

8-1-2018

From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life

Deborah Zalesne

City University of New York School of Law

Adam Dexter

Supreme Court of New York Appellate Division, Second Department

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Civil Rights and Discrimination Commons](#), and the [Family Law Commons](#)

Recommended Citation

Deborah Zalesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 Buff. L. Rev. 909 (2018).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol66/iss4/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Buffalo Law Review

VOLUME 66

AUGUST 2018

NUMBER 4

From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life

DEBORAH ZALESNE[†] & ADAM DEXTER^{‡*}

When the civil magistrate sought to justify his reign, he preached to the people that under his rule they are free and equal: free to pursue their conceptions of the good life and equal under the law. For word of the good news to reach the people, the civil magistrate invited citizens from each community under his jurisdiction to hear him preach: Joseph, Gautama, Sarah, Aisha, Hillary, and Isa, each of whom was pursuing his or her own conceptions of the good life by choosing associations fit for them.

Joseph was recently wed to Mary at their church. The civil magistrate told him, "I approve of your union and will recognize it. Further, I will weigh your union as a factor when making policy so as to provide you benefits and protections with respect to it."

Gautama lived permanently with Steve and Bob in a tantric trio of love and commitment. The civil magistrate told him, "I disapprove of your union and I will not recognize it. Further, I will not weigh your union as a factor when making policy and therefore will provide you no benefits and protections with respect to it."

[†]Professor of Law, City University of New York School of Law. J.D. University of Denver College of Law; LL.M. Temple University School of Law; B.A. Williams College.

[‡]Law Clerk, Judge Colleen Duffy, Supreme Court of New York Appellate Division, Second Department. J.D. City University of New York School of Law; M.A. (Philosophy) University of Amsterdam; B.A. Fordham University.

*The authors would like to thank the participants of the CUNY School of Law Faculty Forum for their detailed and thoughtful comments on an earlier draft. Special thanks to our fabulous research assistants Alanna Doherty and Denis Buci for their invaluable research assistance.

Sarah was Rebecca's sister. Together they took care of Sarah's child, Ruth. The civil magistrate told her, "I disapprove of your union and I will not recognize it. Further, I will not weigh your union as a factor when making policy and therefore will provide you no benefits and protections with respect to it."

Aisha was also a "single mother," raising her child, Joshua, with her father, Ishmael (Joshua's grandfather). The civil magistrate told her, "I disapprove of your union and I will not recognize it. Further, I will not weigh your union as a factor when making policy and therefore will provide you no benefits and protections with respect to it."

Hillary sought to join Debra and Sappho as sister-wives in a polygamous relationship with their husband, Denis. The civil magistrate told her, "I disapprove of your union and I will not recognize it. Further, I will not weigh your union as a factor when making policy and therefore will provide you no benefits and protections with respect to it. Moreover, Hillary, I will lock you up."

Isa then approached, and with an eye on the magistrate who was so hurtful toward Hillary, said to the citizens, "that the hypocrite reign not, lest the people be ensnared."¹

INTRODUCTION

Laws and attitudes around marriage have changed drastically in our own history and are widely different across cultures. Same-sex marriage is now legal, polyamorous relationships are on the rise, and, as an empirical matter, marriage serves a different purpose than it did as little as forty years ago—marriage is no longer a prerequisite for sexual intimacy, cohabitation, or parenthood. There are no essential elements to a definition of marriage to which the State can appeal without arbitrarily restricting citizens' possibilities concerning their most intimate relationships. Therefore, because any State-sanctioned version of marriage will be arbitrary, as illustrated in the introductory vignette, the only justified form of marriage the State can sanction is marriage in the form of a contract, treated like any other contract.

From this premise, we propose a shift from "marriage" as a unique status with membership based on State

1. *Job* 34:30 (King James).

approval, to the broader notion of “household” as a contract with the parties themselves determining the members. Under this new legal approach, “households” supplant marriages as the atomistic factor in policymaking and social thinking. Households would replace marriages in receiving the State allocated benefits traditionally provided to married couples,² but the parties themselves would define who is a member of the household. Unlike marriage, the notion of contractual household formation does not depend on a sexual relationship. Equal treatment of independent relationships, free of State-imposed membership requirements, respects autonomy and diversity. Household constitution is grounded in voluntary choice and subject to the standard contract defenses concerned with illusory assent.

Adducing the endless variety of intimate relations throughout history and across cultures, coupled with the principle that citizens should be free to pursue intimate arrangements fit for them, we set out to justify the claim that formal recognition of family formation should not be limited to couples, but must include the freedom to pursue arrangements involving more than two people. The State no longer regulates legally recognized family relations by sex, gender, race, continuity, and marital property. We argue that the regulation of number is equally ripe for reform. Insofar as there is only one form of marriage, it cannot fairly be said that the decision to enter that marriage is a choice in the meaningful sense, since true choice demands alternative feasible arrangements. When the civil magistrate endows preferential treatment on one marital arrangement, the supreme power of the State’s coercive capacity unduly influences one’s choice.

2. We see a compelling argument that the State should not confer any special benefits based on relationship status, but should rather provide basic protections to all citizens. However, this Article stops short of proposing the complete elimination of marriage. Instead, to the extent that marriage exists, and as long as the State imposes obligations and grants benefits to married people, we propose expanding the categories of people who qualify.

We justify our approach on established principles of political liberalism and classical contract law, finding common trends toward openness and autonomy between the two traditions. A central tenet of political liberalism is State neutrality with respect to “the good life,” whereby the State provides the conditions for the actualization of human purposes without sanctioning one form of life over another.³ Especially in a pluralistic society such as the United States, for the State to favor this or that form of life is either to discriminate against those who live differently or to narrow the range of options for citizens arbitrarily, thereby supplanting organic society’s variety and richness of human life with a prescribed homogeneity. Likewise, principles of contract law—autonomy, self-determination, willing cooperation, and consent to association—also demand an absence of arbitrary restrictions on private choice.

Nonetheless, that there are three parties to the marriage contract, two spouses and the State, secures for the State the power not only to recognize, but also to design family relationships, promoting one way of life among many possibilities.⁴ The State legally favors traditionally married couples in areas as varied as tax preferences,⁵ evidentiary privileges,⁶ immigration status,⁷ medical issues,⁸

3. JOHN RAWLS, *POLITICAL LIBERALISM* 4–6 (1993).

4. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (noting that, “[i]n a real sense, there are three partners to every civil marriage: two willing spouses and an approving State”).

5. There are approximately fifty-nine provisions in the Federal Income Tax Code in which tax liability depends on marital status. U.S. GEN. ACCOUNTING OFFICE, *GAO/GGD-96-175 TAX ADMINISTRATION: INCOME TAX TREATMENT OF MARRIED AND SINGLE INDIVIDUALS* 3 (1996).

6. Married spouses are entitled to both spousal immunity and privileged confidential marital communications under the Federal Rules of Evidence. *See* FED. R. EVID. 501; FED. R. EVID. 501 advisory committee’s notes to 1974 enactment.

7. Unmarried couples do not have the ability to petition for their alien partner under current immigration laws. 8 U.S.C. § 1101(a)(15)(k) (2012).

8. For example, married couples benefit from the Family and Medical Leave

government benefits such as Social Security,⁹ hospital visits,¹⁰ inheritance,¹¹ wrongful death and loss of consortium actions,¹² and bankruptcy protections,¹³ among others.¹⁴ In addition, neither Title VII¹⁵ nor the Fair Housing Act¹⁶ prohibits marital status discrimination.¹⁷ The 1990s welfare reform particularly favored marriage and hurt unmarried women by incentivizing states to reduce out of wedlock

Act (FMLA), which requires covered employers to grant employees up to twelve weeks of unpaid leave per year for the care of an immediate family member with a serious medical condition. While the FMLA has a broad definition of child, including the child of a person standing in *loco parentis*, the term “spouse” is limited to husband and wife. 29 U.S.C. § 2611(12)–(13) (2012).

9. When no other condition applies, Social Security benefits pass to a surviving spouse so long as they have been married for at least nine months. 42 U.S.C. § 416(c) (2012).

10. The most famous case is that of Sharon Kowalski, in which her parents were able to legally deny her same-sex partner guardianship and hospital visitation. *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App. 1986).

11. Among other estate distribution benefits, married couples are entitled to a tenancy by the entirety when their partner dies, JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 133 (2d ed. 2007), and benefit from a marital tax deduction from estate and gift taxes for all property left to a spouse. 26 U.S.C. §§ 2056, 2523 (2012).

12. Many states do not provide wrongful death standing to non-marital partners, and even if a state does provide such rights, the benefits are extended only to those who register and not to all non-marital couples. John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L. J. 171, 172 (2005).

13. A husband and wife can opt to file for bankruptcy jointly. 11 U.S.C. § 302 (2012).

14. Children of married couples are also unduly privileged. Laws emanating from the prevailing law towards marriage generally have created classifications between legitimate and illegitimate children, in many cases to the detriment of children born to unmarried parents. For example, in immigration law, children born out of wedlock must establish paternity, whereas a child born in wedlock is presumed to be the offspring of the husband. 8 U.S.C. § 1101 (b)(1)(A)–(D) (2012). The presumption is yet another coercive measure pushing people toward a specifically designed end.

15. 42 U.S.C. § 2000e (2012).

16. *Id.* §§ 3601–3619.

17. Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 790 (2002).

births.¹⁸ Social policy does more than “nudge” individuals into recognized marital relations.

Privileging married persons with government benefits and special taxation treatment violates basic principles of political liberalism.¹⁹ With regard to family law in general, and the law around marriage formation in particular, two questions arise. First, an empirical question: Does the law restrict or unduly burden otherwise private, organic institutional conduct? And second, a normative question: If the law does in fact restrict such conduct, is the restricted conduct harmful or unjust? If not, the State is violating basic principles of human dignity and autonomy by interfering with private, free choice. We will show the State’s privileging of monogamous marital relations is based not on the grounds that alternative forms of relationships are inherently harmful, but rather, on parochial grounds. We propose that the criminalization and non-recognition of multiple marriage or polyamorous marital relationships is, for example, motivated by religious animus and “proper” Victorian ethics rather than legitimate state ends.

Marriage is most fairly and justly conceived as a contract because the principles and values underpinning contract law

18. Ruthann Robson, *Compulsory Matrimony*, in *FEMINIST AND QUEER LEGAL THEORY* 313, 317–18 (Martha Albertson Fineman et al. eds., 2009).

19. See generally ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 168 (2012) (arguing that marriage should be modeled on friendship rather than romantic union); CLARE CHAMBERS, *AGAINST MARRIAGE: AN EGALITARIAN DEFENCE OF THE MARRIAGE-FREE STATE* (2017) (arguing that civil marriage violates liberal neutrality); TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* 7 (2010) (arguing that civil marriage privileges some views of the good life at the expense of others); Jeremy R. Garrett, *Marriage Unhitched from the State: A Defense*, 23 *PUB. AFF. Q.* 161, 167–68 (2009) (arguing that civil marriage devalues “alternative ways of life, including living singly, cohabiting, and other forms of nonrecognized partnering.”). But see Simon Cabulea May, *Liberal Neutrality and Civil Marriage*, in *AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS* 9 (Elizabeth Brake ed., 2016) [hereinafter *AFTER MARRIAGE*] (offering a defense of marriage as compatible with liberalism); Ralph Wedgwood, *Is Civil Marriage Illiberal?*, in *AFTER MARRIAGE*, *supra* note 19, at 29 (offering a defense of marriage as compatible with liberalism).

are borrowed from a more general conception of a free human being.²⁰ The formalization of intimate relations and family formation is so central to one's identity that general principles of human freedom are replaced by parochial institutional conceptions of "proper" conduct only at the price of selling short human dignity and autonomy. A just spectrum correlates the degree of autonomy warranted with the strength of the privacy claim.

