages is evident ('Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality').

contracts, we see that I am concerned with polygamy as a matter of public policy. So if it is true that, given the structure of a particular society, a particular law would tend to increase exploitation or would create a new risk of exploitation for particular vulnerable groups, then as a matter of public policy, such a law would be unjust according to my view. My claim is not that all polygamous marriages necessarily exploit people. As I acknowledge earlier, there could indeed be good reasons, unrelated to exploitation, to enter into such an arrangement, but unless and until we can be confident that the structural injustices are not impacting the marital choices that the least advantaged members of society are making, it is wrong to legalize arrangements that are characterized by an asymmetrical power relation as a structural feature.

Finally, rather than objecting that my argument proves too little, one might object that it proves too much. This objector, contrary to the first two, agrees that many marriages are hierarchical in nature and that many types of marriages involve a power imbalance, for example, heterosexual or homosexual monogamous marriages to alcoholics or marriages between members of particular sects of Christianity who take literally the biblical imperative in Ephesians 5:22: “Wives should be subordinate to their husbands as to the Lord.”<sup>26</sup> But my objector sees this as a reason to reject my distinction between harmful and non-harmful marriages based on (O<sub>3</sub>) the risk of exploitation objection. Though she may side with me (against Brooks) saying that hierarchical contracts are not in themselves unjust, and with some libertarians who argue that what makes such arrangements toxic is that the state chooses arbitrarily to reward those who enter into civil marriages, she argues that my rejection of hierarchical contracts that risk exploitation entails a wholesale rejection of the institution of marriage. The fact of structural injustice should make us suspicious of all potentially hierarchical contracts, which includes all marriage contracts, not just polygamous ones.<sup>27</sup> Thus, my distinction no longer makes sense. According to this objection, my argument actually stands as a more

26 Tom Hill offers a helpful picture of the “Deferential Wife” from a Kantian perspective in his article: ‘Servility and Self-Respect,’ *The Monist* Vol. 57, No. 1 (1973), pp. 87–104.

27 In fact, some liberals argue that the question that we ought to explore is whether the family promotes justice at all. For instance, Veronique Munoz-Darde argues that the question for Rawlsians ought to be whether the worst off would prefer the family to a “well-run orphanage.” She concludes that because state marriage creates inequalities that do not benefit the worst off, Rawlsian liberals ought to reject marriage as a state institution (‘Is the Family to Be Abolished Then,’ *Proceedings of the Aristotelian Society, New Series* Vol. 99 (1999), pp. 37–56). I agree with Munoz-Darde, as I agree with the libertarian, in principle. My primary concern though is with marriage law in a non-ideally liberal society.

general critique of the institution of civil marriage rather than as a critique of polygamous marriage.<sup>28</sup>

Against this final objection, I offer a partial concession and a reformulation. Although I agree that there are many potential sources of hierarchy within interpersonal relationships and though I am willing to concede that my argument provides reason to reject at least certain types of hierarchical monogamous marriages as well, I do think that polygamy is distinctively exploitative. I think the role-sharing aspect of polygamy uniquely reinforces the hierarchy inherent in the structure of the arrangement in a way that at least some hierarchical monogamous arrangements do not. In polygamous marriages, the participants on the multiple-side vie for positioning relative to each other, but are always subordinate to the participant on the single-side. This means that one who enters into a polygamous marriage as an addition to the multiple-side is accepting a doubly subordinate role. While it is possible that certain types of monogamous marriages have similar built-in structural hierarchies, it is at least less obvious, from the standpoint of the law, toward which partner the power balance tips. Consequently, I am willing to concede that any marriage type that includes a clear structural inequality and that would disproportionately attract members of a particular disadvantaged group ought to be rejected as unjust. The problem is that the power asymmetry within monogamous relationships is rarely so clear as it is within a polygamous relationship. Thus, my distinction between marriage types that increase the risk of exploitation and marriage types that do not stands firm.

In addition, it is important to keep in mind that marriage legislation is an especially thorny area. The balance between creating laws that avoid exploitation and other harms and creating laws that do not interfere in the private lives of citizens is a difficult one. Although I am wary, then, of legislation that would encourage the formation of structurally unequal contracts within a society characterized by individuals in vastly unequal bargaining positions, I do not think the solution is to reject marriage as a civil institution. Rather, what is needed is more attention to the background of structural injustice so that we can rest assured that any contracts individuals choose to enter are not a result of their being at a disadvantage relative to their contractual partners and to their peers.

Ultimately, as I have said, in an ideally just society or one that approaches the ideal in a way that our own currently does not, I think the 'let a thousand flowers bloom' mantra rings true, but given that we are thinking about this issue within the context of a non-ideally just liberal democratic society, the

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28 I am indebted to Renée Smith for raising this point.

proper question to ask is this: would decriminalizing polygamy lead us toward the liberal ideal or away from it? Therefore, although I think marriage laws in the US and in other liberal democratic nations are in need of reform, I also think there are better and worse ways to institute the correct reforms. I fear that abolishing the institution of marriage altogether, at least given prevailing attitudes, would have negative unintended consequences.

To conclude briefly, although both the contract-based approach and the rights-based approach to marriage have resources for responding to the slippery-slope indictment offered by opponents of same-sex marriage, I show that my own approach has the advantage of better fitting our intuitions about how best to promote liberal values. I argue that my non-exploitation approach to marriage can provide a criterion upon which liberal theorists, who wish to defend same-sex marriage, but also to reject polygamous marriage, could base their argument. Although the standard objections to polygamy fail to block the slippery-slope objection to same-sex marriage, my objection to polygamy saying that decriminalization would increase the risk of exploitation for vulnerable members of liberal democratic societies, successfully draws the line between harmful and non-harmful marriage arrangements.<sup>29</sup>

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