Those critical of contract as panacea might argue that, because women contract from an already subordinated position, modern patriarchy is legitimized through contract,²¹ and therefore our contractual paradigmatic method is naïve. Carole Pateman argues in the influential *Sexual Contract*, for example, that "for marriage to become merely a contract of sexual use . . . would mark the political defeat of women *as women*."²² Such criticism, however, is rendered moot when we decouple marriage from sexuality entirely and take the household as the central unit, permitting associations of women, associations of men, mixed polyamorous arrangements, and even modern polygamy. The end of marital rape exceptions, the existence of which Pateman heavily relies on for her claim that civil contract secures male sex-right, was the first step in decoupling sexuality from marriage.²³ We have many more steps ahead.

20. Others have argued for the abolition of marriage as a legal category and promoted the use of contract instead. *See, e.g.*, MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995). *See generally* LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* 255–333 (1981).

21. *E.g.*, CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988).

22. *Id.* at 187. For Pateman, the correspondence of "man" with "individual" is so embedded in our political and legal culture that to make a "woman" an individual is to make women like men, thereby denying concrete sexual difference. Pateman argues the social contract the "canonical" theorists hypothesized included, in addition to the creation of civil society among men, the transformation of man's "natural right over women into the security of civil patriarchal right." *Id.* at 6.

23. *Id.* at 7.

Polygamy is one feasible alternative to monogamy that tests our allegiance to basic principles of liberalism and classical contract law.²⁴ It is true that historically, polygamous relationships have been characterized by exploitation and oppression of women, and that the practice of polygamy often coincides with crimes targeting women and children, such as incest, sexual assault, statutory rape, and failure to pay child support.²⁵ But inequality within the household and oppressive patriarchal forces are not inherent to polygamy any more than exploitation of workers is inherent to a free market. Just as pre-existing inequalities, concentrated wealth, and competing job applicants with little bargaining power create the conditions for the exploitation of workers, patriarchal ideology, religious fanaticism, laws and norms limiting the education and professionalization of women, and economic dependence on men create the conditions for exploitation of women in polygamous (and monogamous) marriage.²⁶ Proper polygamy—the right to marry multiple, consenting, age-appropriate partners of whatever gender—is not inherently harmful or unjust.

24. A variety of other scholars have argued for state recognition of polygamy. See, e.g., Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 2 (2014) (setting out “a regulatory scheme that not only legalizes polygamy, but also develops regulatory rules to ensure consent, prevent unequal bargaining power between the parties, and protect individual rights”); Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, 8 J. MORAL PHIL. 246 (2011); Peter de Marneffe, *Liberty and Polygamy*, in AFTER MARRIAGE, *supra* note 19, at 125 (arguing that although polygamy should not be legally recognized, it should nonetheless be decriminalized); Laurie Shrage, *Polygamy, Privacy, and Equality*, in AFTER MARRIAGE, *supra* note 19, at 160 (arguing that problems of oppression posed by polygamy are no different from those posed by monogamy, and making the case for egalitarian polygamy and bigamy).

25. See generally Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 239–45 (2001).

26. See *infra* notes 177–81 and accompanying text.

Traditionally oppressive forms of polygamy have no bearing on the issue of whether, within the liberal paradigm, polygamy as such is morally permissible and whether it should be legally so. Americans' immediate associations of polygamy with the *other* race of people or the *other* religion are cause for initial skepticism of our intuitions about what is unjust or harmful.

Important clarifications help specify the nature of our argument. First, we are not arguing that a world with more multiple marriage is preferable to a world with less; rather, we argue for the moral and legal *permissibility*²⁷ of various household arrangements for the sake of actual adherence to principles of liberalism and classical contract law. Other arrangements deserving of equal State treatment include nonsexual partnerships, temporary marriages, polyamorous arrangements, co-habiting couples, and multi-generational cohabitation, such as a mother and grandmother raising a child, among others—all equally “households.” We make the larger claim that the law around marriage should be reformed so as to better resemble the classical contract paradigm, permitting the parties to contract for whatever arrangements that are both fit for them and morally permissible. Our preoccupation with State neutrality is based on the fundamental principle of justice as fairness.

Second, monogamy, polygamy, and polyamory²⁸ are normatively idealized forms of life debased by their

27. Moral theory generally consists of three categories: (1) moral; (2) immoral; and (3) morally permissible. ANNE THOMSON, *CRITICAL REASONING IN ETHICS: A PRACTICAL INTRODUCTION* 12 (1999). For instance, when walking by a pond and seeing a drowning child, the moral course of action would be to help the child and the immoral course of action would be to ignore the child. But what is the moral status of the choice to sing the song *Hero*, written by Enrique Iglesias (2001), while saving the child? Doing so would be neither moral nor immoral. Singing would neither help nor hurt the child nor anyone else. Thus, singing *Hero* while saving the child would be merely morally permissible. *Id.*

28. Polyamory is the practice of having ongoing intimate and/or romantic relationships with more than one person, whether independent relationships or unions of three or more people. Ann Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1479 (2011).

corresponding actual practices. Christianity and Islam are also normatively idealized forms of life, as are republicanism and democracy. All have meanings inherently contested by their participants but mean in each case that form of life for which human beings may choose to strive to achieve. Just as specific instances of “Islamic terrorism” or repressive theocracy do not condemn Islam, specific examples of patriarchal polygamous practices do not condemn multiple marriage as such.

Thus informed by the virtues and vision of political liberalism and freedom of contract, we propose two general principles of law around marriage or civil unions. The first principle is that the state should involve itself no further in family formation than to enforce private contractual arrangements made on the basis of meaningful choice. “Meaningful choice” here means the free pursuit of one option among conceived feasible alternatives. That is, a choice is only a choice if other options are available. The second principle is that in the area of family law, the law should accommodate organic society’s spontaneous forms rather than the other way around. Here, abstract conceptions of marriage are often at odds with the reality. Some features of current marriage law have become anachronistic oddities given the current state of society, especially considering the progress made on women’s rights.²⁹ The law should follow the cultural shift away from

29. As examples, marital property is the lingering effect of coverture and the reluctance of law enforcement to effectively criminalize abuse within the family is a lingering effect of marital rape exemptions. Relatedly, continued income gaps between men and women are the lingering effect of assumed gender roles within the family where the husband concerns himself with the public sphere and the wife with the private sphere, even though more women are graduating from college with professional degrees than ever. *See* INSTITUTE OF EDUCATIONAL SERVICES: NATIONAL CENTER FOR EDUCATION STATISTICS, DEGREES CONFERRED BY DEGREE-GRANTING POSTSECONDARY INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENT (2013), https://nces.ed.gov/programs/digest/d13/tables/dt13_318.10.asp (reporting that in 2012, 57.3% of those who graduated with a bachelor’s degree were women as compared to 55.1% in 1995; and 59.9% of those who earned a master’s degree were women in 2012 as compared to 55.5% in 1995).

marriage and toward family formations as varied as single parenthood, romantic cohabitation without marriage, and polyamory.

The circularity of the claim that marriage should be between two persons because marriage is defined as consisting of two people should be clear. What is the source of the definition? Can anything but tradition and prejudice make it ostensibly legitimate? Arguments on both sides, that evolutionary biology and evolutionary psychology produce evidence that monogamy is either, for the most part, “natural”³⁰ or “unnatural,”³¹ commit the naturalistic fallacy³² and hardly factor into our analysis.

Here, similarly, we seek to de-naturalize and impregnate with possibility the idea of “marriage” to the point that it is more precisely called a household. While traditional marriage will likely remain popular, the broader notion of households justly and fairly accommodates the endless variety of morally permissible family forms determined by the participants.

Accordingly, based on overlapping principles of political liberalism and classical contract law, Part I asserts that the State should not be involved with family formation other than to enforce private contracts. This Section surveys the long history of the State’s unjustified intrusion into the institution of marriage as well as current trends related to marriage and polygamy, highlighting the importance of State neutrality and the need for reform. Part II then proposes a shift from marriage as a status to household as a contract. As a model, we look to the law of business partnerships, which does not limit the number of participants but allows the business relationship to be

30. See ROBERT WRIGHT, *THE MORAL ANIMAL* 59 (1994).

31. CHRISTOPHER RYAN & CACILDA JETHÁ, *SEX AT DAWN: THE PREHISTORIC ORIGINS OF MODERN SEXUALITY* 46 (2010).

32. DAVID HUME, *A TREATISE OF HUMAN NATURE* 331–37 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1739).

defined largely by the parties themselves.

Arguably, the greatest virtue of the United States is the slow but steady trend toward openness and tolerance. The trend does not skip over marriage law. From coverture to marital property to no fault divorce to gay marriage and cohabitation, we see a line of progress far from its finale. Just as our society has been made more just by the expansion of the concept of “citizen,” so too will the expansion of the concept of marriage serve the ends of a just society. This is so, even if the multi-cultural window is opened to family forms as objectionable to some as disagreeable speech protected by the First Amendment, and even if one day expanded to the point of abolition.

I. POLITICAL LIBERALISM AND CLASSICAL CONTRACT LAW: GOVERNMENT ROLE IN FAMILY FORMATION

Spanning the tradition of political liberalism from the seventeenth century until today is the presumption that the state must sustain the conditions for actualizing the widest feasible array of conceptions of the good life, ways of being in the world, and life projects that do not infringe the rights of others.³³ In other words, freedom and reciprocity go hand-in-hand. Freedom for one presupposes freedom for all. Rawls, for instance, theorizes the “reasonable” citizen “ready to propose principles and standards as fair terms of cooperation and to abide by them willingly given the assurance that others will likewise do so.”³⁴ Political liberalism, then, sees the State as neutral with regard to the good life and what people value; as a socio-historical fact, the United States is so large, complex, and diverse that empirically there can be

33. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF 1789]; JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 8–11 (1869).

34. RAWLS, *supra* note 3, at 49.

no consensus on these matters.³⁵ The law should not restrict or unduly burden otherwise private, organic institutional conduct unless the restricted conduct is harmful or unjust. If the potential harm is merely speculative, interference is not warranted, especially where there is a strong countervailing policy that furthers the good life.

It is likewise a fundamental principle of classical contract law that individuals should be free to set their own contract terms and to engage in free exchange of goods and services, without interference from the government.³⁶ This rule reflects the belief that individual choice and autonomy are fundamental to human life, and courts should not impose upon the parties their own views regarding the value of goods and services exchanged, as long as the contracting parties voluntarily and freely assented to such terms.³⁷

Marriage and family formation illustrate the value of the principles of individual autonomy and State neutrality. Without neutrality, there is great risk that such a fundamentally basic organizing principle for living as household formation would be subordinated to governmental social and economic interests: dis-incentivizing single motherhood because of the “drain” on public services or criminalizing polygamy because of the myth of a “Judeo-Christian” foundation to our laws, for instance.

With respect to marriage and intimate relationships, social experience strongly suggests that people will desire different and varied types of intimate relationships and forums for raising their children, or abstain from defined

35. *Id.* at 36 (stating that “the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy”).

36. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE* (1981) (claiming that individual autonomy is a central precondition to individual freedom); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (claiming that individual autonomy is seen as a paramount social value).

37. FRIED, *supra* note 36; FRIEDMAN, *supra* note 36.

relationships altogether. In fact, in a pluralistic, open, and liberal society such as ours, we should expect people to choose to commit to relationships that many of us find counterintuitive because human beings are animals with feelings, not rational wealth-maximizers. Thus, we can reasonably expect the variety of rich human characteristics and experiences that critics of plural marriage fear will be lost due to the specter of resurgent religious control over family formation. Further, we can reasonably expect some people to reject the notion that monogamy is always a good thing.³⁸

Despite the rich variety of human conceptions of the good life with respect to relationships, the State privileges monogamous dyads by granting vast economic and legal benefits to couples that register their relationships with the State³⁹ (while generally staying neutral regarding other forms of caring relationships—implicitly devaluing those other non-privileged relationships). Judicial opinions at all levels extol the virtues of monogamous matrimony and the dangers of alternative household formations (often celebrating marriage in a way that exposes religious influence), and the State has explicitly regulated and criminalized polygamy, a type of personal relationship arrangement that it has deemed to be against public policy.⁴⁰ Particularly analyzed as coupled together, by privileging one form of life while criminalizing another, the State, in the area of law around marriage, clearly and obviously violates the principle of neutrality.

In this Section we set out to show the State's regulation

38. See Isiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 169–70 (1970) (explaining that humans choose between ultimate values); RYAN & JETHÁ, *supra* note 31, at 5 (2010) (noting that “[t]he frantic sexual hypocrisy in America is inexplicable if we adhere to traditional models of human sexuality insisting that monogamy is natural, marriage is a human universal, and any family structure other than the nuclear is aberrant”).

39. See *supra* notes 5–14 and accompanying text.

40. See *generally infra* Section II.A.1.b.

of marriage arbitrarily restricts conduct by narrowing the range of legal, feasible, and therefore conceivable family formations. The key word here is “arbitrary.” Criminal law seeks to prohibit conduct and narrow the range of human possibility non-arbitrarily, because to do otherwise would risk clearly identifiable harms. The State’s justifications for restricting marriage to dyads are arbitrary in that “the stable family” masks residual puritanism, and “the best interests of children” masks the intent to rationalize heteronormativity, as it was during the “gay marriage debate.” In each case, appeals to social prejudices with ostensibly neutral language are the means by which democratic processes favor one way of life over another.

Section A surveys the long history of State interference with private relationships through a vast array of laws and regulations providing economic and legal benefits to those who marry, and criminalizing marriage among more than two people. Section A then looks at current trends surrounding marriage, highlighting the existing illusion of liberal progress. Although there is no longer coverture and there are no longer marital rape exemptions, problems such as domestic violence and gendered marital roles remain. This Section then explains why such State interference is unjustified and sets out the need for State neutrality. The overarching themes here are the State’s unjustified narrow conception of marriage and its intrusion into personal, intimate relations.

Section B proposes the idea of marriage as a private institution, which would grant participants autonomy to make individual choices based on their unique individual needs and desires. In this Section we ultimately set out to show why the various other unprivileged intimate relationships, such as polygamy and polyamory, are not inherently harmful, and should be offered as meaningful alternatives to traditional two-person monogamous marriage. Here, the overarching themes are, as opposed to unjustified essentialism and intrusion, a justified approach

based on established contract law principles and an openness to forms of life.

A. *Marriage in the Liberal State*

The State has a long history of regulating marriage in order to promote its financial interests and an equally long history in prohibiting polygamy in order to promote sexual behavioral norms and the “best interests” of women and children. The State endorses one form among feasible alternative matrimonial ideals, advancing “matrimony as an ideal type of personal relationship.”⁴¹ By promoting civil marriage, the State endorses one conception of the good life, advancing the view that civil marriage gives meaning and value to life and is superior to other types of relationships. In doing so, the State “ignores alternative ideals of relationship[:] . . . close dyadic friendships, small group family units, or networks of multiple, significant nonexclusive relationships that provide emotional support, caretaking, and intimacy,”⁴² not to mention living singly. The prevailing legal approach is unjustified in confusing the parochial for the universal and violating the principle of neutrality. It is also exclusive in that marital terms accord to a particular image of the good life and deny formal recognition to feasible alternative arrangements.

1. Illiberal History of State Interference in Marriage and Preference for Monogamy

a. *Marriage*

A genealogical approach to understanding marriage’s role in society opens a window to a clearer view of how social norms and public policy have restricted feasible alternative family forms and trapped individuals into a single, normatively idealized form of life. Some of these same

41. Cabulea May, *supra* note 19, at 9.

42. BRAKE, *supra* note 19, at 168. See *supra* notes 5–14 and accompanying text.

individuals, under a more open legal regime, may have lived differently—an injustice of no small measure. The injustice is magnified when considering the injustices historically associated with the State-sanctioned monopolistic monogamous marriage.

Historically, patriarchy has used marriage to deny women liberally conceived rights and personhood with reference to men, or rather “public society.”⁴³ A free woman’s legal rights depended on her marital status;⁴⁴ single women had more rights than married women at common law.⁴⁵ As long as a woman remained unmarried she could enter into contracts, buy and sell real estate, and accumulate personal property, which included cash, stocks, and livestock.⁴⁶ An unmarried woman could also sue or be sued, write wills, and act as an executor of an estate.⁴⁷ Under the common law system of coverture, once married, a woman lost her autonomy and was subsumed under her husband’s identity.⁴⁸ The husband acquired an estate in the wife’s real property for the duration of the marriage and he was entitled to sole possession and control of any property that the wife owned.⁴⁹

At common law the husband also enjoyed substantial

43. Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 170 (1999).

44. Enslaved black women were not allowed to marry, have custody of children, own property, control their bodies, or earn money from their labor. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307–11 (2006).

45. Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN’S RTS. L. REP. 181, 183–87 (2006).

46. *Id.* at 183–84.

47. *Id.* at 183.

48. Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979). *See also* *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring).

49. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1661 (2003).

rights over the body of his wife. Husbands were allowed to punish their wives physically as long as the corporal punishment did not cause permanent injury.⁵⁰ Husbands were also legally permitted to restrict their wives' movements; rape their wives; physically restrain wives from leaving the household; force them to come back to the household if they left; and conclusively determine where the couple would reside.⁵¹

Until the late twentieth century, marital rape exemption laws—laws that allowed husbands to brutally rape their wives without fear of prosecution⁵²—existed under the statutory law of every state and the common law.⁵³ These laws were justified by the idea that there was a “marital right” to sexual intercourse that wives irrevocably consented to upon marriage.⁵⁴ Further, since wives were considered the property of their husbands and since their identities merged upon marriage, rape was impossible—at best it was a crime against the husband's property interest.⁵⁵ The State was thought to have no right to legislate the private relationships between husband and wife.⁵⁶ Furthermore, for the majority of our country's history, “a husband's use of physical violence to exert power and control over his wife was not conceptualized as domestic violence.”⁵⁷ In fact, “[before] 1970, the term ‘domestic violence’ referred to ghetto riots and urban terrorism, not the abuse of women by their intimate

50. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389 (2000).

51. *Id.* at 1390–92.

52. Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1825 (2011).

53. *See id.* at 1819.

54. *Id.* at 1825.

55. *Id.* at 1826.

56. *Id.* at 1826–27.

57. Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 32 (2009).

partners.”⁵⁸ Many of the same beliefs that supported the justification for marital rape exemption laws also justified a husband’s entitlement “to correct [his wife’s] behavior as he would that of a servant or child.”⁵⁹

The history of marriage before the latter part of the twentieth century is an important factor in the evaluation of claims that in virtue of polygamy or co-habitation, or polyamorous unions, patriarchy will reign. Feminism, secularization, and the trend toward tolerance mitigated the harsh effects of monogamous marriage, as it will other arrangements, including polygamy, insofar as people will voluntarily choose it.

b. *The Monogamy Monopoly*

The State has demonstrated an unfair preference for monogamy, one feasible form of life among others. As an example, consider the history of the law of polygamy. The history of State animus toward and criminalization of polygamy is also long. Polygamy is one of six important historical bars to civil marriage in the United States: (1) during the period of slavery in the United States, marriage between slaves, though informally celebrated, was not legally recognized; (2) historically marriage across racial lines was barred; (3) until recently, same-sex marriage was not legally recognized; (4) incest or family marriage is barred in every state in some form;⁶⁰ (5) marriage of minors is not recognized; and (6) polygamous marriages are not legal.⁶¹ Of those, incest, age, and polygamy are the only bars to

58. Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 155 (2004) (citing Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1290 n.42 (2000)).

59. Sack, *supra* note 57, at 33.

60. Harvard Law Review Association, *Inbred Obscurity: Improving Incest Laws in the Shadow of the “Sexual Family,”* 119 HARV. L. REV. 2464, 2465 (2006).

61. Calhoun, *supra* note 24, at 1024.

marriage that remain.⁶²

In response to the Mormon practice of plural marriage in the Utah Territory,⁶³ the federal government first began to regulate polygamous marriage in 1862, with the Morrill Anti-Bigamy Act of 1862,⁶⁴ making bigamy (defined as “when a person with a living husband or wife marries another person”⁶⁵) a federal offense. The Morrill Anti-Bigamy Act, however, did little to curtail bigamy, since “Mormon juries refused to convict their peers.”⁶⁶ Even so, anti-polygamy sentiment in the rest of the country was high, and the federal government persisted in making life difficult for polygamists. This continued attention paid to anti-polygamy efforts by the federal government ultimately resulted in a legal challenge to the law by Mormon leaders.

In 1878, in *Reynolds v. United States*,⁶⁷ the Supreme Court held that polygamy was not protected under the Free

62. We justify permitting polygamous marriage while rejecting incestuous matrimony and marriage of minors based on the proven identifiable harms to incestuously born children and the emotional and intellectual incapacity of minors. However, our proposal embraces sibling partnerships and inter-generational households and does not rule out arrangements between siblings and cousins not intended to result in parenthood. The precise solution to the age and incest issues is beyond the scope of this paper’s broad proposal for a paradigmatic shift in the law.

63. Though the primary targets of American polygamy laws have been Mormon populations, some Native Americans communities also engage in the practice of polygamy, but their tribal marriage practices supersede state law. See *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914) (holding that “a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages,” even if in conflict with state law).

64. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

65. Ashley E. Morin, *Use It or Lose It: The Enforcement of Polygamy Laws in America*, 66 RUTGERS L. REV. 497, 502 (2014).

66. *Id.*

67. 98 U.S. 145, 166 (1878).

Exercise Clause,⁶⁸ explaining that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.” The *Reynolds* decision “galvanized the anti-polygamy movement further,” causing “reformers of all kinds—women’s rights advocates, educators, church leaders, politicians, presidential platforms, state legislatures, the Supreme Court, and the American Congress—[to] harshly condemn[] polygamy.”⁶⁹ In 1882, Congress passed the Edmunds Anti-Polygamy Act,⁷⁰ which reinforced the Morrill Anti-Bigamy Act by adding several provisions to help enforce polygamy prohibition. The Edmunds Anti-Polygamy Act prohibited bigamous cohabitation, thus removing the need to prove that actual marriages had occurred.⁷¹ The Act also stated that anyone who believed in bigamy was unfit to serve as a juror or hold public office.⁷² These additions ultimately increased the number of indictments.⁷³

After these crackdowns on polygamy, “Mormons continued to fight federal laws aimed at curtailing polygamy, but they were largely unsuccessful.”⁷⁴ Ultimately, in 1890, in *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*,⁷⁵ the Supreme Court upheld the Edmunds Anti-Polygamy Act and disincorporated the Latter Day Saints (LDS) Church. At this point, the Mormon Church appeared to reject polygamy, but many Mormons continued to practice it. But when the Church threatened to excommunicate polygamists in the 1930s, the “vast majority”

68. U.S. CONST. amend. I.

69. Morin, *supra* note 65, at 503–04 (internal quotations and citations omitted).

70. Edmunds Anti-Polygamy Act of 1882, Pub L. No. 47-47, 22 Stat. 30 (1882).

71. *See id.*

72. *Id.*

73. Morin, *supra* note 65, at 504.

74. *Id.*

75. 136 U.S. 1, 64–66 (1890).

of Mormons finally abandoned the practice.⁷⁶ There remained, however, a small group of Mormons who continued to practice polygamy. These fundamentalists “do not believe the Church of Latter-day Saints had the authority to issue a manifesto in 1890 banning plural unions” and that “if an ‘eternal principle’ was valid at one time it was valid for all times.”⁷⁷ Accordingly, these fundamentalist communities continue today to practice polygamy, as a “fundamental tenet of the Mormon faith.”⁷⁸

Today, although polygamy remains illegal in all fifty states, laws proscribing polygamy are rarely enforced—other than the prosecution of a few infamous fundamentalist leaders.⁷⁹ The lack of rigid enforcement does not discount the fact that the history of the criminalization of polygamy has influenced public opinion; state criminalization statutes remain popular. Polygamy has been widely viewed as

76. The LDS Church has asserted that it has no interest in reinstating the practice of polygamy, having recently conceded in a brief to the United States Supreme Court that “[t]he question of plural marriage, of course, was addressed in *Reynolds v. United States*, 98 U.S. 145 (1878).” Brief of The Church of Jesus Christ of Latter-Day Saints as Amicus Curiae in Support of Respondents at n.11, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074). In that brief, the LDS church reiterated that “[t]he practice of plural marriage was abandoned by the Church in 1890, and in filing this amicus brief the Church has no interest in revisiting this issue,” and explained that stories about Mormon polygamy in the media were generally about “splinter groups” that had left the church. *Id.*

77. Morin, *supra* note 65, at 504.

78. *Id.*

79. The lack of law enforcement raises questions about the criminal status of the practice:

[b]y disregarding and selectively enforcing polygamy laws, state governments are failing to advance the purported protective goals of polygamy legislation and negating the purpose of the laws, while also restraining law-abiding citizens from entering into the practice.] Thus, the current state of polygamy legislation operates in an illogical middle ground and undermines the legitimacy of the criminal justice system.

Morin, *supra* note 65, at 500–01. There is an argument to be made that in light of the lack of enforcement, polygamous relationships should be decriminalized, if only to legitimize the criminal justice system. *Id.*

morally inferior by a majority of the world:

Most Americans still view polygamy as something nefarious, much like slavery, its “twin.” In a Gallup Poll taken in May 2003, just one month prior to the Supreme Court’s decision in *Lawrence v. Texas*, overturning that state’s ban on same-sex sodomy, ninety-two percent of adults surveyed nationwide considered “polygamy, when one husband has more than one wife at the same time” —or, more precisely, polygyny—to be “morally wrong.”⁸⁰

Despite ever-increasing divorce rates, monogamous marriage is “the preferred—even legally and socially mandated—marital lifestyle in so much of the modern world[.]”⁸¹ Monogamous marriage was initially and historically based primarily on economic conditions,⁸² meeting financial needs of couples (and women in particular) and meeting the parenting needs of families. Monogamy is also thought to reduce male reproductive competition and suppress intra-sexual competition among men for brides, which shrinks the size of the pool of low-status, risk-oriented, unmarried men.⁸³ The result is lower rates of crime (including rape, murder, assault, and robbery) and personal abuse.⁸⁴ On the flip side, there is thought to be “greater parental investment (especially male), economic productivity ([GDP per capita]), and female equality.”⁸⁵ By increasing the relatedness within the household, monogamy may also reduce intra-household conflict, leading to lower rates of

80. Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101, 104 (2006) (internal citations omitted).

81. DAVID P. BARASH, *OUT OF EDEN* 109 (2016).

82. *Id.* at 121.

83. Joseph Henrich et al., *The Puzzle of Monogamous Marriage*, 367 ROYAL SOCIETY PUBL’G 657, 658 (2012). See also DAVID M. BUSS, *THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* 427–439 (2d ed. 2015); June Carbone, *Understanding the Biological Basis of Commitment: Does One Size Fit All?*, 25 WOMEN’S RTS. L. REP. 179, 181 (2004); Patrick Coleman, *Blame Monogamy for Male Infertility*, FATHERLY (Apr. 19, 2017, 10:53 AM), <https://www.fatherly.com/health-science/blame-monogamy-for-male-infertility/>.

84. Henrich, *supra* note 83, at 658.

85. *Id.*

child neglect, accidental death, and homicide.⁸⁶

While monogamous marriage is often idealized, the undeniable religiously-grounded history frequently appealed to by courts,⁸⁷ legislatures,⁸⁸ and executives,⁸⁹ contributes to the current framing of monogamy as valuable for its own sake, independent of context and the participants. For example, Christian values promote sexual fidelity, lifelong marriage, and parenthood, and the belief that cohabitation, premarital sex, divorce, unwed motherhood, and abortion are immoral behaviors is fundamental to many Western religions.⁹⁰

It is not unusual for politicians to invoke God in their defense of traditional monogamous marriage. In 2006, for example, Mike Pence, as head of the Republican Study Committee, supported a constitutional amendment that would have defined marriage as between a man and a woman and stated that “societal collapse was always brought about following an advent of the deterioration of marriage and family.”⁹¹ He went on to say that keeping gay people from marrying was not discrimination, “but an enforcement of ‘God’s idea.’”⁹² Mike Huckabee, the 44th Governor of

86. *Id.* at 657.

87. *See infra* notes 99–102 and accompanying text.

88. *See infra* note 98 and accompanying text.

89. *See infra* notes 91–94 and accompanying text.

90. *See, e.g.*, Dave Miller, *The Sacredness of Marriage*, APOLOGETICS PRESS, <https://www.apologeticspress.org/apcontent.aspx?category=7&article=1237> (last visited May 21, 2017) (arguing that “the breakdown of the traditional two-parent, biological husband-wife family is a major factor contributing to the overall moral, religious, and ethical decline of our country”); *see also* Daniel B. Gallagher, *The Sacredness of Marriage: A Lesson from the Pagans*, CRISIS MAGAZINE (Mar. 1, 2016), <http://www.crisismagazine.com/2016/the-sacredness-of-marriage-a-lesson-from-the-pagans> (putting forward the idea that “marriage between a man and a woman, and indeed monogamy itself, are contained in the natural law”).

91. Will Drabold, *Here’s What Mike Pence Said on LGBT Issues Over the Years*, TIME (Jul. 15, 2016) <http://time.com/4406337/mike-pence-gay-rights-lgbt-religious-freedom/>.

92. *Id.*

Arkansas, stated that “[f]or me... [marriage equality] is not just a political issue. It is a biblical issue.”⁹³ Randy Weber, a United States congressman from Texas, even wept at a prayer event in Washington, D.C. as he begged God to forgive the United States for legalizing same-sex marriage. He exclaimed, “[f]ather, we’ve trampled on your holy institution of holy matrimony and tried to rewrite what it is and we’ve called it an alternate lifestyle. . . father, oh father, please forgive us.”⁹⁴

Legislatures also invoke God to justify their polygamy legislation. The Morrill Anti-Bigamy Act,⁹⁵ The Edmunds Anti-Polygamy Act,⁹⁶ and the Edmunds-Tucker Act of 1887⁹⁷ all have religious foundations. For example, the legislative history of the Edmunds Tucker Act includes President Grover Cleveland’s emotional discussion of the issue of polygamy:

The Strength, the perpetuity, and the destiny of the nation rest upon our homes, established by the law of God, guarded by parental care, regulated by parental authority, and sanctified by parental love. These are not homes of polygamy. The mothers of our land, who rule the nation as they mold the characters and guide the actions of their sons, live according to God’s holy ordinances, and each, secure and happy in the exclusive love of the father of her children, sheds the warm light of true womanhood, unperverted and unpolluted, upon all within her pure and wholesome family circle. These are not the cheerless, crushed, and unwomanly mothers of polygamy. . . . There is no feature of this practice or the system which sanctions it which is not opposed to all that is of value in our

93. Bethany Grace Howe, *If Not God’s Authority, Whose? Where Did Marriage Come From*, HUFFINGTON POST (Sep. 5, 2015, 10:12 AM), http://www.huffingtonpost.com/raina-bowe/if-not-gods-authority-who_b_8090588.html.

94. Curtis M. Wong, *GOP Congressman Wept as He Begged God to Forgive U.S. for Marriage Equality*, HUFFINGTON POST (Apr. 28, 2017, 2:39 PM), http://www.huffingtonpost.com/entry/randy-weber-marriage-equality_us_59023d75e4b05c39767d0722.

95. Pub. L. No. 37-126, 12 Stat. 501 (1862).

96. Pub. L. No. 47-47, 22 Stat. 30 (1882).

97. Pub. L. No. 49-397, 24 Stat. 635 (1887).

institutions.⁹⁸

Pervasive views of monogamous, two-person marriage as “noble” and “sacred” can also be seen in most of the United States Supreme Court’s notable marriage cases. For instance, the 1888 United States Supreme Court called monogamous marriage “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress.”⁹⁹ In the mid-twentieth century, the Court opined that marriage is:

a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰⁰

Most recently, the 2015 Court, granting same-sex couples the right to marry, reasoned, “[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”¹⁰¹ The Court opined:

From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.¹⁰²

The *Obergefell* Court’s rhetoric about the sacredness of

98. 17 CONG. REC. 109, 119 (1886).

99. *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

100. *Griswold v. Conn.*, 381 U.S. 479, 486 (1965).

101. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

102. *Id.* at 2593–94.

marriage is high oratory hewing a huge hypocrisy, considering that this same sovereign body would quickly uphold criminal sanctions against Hillary's decision to accept Sappho's wish to be a "sister-wife" or prosecute anti-bigamy laws against Steve for intending to formalize his tantric trio with Gautauma and Bob.¹⁰³ Such rhetoric is especially hypocritical in that the unions this Court would not sanction simply seek fulfillment outside of the so-called "unique fulfillment" offered by a particular, though historically-rooted, conception of the good life and right way to live.

The particular conception of the good life and right way to live favored by the State parallels historical social prejudices. While marriage is seen as sacred, intimate relationships not culminating in marriage have historically been seen as "illicit"¹⁰⁴ or "meretricious,"¹⁰⁵ with participants thought to be "living in sin." This phrase, popularly associated with the attitude of the church, arises from the outdated idea that legal marriage is a prerequisite for conjugal relationships—and that conjugal relationships

103. See *supra* introductory vignette.

104. Illicit cohabitation is "an offense committed by an unmarried man and woman who live together as husband and wife and engage in sexual intercourse." *Illicit Cohabitation Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/i/illicit-cohabitation/> (last visited July 8, 2018). Though this offense does not exist in most states any more, and where it does, it is rarely prosecuted, the term is still sometimes used to refer to a couple who are not married to one another but "live together in circumstances that make the arrangement questionable on grounds of social propriety." *Id.* Illicit cohabitation is still sometimes a crime "when [it] amounts to public immorality and public scandal." *Id.*

105. A meretricious relationship is generally defined as a cohabitation that is marital in nature but not on paper. *Meretricious relationship*, BLACK'S LAW DICTIONARY (10th ed. 2014). When a former spouse and new partner live together without getting married, for example, their relationship is meretricious, and can affect the former spouse's legal rights with respect to alimony and child support. Generally, such a term has been used negatively to indicate a former spouse is "living in sin." Courts have historically disfavored private contractual alternatives to marriage, finding them contrary to public policy. 2 HOWARD O. HUNTER & KEITH A. ROWLEY, *Cases Rejecting Marvin Approach*, in MODERN LAW OF CONTRACTS § 24:8 (rev. ed. 2011) (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979)).

outside of marriage are sinful. For just one example, *Got Questions Ministries*, a Christian website that answers Bible questions, answered the question about whether living together before marriage is considered living in sin in this way:

Since the only form of lawful sexuality is the marriage of one man and one woman (Genesis 2:24; Matthew 19:5), then anything outside of marriage, whether it is adultery, premarital sex, homosexuality, or anything else, is unlawful, in other words, sin. Living together before marriage definitely falls into the category of fornication—sexual sin.¹⁰⁶

The religious framing of marriage unduly influences judicial policy outside of polygamy as well. For example, meretricious agreements, or private agreements governing non-marital sexual relationships, are still viewed by some courts as against public policy.¹⁰⁷ Particularly where the parties to a contract are a gay or lesbian couple, or an unmarried, cohabitating heterosexual couple, moral and social judgments about sexuality and loose sexual behavior can influence the court's analysis of the contractual issue at hand. Similarly, most courts do not view meretricious relationships the same way as marriage when it comes to the distribution of marital property. In Washington State, for example, laws involving distribution of marital property do not apply directly to division of property following a meretricious relationship (though courts may look to these laws for guidance).¹⁰⁸

Not surprisingly, then, adultery, which violates the

106. *Why is living together before marriage considered living in sin?*, GOT QUESTIONS, <https://www.gotquestions.org/living-in-sin.html> (last visited July 8, 2018).

107. Though post-*Marvin* contracts between cohabitants are now often enforceable, Elizabeth Hodges, Comment, *Will You "Contractually" Marry Me?*, 23 J. AM. ACAD. MATRIMONIAL LAW. 385, 391–92 (2010), there are still some states that refuse to enforce them. See, e.g., *Long v. Marino*, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983)).

108. *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995).

sacred bonds of marriage, is still a criminal act in twenty-one states (although rarely enforced),¹⁰⁹ and still very much considered a sin by many. The criminalization of certain types of sexual activity within a marriage is a vestige of the historical view that adultery is not simply “a breach of the nuptial vow” but rather “a crime against society”:

It is the destruction of all domestic confidence; the alienation of the affections of the wife from the husband; and the withdrawal of the protection and support of the father, from the child. It is the confusion of the issue, the corruption of the blood, casting upon a man the insufferable imposition of compelling him to maintain by his name, and with his property, as his own heir, the child of his worst enemy, which eminently distinguishes the crime of adultery from that of fornication. The true distinction between adultery and fornication, will be found to consist in this. That whenever the issue which may arise from the illicit intercourse, will be Legitimate, it is adultery: but on the contrary, if the issue will be a Bastard, it is fornication.¹¹⁰

Courts frequently base their judgments on this moral denunciation. For example, in 1981, a state appellate court in Louisiana upheld a verdict that found a mother “morally unfit” to have custody of her young daughter because the mother, while married, engaged in a course of open and public adultery in disregard of generally accepted moral principles.¹¹¹ Courts also consider adultery as marital fault weighing against the adulterer when determining equitable distribution. For example, in 2011, an appellate court in Mississippi upheld a trial court’s verdict that awarded the husband ninety percent of marital property after “weigh[ing] [the wife’s adultery] heavily against [her].”¹¹² The use of

109. Deborah L. Rhode, *Why is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html>.

110. *State v. Lash*, 16 N.J.L. 380, 383 (1838). In 1840, the Supreme Court of Wisconsin, prosecuted Hugh R. Hunter for violating an adultery statute, and stated that, “adultery is the sin of incontinence between persons, one or both of whom are married.” *Hunter v. United States*, Bur. 171 (Wis. 1840).

111. *Bonner v. Bonner*, 408 So. 2d 995, 998 (La. Ct. App. 1981).

112. *Bond v. Bond*, 2010-CA-00637-COA, 69 So. 3d 771, 772–73 (Miss. Ct. App.

adultery as marital fault extends to alimony as well. In 2014, an appellate court in South Carolina found that a trial court acted within its discretion when it denied alimony to a wife because her husband presented sufficient corroborating testimony to demonstrate that she had committed adultery.¹¹³

Another way courts hand down moral judgment about non-marital relationships is through the preferential economic treatment of married couples referred to in Section I.A.1.a above.¹¹⁴ Most of the government-provided legal benefits offered to married couples have not been afforded to those in meretricious relationships. For example, after Michigan stopped recognizing any common-law marriage contracted after January 1, 1957, property rights afforded to a legally married couple have not been extended to those engaged in meretricious relationships.¹¹⁵

Based on these historical and traditional views, the State's ostensible justification for the criminalization of polygamy as necessary to uphold and protect the sacred institution of marriage is nearer the "idealized normative ideal" of theocracy, than to liberal democracy. For example, as early as 1890, the Supreme Court held that "[t]he state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced."¹¹⁶ Later, in *Reynolds*, the Court justified its holding criminalizing polygamy by noting that marriage by its nature is "a sacred obligation,"¹¹⁷ and that polygamy has always been "an

2011).

113. *Mick-Skaggs v. Skaggs*, 766 S.E.2d 870, 874 (S.C. Ct. App. 2014).

114. *See supra* notes 43–49 and accompanying text.

115. *Carnes v. Sheldon*, 311 N.W.2d 747, 750 (Mich. Ct. App. 1981).

116. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 50 (1890).

117. *Reynolds v. United States*, 98 U.S. 145, 165 (1878). The *Reynolds* Court

offence against society.”¹¹⁸ Here, the offense against society is still functionally a supposed offense against “the sacred” with no identifiable harm—the paradigmatic theocratic reasoning:

Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.¹¹⁹

The *Maynard* Court similarly used language relating to the sanctity of marriage to justify its decision to criminalize polygamy. The Court noted:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹²⁰

Fallacy results when monogamy in its modern form is compared to polygamy’s dominant historical form. Historically, polygamous relationships have been characterized by exploitation and oppression of women. The practice of polygamy often coincides with crimes targeting

noted:

From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law.

Id.

118. *Id.*

119. *Id.*

120. *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

women and children, such as incest, sexual assault, statutory rape, and failure to pay child support.¹²¹ Evidence from Africa and the Middle East indicates higher rates of domestic violence in polygamous marriages, including sexual abuse.¹²² Likely as a result, women in polygynous unions are at risk of increased mental health problems, and children in polygynous unions fare worse than their counterparts in monogamous marriages in a variety of ways, including higher death rates.¹²³ Polygamy in the United States also has a long history of misogyny and extremely oppressive patriarchy, as well as a history of statutory rape.¹²⁴

But the reality is that both monogamy and polygamy were historically designed to serve the needs of men and as a tool used to enslave women. Both forms of family formation have oppressed millions of women around the world, creating psychologically and physically damaging relationships. The pervasive problem of oppression of women in both types of family formations indicates that the cause is not limited to just one of the forms of family. A new, modern contract model is warranted and overdue.

2. Current Trends

a. *Marriage*

Today, many of the historical problems with the institution of marriage remain, although in modified form. Marriage still disadvantages women in many ways, including by the continued prevalence of domestic violence.

121. See generally Vazquez, *supra* note 25, at 239–45.

122. See generally Rose McDermott, Expert REPORT PREPARED FOR THE ATTORNEY GENERAL OF CANADA, VANCOUVER REGISTRY NO. S-097767, 5, <https://stoppolygamyincanada.files.wordpress.com/2011/04/mcdermott-report.pdf>.

123. See generally *id.*

124. See, e.g., State v. Holm, 2006 UT 31, 137 P.3d 726, 752 (Utah 2006) (upholding the conviction of a man on charges of bigamy and sexual contact with a minor when he married a 16-year-old girl in a religious ceremony).

Women continue to do worse in the employment market,¹²⁵ which increases their dependence on their spouse, which in turn weakens their autonomy and perpetuates the subordination of women in a marriage. It is widely thought that marriage continues to be “a central instrument in the denial of women’s status as full citizens.”¹²⁶

Despite great advances in the legal treatment of domestic violence,¹²⁷ statistics show that domestic violence against the woman remains widespread in our society,¹²⁸ and “[c]ommunity-based research indicates that almost one out of every four married women will be struck by their husbands at some time during their marriage.”¹²⁹ The American criminal justice system still tends to be reluctant to interfere in private family life,¹³⁰ based on the historical view that “the preservation of marital privacy and domestic harmony require[s] that the law stay out of the relationship

125. U.S. DEP’T OF LABOR, NEWS RELEASE USDL-18-1240, THE EMPLOYMENT SITUATION—JULY 2018, <https://www.bls.gov/news.release/pdf/empisit.pdf>.

126. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–20 n.210 (2013) (internal citation omitted).

127. In the mid-1970s, state legislatures and courts finally began to realize that there was no place for marital rape exemptions in “modern American law and society.” Klarfeld, *supra* note 52, at 1819 (quoting *People v. M.D.*, 595 N.E.2d 702, 711 (Ill. App. Ct. 1992)). During this period, marital rape exemption laws began to dissolve. *Id.* at 1826; Sack, *supra* note 57, at 35. In fact by 1993, all fifty states and the District of Columbia recognized marital rape as a crime. Klarfeld, *supra* note 52, at 1819. This “profound shift in domestic violence policy” led Congress to pass the Violence Against Women Act of 1994 (42 U.S.C. § 13701 (2012)), which was “the first comprehensive federal response to the problem of domestic violence.” Kinports, *supra* note 58, at 156 (footnote omitted); Sack, *supra* note 57, at 36 (footnote omitted).

128. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991); see also *I Married a Monster: The Horrors of Domestic Violence*, 51 R.I.B.J. 29, 30 (2003) (noting that “[v]iolence is a common occurrence in ten (10%) to twenty-five (25%) per cent of all marriages in the United States and cuts across all racial, age and economic lines” (citing TAMARA L. ROLEFF, DOMESTIC VIOLENCE 16–17 (2000))).

129. Sana Loue, *Intimate Partner Violence Bridging the Gap Between Law and Science*, 21 J. LEGAL MED. 1, 1 (2000).

130. Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1192 (2007).

between husband and wife.”¹³¹ The way the criminal justice system treats sex offenses committed within marriages is one example of the “long-lasting” marks the historical nature of marriage has left.¹³²

Another residual effect of coverture prevailing today is the presumption that a married couple’s division of labor should be gendered pursuant to each spouse’s “natural role.” Women still “fare more poorly in the employment market and thus are more dependent on their spouses,”¹³³ and women are particularly burdened at home due to the division of labor. According to De Beauvoir, a woman’s work within the home does not provide her with any autonomy. She is not useful to the wider society; her work is seen as being mere maintenance. A woman’s work is only given meaning through her husband and children—“she is justified through them; but in their lives she is only an inessential intermediary.”¹³⁴ Despite the fact that her obedience is no longer a legal obligation, this does not change the way that she is perceived in society. It is very difficult for a woman (wife) to gain recognition for her work, to be “respected as a complete person.” However respected a woman is, she is still regarded as “subordinate, secondary, parasitic.”¹³⁵

While women’s expected labor within the marital relation is left wanting for excitement, so is the romance. In Western countries, almost all of which have forbidden polygamy, adultery is rampant. Indeed, according to the *General Social Survey*, the rate of infidelity has been pretty constant at around twenty-one percent for married men, and

131. See Klarfeld, *supra* note 52, at 1826; Sack, *supra* note 57, at 33–34.

132. See Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage*, 11 J.L. & FAM. STUD. 113, 117 (2008).

133. Aloni, *supra* note 126, at 620.

134. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 510 (H. M. Parshley ed. & trans., First Vintage Books 1974) (1949).

135. See *id.* at 501.

between ten to fifteen percent for married women.¹³⁶ Overall, fewer and fewer individuals and couples are choosing to marry,¹³⁷ and those who do are divorcing at alarming rates.¹³⁸ The monogamous, state-sponsored marriage policy is unsuccessful according to its own terms.

Despite the shocking historical practice of marriage and the continued suppression of women in the lingering shadow of coverture, the State still promotes marriage as the idealized form of personal relationship. The State's interest in marriage is apparent from the benefits granted to married people. There are approximately 1,049 federal laws in the United States Code that consider marital status as a factor¹³⁹ and the vast majority of those laws provide economic benefits for the married couple. For example, the tax code provides tax breaks to married couples,¹⁴⁰ the bankruptcy code allows for a favorable choice of different filing options for married couples,¹⁴¹ and surviving spouses of a marriage receive a

136. Richard A. Friedman, *Infidelity Lurks in Your Genes*, N.Y. TIMES (May 22, 2015), <https://www.nytimes.com/2015/05/24/opinion/sunday/infidelity-lurks-in-your-genes.html>.

137. See Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1034, 1038 (2015).

138. The conventional wisdom is that half of all marriages end in divorce. See William J. Doherty & Leah Ward Sears, *Delaying Divorce to Save Marriages*, WASH. POST (Oct. 20, 2011), https://www.washingtonpost.com/opinions/delaying-divorce-to-save-marriages/2011/10/19/gIQAKh0f1L_story.html?utm_term=.76c566eff427.

139. U.S. GEN. ACCOUNTING OFF., GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT, 4 (1997).

140. There are fifty-nine provisions in the Federal Income Tax Code under which tax liability depends on marital status. U.S. GEN. ACCOUNTING OFF., GAO/GGD-96-175, TAX ADMINISTRATION: INCOME TAX TREATMENT OF MARRIED AND SINGLE INDIVIDUALS, 3 (1996). When a married couple's incomes have large disparities, they often receive a tax bonus because the spouse with the higher income will pay less in taxes by filing jointly than he or she would have filing as a single person. *Id.* The tax treatment appears to preference traditional notions of marriage where a partnership is formed between a wage earner and a homemaker.

141. Under the bankruptcy code, a husband and wife can opt to file for

number of “death benefits,” such as social security.¹⁴² Indeed, “the entire federal tax scheme fosters and subsidizes the economics of marriage.”¹⁴³ As a result, “those who do not participate in the ‘economic partnership’ of matrimony may suffer financially.”¹⁴⁴ For instance, one of the authors would save thousands of dollars a year on health insurance costs but-for being a co-habitant rather than a legal spouse.

For the most part, the historical and current emphasis on marriage has trumped or limited private decision-making in these areas because the state treats the marital unit as a fundamental part of policy-making in a way that excludes other increasingly common family forms. Indeed, historically, the law has treated non-married partners as strangers or third parties.¹⁴⁵ Setting economic benefits within the construct of marriage elevates the status of marriage and herds couples into a state-designed and

bankruptcy jointly. 11 U.S.C. § 302 (2012). Since couples are often jointly liable for debts and own property jointly, the statute facilitates the consolidation of the estates, which reduces administration costs and only requires one filing fee. Even though they are filing jointly, the statute allows each party to claim federal exemptions as if they were filing separately, although some states have opted out of this. *Id.* § 522(m).

142. Once a couple meets the marriage requirements, a surviving spouse has access to survivors’ insurance benefits and have more options in how they receive retirement benefits. 42 U.S.C. § 416(c) (2012). Spouses can elect to take [their] own benefits, or instead take 50% of a spouse’s benefit. As in tax treatment, this would not benefit equal wage earners but in beneficial for marital couples with disparate wages.

143. Robson, *supra* note 17, at 786. However, tax policy benefits married couples with disparate incomes and “penalizes” married couples with similar incomes, functioning as state perpetuation of the historical trend in the West of the husband in the “public sphere” and the wife in the “private.” *Taxes: Who Gets a Marriage Bonus and Who a Penalty*, WALL ST. J. (Apr. 9, 2014, 10:30 PM), <https://www.wsj.com/video/taxes-who-gets-a-marriage-bonus-and-who-a-penalty/13172E38-C73B-49F4-9EF8-9357FC6CB6F1.html>.

144. Robson, *supra* note 17, at 783.

145. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 349 (2002) (explaining that “[l]ike other third parties, when a lesbian coparent seeks ongoing custody and visitation with the biological child of her same-sex partner, she is often unsuccessful in overcoming the constitutional principles of parental autonomy and privacy”).

regulated institution.¹⁴⁶

Presumably the State's primary interest in marriage is to promote the integrity of the family and create optimal child rearing conditions. Marriage is assumed by policymakers to be the best environment for raising healthy and successful children, without demonstrable evidence. Instead, parochial ideology plays the justifying role. For example, the United States Congress considers marriage an "essential institution of a successful society" and the optimal environment for successful child rearing.¹⁴⁷ The current rationale, at least in part, is based on findings from "welfare reform" legislation, known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.¹⁴⁸ Among other things, Congress found that children born out of wedlock, specifically to unwed mothers age seventeen and under, are more likely to experience abuse and neglect, have lower cognitive scores and educational aspirations, become teenage parents themselves, and be on welfare when they grow up.¹⁴⁹

The State's concerns with family values dovetails seamlessly with the economic interest in preventing unwed motherhood. Congress found that young, unwed mothers are not only more likely to go on public assistance, but also more likely to remain on public assistance for longer periods. "These combined effects of 'younger and longer' increase total AFDC [(aid to families with dependent children)] costs per household by 25 percent to 30 percent for 17-year-olds."¹⁵⁰ Notably, Congress also found that an "increase in the

146. See generally Robson, *supra* note 17, at 795 (discussing the primacy of marriage and the "zeal of elected federal officials to exalt marriage"); Zalesne, *supra* note 137, at 1066–68.

147. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(2)–(3), 110 Stat. 2105, 2110 (codified at 42 U.S.C. § 601 note (2012) (Congressional Findings)).

148. *Id.*

149. *Id.* § 101(8)(B)–(F), 110 Stat. at 2111.

150. *Id.* § 101(8)(A), 110 Stat. at 2111.

number of children receiving public assistance is closely related to the increase in births to unmarried women,” framed as a “problem” to be solved.¹⁵¹

Laws providing benefits to married people also attempt to promote sexual behavioral norms. Marriage can be seen as promoting abstinence from sex outside marriage, and in particular, abstinence from premarital sex by teenagers and young adults. Marriage also promotes monogamy and opposite-sex relationships, and is often regarded as “the expected standard of human sexual activity.”¹⁵² The government message fostered by sex education is that marriage is the “only acceptable condition for sexual expression.”¹⁵³

The State’s promotion of traditional marriage as a means of achieving conformity with normative sexual behavior, family stability, and economic security is problematic for two main reasons. First, the means-ends relationship is tenuous and often reversed, propelling the myth that marriage actually helps to achieve any of these goals, when the government often uses these values to promote the institution of marriage itself. Second, the means-ends justification assumes that the government’s goals are in fact legitimate.

Promoting traditional marriage is only tangentially related to the goals of building stronger family units or enhancing economic security. Interestingly, a 1990 United States Department of Health and Human Services report identifying characteristics of strong families references six studies and forty-nine characteristics before the mention of “marriage.”¹⁵⁴ While “economic security” can play a role in

151. *Id.* § 101(5)(C), 110 Stat. at 2110.

152. 42 U.S.C. § 710(b)(2)(D) (2012).

153. Robson, *supra* note 17, at 798.

154. MARIA KRYSAN ET AL., U.S. DEPT OF HEALTH AND HUMAN SERVS., IDENTIFYING SUCCESSFUL FAMILIES: AN OVERVIEW OF CONSTRUCTS AND SELECTED MEASURES 20–22 (1990), <http://aspe.hhs.gov/daltcp/reports/idsucfam.pdf>.

promoting a stronger family unit, it is not dispositive. Economic security is more closely related with class and socio-economic factors than with marriage. Congress fails to consider how socio-economic conditions and government (non)spending at the federal, state and local level, with grossly inadequate services devoted to basic human need, functions to leave the non-married vulnerable. By promoting marriage through economic benefits, the State contributes to economic stability and social acceptance, which may lead to an easier lifestyle for married couples. Tax cuts for capital investments also lead to an easier life for the investor. No one would argue that because the beneficiaries of capital gains tax-cuts are wealthy, the capital gains tax reduction is what made them so—that is, unless one’s ideological lenses require a government for the already privileged rather than for the vulnerable, the function of the prevailing law around marriage. In its promotion of marriage to achieve the goals of “stability” and “happiness,” the government perpetuates the monogamous marital paradigm and fails to consider the larger socio-economic and class factors that play a much more important role in determining outcomes.

Further, to the extent that monogamy has been justified by arguments that people are happiest in monogamous marriages, empirical evidence can be adduced that financial stability is the cause of both the marriage and the happiness, rather than monogamy being the cause of happiness. It is arbitrary to say people will be happier in monogamous relationships than in polygamous ones. The intimate arrangements making Peter happy or Paul happy are, like religious practice, up to them.¹⁵⁵

Although the State exalts the virtues of abstinence

155. Sincere religious converts demonstrate that happiness is a function of the relationship between the individual will and the manifestation of a particular form of life. On the other hand, what has historically been called “piety” or “piousness” is a function of the relationship between the manifestation of a particular form of life and social approval. We are political liberals, interested in citizens’ happiness, not their so-called piety.

before marriage, monogamy, and other sexual behavioral norms, promoting traditional marriage has little, if any, effect on achieving these government ends. While the government, in the past, has put significant resources toward promoting abstinence before marriage,¹⁵⁶ it is unclear whether such promotion of “normative” behavior as a public health goal is even realistic.¹⁵⁷ Indeed, despite state efforts to promote abstinence until marriage, “[a]lmost all Americans have sex before marrying.”¹⁵⁸

By subsidizing marriage through the enticement of a bundle of economic benefits, the State lures couples into marriage, using the ends—economic stability—to justify and promote the means—marriage. This tautological justification boils down to the State lauding marriage as a means to achieving greater economic security, while at the same time exclusively subsidizing married couples with disparate incomes.

These State objectives are not necessarily legitimate. The framing of marriage as a space for permissible sexual expression implicates a free-speech-like analysis that sees the State as arguably suppressing extra-marital sexual expression. In the most recent major Supreme Court articulation of the role of marriage in society, *Obergefell v. Hodges*, granting the right to same-sex marriage, Justice Kennedy ambiguously but conspicuously wrote that marriage provides “other freedoms, such as expression.”¹⁵⁹ So long as there remains only one form of marriage, the content of the “expression” is largely meaningless. More significant are the *fact* of marriage and the *identity* of the

156. Robson, *supra* note 17, at 797 As an example, from 1995 to 2000, Congress increased federal funding for abstinence only sex-education by three thousand percent. Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585, 585–86 (2000).

157. Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 73 (2007).

158. *Id.*

159. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

participants. Thus if Steve, Ted, and Bob's tantric trio is denied a formally recognized marriage, their individual expression as equal partners in a tantric trio is suppressed.¹⁶⁰

b. *Beyond Marriage*

Whatever the range of *actual* practices, the normatively idealized form of life we call monogamy, in the abstract, consists of the romantic ideal, the coming together of two loving persons, ultimate mutual commitment, mutual growth, lasting love, and meaningful mutual concern for one another undisturbed by distracting passions. Similarly, whatever the *actual* practices, in the abstract, the normatively idealized form of life we may call multiple marriage consists of a man with multiple wives or women with multiple husbands with the same normative features as monogamy, with "mutual" replaced by "cooperative." Finally, whatever the *actual* practices, the normatively idealized form of life we call polyamory, in the abstract, consists of multiple ongoing relationships either intermingled or independent of each other in terms of substance but dependent on consent to non-monogamy in each case, honest and open communication, and trust among all partners. As with the various religious normatively idealized forms of life, the state justifiably privileges none of the above.

Most feminists and others rightly worry about the exploitation of women who "choose" polygamy. It is thought that the consent is not truly voluntary, or is weakened by the need for financial security, power disparities, or religious acceptance.¹⁶¹ Perhaps polygamy carries too much historical baggage to ever be rectified in modern times. Critics of polygamy are correct to say that in *those particular cases* exploitation obtains. However, exploitation in those cases derives from the involuntariness, the need for financial

160. *See id.*; *supra* introductory vignette.

161. *See supra* notes 128–131 and accompanying text.

security, the power disparity, or the religious ideology, not polygamy as such.¹⁶²

While patriarchy and religious fanaticism are the roots of exploitation and abuse in polygamous marriage, the same could be said about exploitation and abuse in monogamous marriage with no less force. Given the extensive feminist critiques of monogamous marriage and coverture, and the many ways that monogamous marriage has simply been a tool of male power and inheritance, we can see that oppression of women occurs in both monogamous and polygamous marriage.

We retain the burden to confront the argument that ostensible choice masks exploitation. First, exploitation can be divided into structural exploitation and transactional exploitation. Marxist political theorists tend to believe that society's economic institutions are arranged such that workers are structurally exploited. Marxist feminists tend to believe that marriage in all of its forms, whether monogamous or polygamous, is structurally exploitative of women in that women's vulnerability is both the cause and effect of the prevailing marital structure. Transactional exploitation, however, is exploitation in a single transaction, as when an artist selling a painting at an auction gets \$100 as the highest bid when the \$100 dollar bidder mendaciously told all potentially higher bidders that the auction was cancelled.¹⁶³

162. Subordination of women in our society stems from and rests on deeply ingrained social norms and economic structures. "It is generally assumed that women in America are better off than women in other countries." Ray Jablonksi, *Five Reasons Why Gender Inequality is Worse in U.S. Than Elsewhere in the World*, CLEVELAND.COM (Dec. 20, 2015), https://www.cleveland.com/nation/index.ssf/2015/12/five_reasons_why_gender_inequa.html. However, the United States is far behind international standards in gender pay inequality, maternity leave, affordable childcare, women's reproductive rights, and violence against women. *Id.*

163. Alan Wertheimer & Matt Zwolinski, *Exploitation*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 20, 2001), <https://plato.stanford.edu/entries/exploitation/> (last updated Aug. 16, 2016).

Structural exploitation occurs when the ‘rules of the game’ favor some people against others, as when monopolies obstruct a free market or a manufacturer benefits from tariffs on foreign goods.¹⁶⁴ Similarly, transactional exploitation occurs “when *A* gains more from an interaction, and *B* gains less, than they would have were it not for the existence of a prior injustice”¹⁶⁵ or “background injustice.”¹⁶⁶ In other words, exploitation consists of a voluntary action, the benefits of which are less than they would have been if the procedure or background institutions were fair.

Oppression of women in polygamous relationships historically results from background conditions more than from mere participation in polygamy because the conditions out of which a woman chooses to enter a polygamous relationship (e.g., economic vulnerability, religious ideology) or the actual background conditions in society (e.g., patriarchy or repressive theocracy) corrupt the procedure ushering the ostensibly free choice. In the United States, there are believed to be between 50,000 and 100,000 practicing polygamists, most of whom are Muslim and Mormon families.¹⁶⁷ These families often practice polygamy based upon a fundamentalist interpretation of early Mormon and Islam teachings, giving rise to conditions ripe for oppression of women participants. Polygamy is for the most part nonexistent outside the practices of these two

164. See generally Hillel Steiner, *A Liberal Theory of Exploitation*, 94 ETHICS 225 (1984).

165. Wertheimer & Zwolinski, *supra* note 163.

166. Hillel Steiner on *Exploitation*, PHILOSOPHY BITES (Aug. 9, 2010), http://hwcdn.libsyn.com/p/c/1/0/c10808047bb6209d/Hillel_Steiner_on_Exploitation.mp3?c_id=2149582&expiration=1501995224&hwt=efa5b1747d88dc3e57cb2115ccb0a584.

167. Samantha Allen, *Polygamy is More Popular Than Ever*, THE DAILY BEAST (Jun. 2, 2015, 5:15 AM), <http://www.thedailybeast.com/articles/2015/06/02/polygamy-is-more-popular-than-ever.html> (noting that “[r]ough estimates place the polygamous population in the U.S. somewhere between 50,000 and 100,000 people, chiefly in Muslim and fundamentalist Mormon families”).

religions,¹⁶⁸ and there is little to no evidence surrounding polygamy divorced from religious practices. Thus, while polygamy is most often associated with the religious patriarchal teachings surrounding the practice, oppression of women is not necessarily inherent in the practice of polygamy as a stand-alone “normatively idealized form of life,” and cannot logically be considered the result of the practice of three- or four-person marital relations.

While historically there is great evidence of oppression in polygamous relationships, contract law and criminal law already contain protections against exploitation and abuse. In terms of the initial decision to enter a polygamous relationship, the contract defenses of duress, undue influence, and unconscionability ask the factual question of whether the weaker party effectively had alternative courses of action available and whether she entered into the contract voluntarily with full knowledge.¹⁶⁹ The contract defense of capacity mandates that a contract entered with a minor is voidable at the option of the minor.¹⁷⁰ In terms of abuse during the marriage, state assault and battery laws aim to prevent a man from physically abusing his wife. Federal laws like the Violence Against Women Act of 1994¹⁷¹ provide additional layers of protection for women suffering from domestic violence, sexual assault and other types of violence against women.¹⁷² Since contract and criminal law already

168. It is difficult to pin point exactly who practices polygamy given that it is outlawed in many parts of the world, but it is generally believed that polygamy in the US “flourishes in self-segregated communities, Mormon-fundamentalist and Muslim-immigrant, rather than being widely distributed across society.” Ross Douthat, *The Prospects For Polygamy*, N.Y. TIMES (May 30, 2015), https://www.nytimes.com/2015/05/31/opinion/sunday/ross-douthat-the-prospects-for-polygamy.html?_r=1.

169. See RESTATEMENT (SECOND) OF CONTRACTS §§ 175, 177, 208 (AM. LAW INST. 1981).

170. See *id.* §§ 12, 14.

171. 42 U.S.C. § 13701 (2012).

172. OFF. ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERVS., LAWS ON VIOLENCE AGAINST WOMEN, <https://www.womenshealth.gov/violence-against->

maintain the tools to conduct these types of analyses, oppression in polygamous relationships, in theory, can be controlled.

The potential for polyamorous plural marriage presents another opportunity to locate alleged intrinsic harms on contingent background factors. Polyamory is simply the practice of having ongoing intimate and/or romantic relationships with more than one person, whether independent relationships or unions of three or more people.¹⁷³ The alleged harms derive from the ideological presumption that monogamy is to be understood as moral and proper, universally and for its own sake, natural rather than a political institution. With greater numbers of people involved in the romantic lives of participants, it is natural that there will be increased complexity and increased partner turnover. The emotional complexity of interacting intimately with more people appears to be inherent to this love style. If emotional upheaval—including jealousy or fear of abandonment—goes with the territory of intimate relating, the chances of emotional upheaval increase exponentially when multiple partners are involved.¹⁷⁴ However, jealous lovers may be more inclined toward monogamy while people less likely by constitution to be jealous may be more open to polyamory. Either way, respect for autonomy is the just policy.

In addition, the framing of polyamorous practices as cheating-lite or as an attempt to mitigate the despair of monogamy pathologizes polyamory by characterizing it as a defensive mechanism or an escape. Many couples, however, consider it a thrill or simply a realistic approach to complex, human sexuality.

women/laws-on-violence-against-women/ (last updated Mar. 2, 2018).

173. Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1479 (2011).

174. See generally Deborah Anapol, *The Downside of Polyamory*, PSYCHOLOGY TODAY (Nov. 27, 2010), <https://www.psychologytoday.com/blog/love-without-limits/201011/the-downside-polyamory>.

Increased partner turnover can also have negative effects on the children involved. Children report experiencing some pain at losing the friendship of adults no longer involved in their lives.¹⁷⁵ This loss, as differentiated from loss of a parent from divorce, may be worse because in many cases of divorce there is visitation and continued parental involvement of both parents.¹⁷⁶ Finally, there is currently reported bias against polyamorous parents in the legal system, social disapproval (specifically the risk of rejection by family, friends and coworkers), and discrimination.

However, there are benefits associated with polyamory, including accelerated personal growth. With polyamory, it is possible to get the benefit of several lifetimes worth of mistakes in a short time because multiple ongoing intimate relationships present complex dilemmas and opportunities to act with integrity. Because multiple-partner relationships are inherently more complex and demanding than monogamous ones and because they challenge the norms of our culture, they offer unique valuable learning opportunities.¹⁷⁷ Children raised in polyamorous households may benefit alongside their parents. “These children are more insightful and wise, and open to understanding diversity and many forms of religion and culture.”¹⁷⁸ “Polyamory can help men and women break out of dysfunctional sex roles and achieve more equal, sexually

175. Bella DePaulo, *Is Polyamory Bad for the Children?*, PSYCHOLOGY TODAY: LIVING SINGLE (Jan. 8, 2013), <https://www.psychologytoday.com/blog/living-single/201301/is-polyamory-bad-the-children>.

176. Karen Ruskin, *Polyamory – Not Healthy for Children*, DR. KAREN RUSKIN (Oct. 28, 2013) <http://www.drkarenruskin.com/polyamory-not-healthy-for-children/>.

177. Deborah Anapol, *The Upside of Polyamory*, PSYCHOLOGY TODAY: LOVE WITHOUT LIMITS (Dec. 22, 2010), <https://www.psychologytoday.com/blog/love-without-limits/201012/the-upside-polyamory>.

178. Melissa Hogenboom, *Polyamorous Relationships May Be the Future of Love*, BBC NEWS (Jun. 23, 2016), <http://www.bbc.com/future/story/20160623-polyamorous-relationships-may-be-the-future-of-love>.

gratifying, and respectful relationships simply because of its novelty.”¹⁷⁹

Polyamory’s benefits can extend to the duties of everyday life.

More adults sharing parenting can mean less stress and less burnout without losing any of the rewards. In a larger group of men and women, it’s more likely that one or two adults will be willing and able to stay home and care for the family or that each could be available one or two days a week. If one parent dies or becomes disabled, other family members can fill the gap. It’s possible for children to have more role models, more playmates, and more love in a group environment.¹⁸⁰

Polyamory might also have financial benefits. “Polyamory can mean a higher standard of living while consuming fewer resources. Sexualoving partners are more likely than friends or neighbors to feel comfortable sharing housing, transportation, appliances, and other resources.”¹⁸¹ Polyamory may be good for the social life as well. “[P]olyamorous people tend to maintain more friendships as they keep a wider social network. They are also less likely to cut off contact after a break-up. Monogamous couples on the other hand, often withdraw from their friends in the first, loved-up stages of their relationship.”¹⁸² Lastly, polyamory could benefit everyone in existing relationships by adding spark and fulfillment to a healthy relationship and removing “the fear inherent in some monogamous relationships related to the potential for abandonment.”¹⁸³

Nonetheless, the relevant factor in evaluating the justice as fairness of State policy is not whether polyamorous practices are beneficial, but whether they are, more or less sufficiently and inherently *harmful* to warrant unequal

179. Anapol, *supra* note 177.

180. *Id.*

181. *Id.*

182. Hogenboom, *supra* note 178.

183. Ian Kerner, *Rethinking Monogamy Today*, CNN (Apr. 12, 2017, 5:17 PM), <http://www.cnn.com/2017/04/12/health/monogamy-sex-kerner/index.html>.

treatment or even criminalization. Since the alleged harms associated with polyamory are located on contingent background factors, the evidence suggests otherwise. The aim here is to formalize already existing practices so as to facilitate, not determine, private activity based on private choices.

3. The Importance of State Neutrality: The Analogy Between Marriage & Religion

Insofar as the justification for State-sanctioned monogamy is that people will be “happier” in one way or another, the State is violating the principle of liberalism that the State should not promote one conception of the good life over another, especially in a pluralistic society. Establishment Clause¹⁸⁴ jurisprudence provides useful analytical tools and precedent—the State similarly takes no position on which of the many religions will lead to happiness, spiritual fulfillment or eternal paradise. Both marriage and religion are normatively idealized forms of life, inherently contested and existing in various forms. For both, as far as the state is concerned, neutrality is the just governing principle. The Establishment Clause of the First Amendment is concerned more than anywhere else in United States law with rigorous adherence to the principle of state neutrality.

Our government treats religion with neutrality because religion is considered profoundly personal, a matter of conscience, and an intimate relation with the divine—either through scripture, mystical experience, ritual practices or tradition. The State, consistent with the First Amendment’s Establishment Clause, may never privilege, endorse, involve itself with, nor act with animus toward any religion. The founding generation, enlightened by the period following the religious wars in Europe, knew the dangers of a State-established church and appreciated the rights of religious

184. U.S. CONST. amend I.

minorities—arguably, Washington, Jefferson, and Madison each did not believe in the Christian god.

The comparably deeply personal nature of marriage, household constitution, and family formation also trigger the value of State neutrality in this area of the law. In the words of Justice Black, the Establishment Clause “stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy to permit its ‘unhallowed perversion’ by a civil magistrate.”¹⁸⁵ “Religion” can easily be replaced with “household constitution” or “family formation.” The “civil magistrate” has no more business interfering in marital relationships than in congregational ones.

The Court fails to treat marriage like religion, as a normatively idealized form of life manifesting in various forms. In the nineteenth century, the *Reynolds* Court stated, “it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”¹⁸⁶ The current government policy privileges monogamy over polygamy now no less than as articulated then. The modern reaction to this line tests our commitment to the principles underlying the liberal state and poses the question: should the state “determine . . . the law of social life”¹⁸⁷ in the private space where “freedoms, such as expression, intimacy, and spirituality”¹⁸⁸ are pursued in private life?

Under the Establishment Clause, the government policy must have a secular purpose and not simply a “sham secular

185. *Engel v. Vitale*, 370 U.S. 421, 432 (1962) (holding that a New York State program offering nondenominational, optional prayer time in public schools violated the Establishment Clause because the program was religious in nature, carried out by the government, and imposed indirect coercive pressure on students).

186. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

187. *Id.*

188. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

purpose” masking a religiously motivated policy.¹⁸⁹ If so, as long as there are neither excessive entanglements between the government and religion nor the privileging or burdening thereof, then the government policy will be upheld.¹⁹⁰ The Supreme Court has explained:

When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.¹⁹¹

The judicial duty articulated is especially important considering what is at stake. Justice Stevens explained that the Establishment Clause is intended not only to protect us from explicit state coercion of citizens in favor of religion, but also from more imperceptible harms that both grow and hide with time:

[T]he Constitution also requires that we keep in mind the myriad and subtle ways in which *Establishment Clause values* can be eroded . . . and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion.¹⁹²

Here, the Court is concerned with Establishment Clause “values,” not rules or elements. The injury, more abstract in nature, is a government policy that confuses the parochial for the universal and private interest for public interest. Our prevailing government policy toward marriage confuses the parochial for the universal in that monogamy is considered both universally desired for all individuals as well as fitting and proper for each and every community in multi-cultural

189. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (holding that a student led “invocation” before a high school football game had a religious purpose, despite its characterization by school administrators).

190. *Lemon v. Kurtzman*, 403 U.S. 602, 613–15 (1971).

191. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (internal quotation, alteration, and citation omitted).

192. *Id.* at 314 (emphasis added) (internal quotation and citation omitted).

America. In addition, our prevailing government policy toward marriage confuses public interest for private interest. The private interest is the perpetuation of Victorian sexual norms. The public interest, however, is State neutrality.

Establishment Clause jurisprudence also illustrates the way ideology and judicial overemphasis on “history and traditions” corrupts justice as fairness. For instance, in an opinion upholding the constitutionality of a memorial of the Ten Commandments at the Texas State Capitol, Chief Justice Rehnquist posited that, “[o]ur institutions presuppose a Supreme Being.”¹⁹³ Actually, Thomas Paine was a flaming atheist, George Washington and Thomas Jefferson were demonstrably skeptical of the interventionist notion of God, and the role of the secular legal profession and argumentation in the Federalist Papers and elsewhere undergirded our constitution-making process. Despite our country’s current religious culture, statistics regarding the rising number of atheists today also belie that fact.¹⁹⁴

Elsewhere, in a case upholding the constitutionality under the Establishment Clause of an official, tax-funded chaplain formally leading prayer before the Nebraska State Legislature, the Court engaged in a form of constitutional interpretation that, if applied in other contexts, would reduce our judicial institutions to a power serving formalism and our society to zombie-like eternal recurrence:

Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress . . . [and] legislative and other deliberative public bodies with prayer is deeply embedded in the history and

193. *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

194. Michael Lipka, *Ten Facts About Atheists*, PEW RESEARCH CENTER (June 1, 2016), <http://www.pewresearch.org/fact-tank/2016/06/01/10-facts-about-atheists/> (finding that “the share of Americans who identify as atheists has roughly doubled in the past several years”).

tradition of this country.¹⁹⁵

In these cases, the Court disproportionately weighed as a factor the contingencies of social habit and practices both in the background, and in the actual legal analysis, contrary to the underlying purposes of the Establishment Clause. This emphasis sets the frame for a prejudicial legal analysis.

In a different constitutional context, the Due Process Clause, fewer unjust policies are now saved by their histories. Justice Kennedy writes of “substantive” Fourteenth Amendment Due Process Clause jurisprudence in the *Obergefell* majority decision:

If [fundamental] rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied History and tradition guide and discipline [courts when] . . . identifying interests of the person so fundamental that the State must accord them its respect[,] *but do not set its outer boundaries* [; t]hat method respects our history and learns from it without allowing the past alone to rule the present.¹⁹⁶

The trend toward de-emphasis of “history and tradition” in Due Process Clause analysis is a good sign for progressive-thinking people, and polygamy has been explicitly addressed in that context. With respect to polygamous marriage, for example, Chief Justice Roberts responded to Justice Kennedy’s assertion that, under a Due Process Clause analysis, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy”¹⁹⁷ with a passage that is worth quoting in full:

It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to

195. *Marsh v. Chambers*, 463 U.S. 783, 786, 788 (1983).

196. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2602 (2015) (emphasis added).

197. *Id.* at 2599.

make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?¹⁹⁸

The legal principles articulated above, although pursuant to the First Amendment and Due Process Clauses, are transferable to our understanding of marriage as a contract. The religious, ideological, ethical, or moral views of eighteenth century slaveholding men are not relevant factors in constitutional interpretation in the liberal paradigm or any other concerned with justice and fairness in a large, twenty-first century multicultural democracy.

B. *Marriage as Private Contract*

Family now, more than any time in human history, is voluntary and private by virtue of consent and the range of possible household structures.¹⁹⁹ Because the family can be considered a private institution consisting of voluntary members, the State has no authority or interest in intervening absent serious identifiable harms to identifiable persons.²⁰⁰ As private arrangements, intimate relations should be governed instead by principles of privacy and autonomy.

198. *Id.* at 2621–22 (2015) (Roberts, C.J., dissenting) (quoting the majority opinion at 2599, 2600, 2604).

199. *See Zalesne, supra* note 137, at 1027–34.

200. Some thoughtful people might say that it was a mistake to treat domestic violence as a private matter rather than a matter of public concern. However, domestic violence may be distinguished in two ways: (1) the prevalence of foresight and consent in the case of reproductive autonomy and Assisted Reproductive Technology is missing in a domestic violence case; and (2) in the case of domestic violence, there is a clear identifiable harm to an identifiable person.

1. Marriage as a Private Institution

Intimate relations are not social enterprises, but rather private arrangements, and should therefore be governed by principles of privacy and autonomy. Insofar as marriage is treated as a public arrangement, private life becomes an arm of the state; but a just state is the arm of a free people.

In a private institution, the participants are the stakeholders. With the exception of minors, participants are members voluntarily. In a public institution, on the other hand, the participants are not the only stakeholders. Instead, general members of the public that are ultimately influenced or affected by the institution involuntarily are stakeholders. In this Section, we make the argument that, since family is private, the State should involve itself no further in family formation than to enforce private contractual arrangements made on the basis of meaningful choice and consent.

Consent, market forces, and contract law, based on individual needs, individual desires, and societal demand, are best for dealing with people's varied private interests.²⁰¹ People have a fundamental right, both morally and legally, to privacy and freedom when it comes to personal relationships, so intervention where there are private agreements is not usually justified unless there is identifiable harm to identifiable individuals.²⁰² However, when parties attempt to define the contours of their families and secure rights through contract, they are often met with

201. See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 817–18 (1985) (explaining that “[t]he private contract establishes a first-order relationship based on individual needs and desires”).

202. Despite ongoing resistance by a sizeable segment of the population to reproductive freedom (evident by the development of the law regarding contraception and abortion), individual choice today already generally guides reproduction, which arguably is more complex than marriage and intimate relationships because of the fact that decisions generally affect an unborn child.

legal hostility.²⁰³ Despite the fact that their contracts are between private parties, and even when those parties have given full consent, such contracts continue to be either unevenly enforced or unenforceable altogether.²⁰⁴ Courts do not enforce family contracts in the same ways they enforce contracts outside the family context, as principles of freedom of contract are not applied in the same ways and to the same degree in the family context.²⁰⁵

For those who believe that the law already treats marriage as a contract, consider the words of Canadian Political Philosopher Will Kymlicka. When it comes to marriage:

there is no written document, each party gives up its right to self-protection, the terms of the contract cannot be renegotiated, neither party need understand its terms, it must be between two and only two people, and [until 2013] these two people must be one man and one woman.²⁰⁶

Such non-waivable provisions belie the notion that the contractual arrangement is the outcome of meaningful choices and prudent planning on behalf of the participants. Despite the fact that marriage is one the most important relations in most people's lives, the participants have as little say in the terms and conditions as they do over the terms and conditions of clickwrap agreements.²⁰⁷

2. Autonomy, Assent, and Meaningful Choice

As long as the natural restrictive parameters of informed

203. Zalesne, *supra* note 137, at 1030.

204. *Id.*

205. *Id.*

206. Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFFS. 77, 88 (1991).

207. Clickwrap agreements are agreements entered over the Internet under which users must agree to terms and conditions before using a company's services or products. Typically, a user has no ability to negotiate the terms before agreeing. See NANCY S. KIM, WRAP AGREEMENTS (2013).

consent in contract law are policed, private agreements concerning any variety of intimate relationships, including polyamory or even polygamy, should be enforced within just communitarian parameters (likely varying among jurisdictions), so as to give credibility to the two-person marriage option as a meaningful choice among alternatives, so as to recognize the wide array of possible conceptions of the good life, and so as to respect the autonomy of individual participants.

Meaningful choice requires more than one reasonable option and an absence of coercion. In order for choice surrounding marriage to be meaningful, women and men must have the option of exercising choice with respect to whether and whom to marry. Thus, arrangements other than two-person marriage, such as being unmarried, polygamous, or polyamorous, which are not inherently harmful, should be available and recognized by the State, with the participants determined by the parties to the union themselves. Available options might include intimate non-sexual partnerships with or without cohabitation and with or without formal recognition, intimate sexual partnerships with or without cohabitation and with or without formal recognition, temporary marriage, polygyny, polyandry, polyamory, multi-generational cohabiting families, or any other relationship as conceived by the people involved.

Other values in addition to autonomy, such as pluralism and fairness, are also respected by our approach. Here, recognizing and validating autonomy simply expands the choices available to individuals, legitimizing such choice *as a choice*. At the same time, our proposal potentially alleviates some of the violence against women and economic subjugation associated with traditional marriage because the legal family unit will no longer rest upon dyadic dependency and domination. We argue not for polygamy but for the woman's right to choose polygamy or any other household arrangement she sees fit for her. What might be called "out possibilities" available to women will lessen

dependency. If, as we argued above, exploitation is incidental to polygamy and other relationships, it can be policed through criminal law and contract law, which shows its inherent concern with social norms, fairness, and inequality through doctrines such as the duty of good faith, and defenses such as unconscionability. Accordingly, regulation or prohibition of the various relationship possibilities is redundant, over-inclusive, and violates the paramount principles of political liberalism and autonomy. Otherwise, the choice to marry remains “only [a] Hobson’s choice, ‘that or none,’”²⁰⁸ rather than a meaningful choice among alternatives.

Restricting a woman’s autonomy and freedom of contract imposes a detriment on women under the guise of protecting them from exploitation when alternative protective measures are available. Not all men and women relate to marriage in the same way. Rather than making presumptions based on the sanctity of two-person marriage, presumptions are instead warranted in favor of the competence of people who are exercising their right to self-determination by making thoughtful and informed decisions. To that end, pertaining to intimate contracts, participants must be given the (economic) choice not to marry, as well as a meaningful array of options if they do choose to “marry.” One’s choice here should not affect whatsoever one’s privileged relation to the State.

Under various contracts defenses, one of the ways a party can show that a contract was not voluntarily entered is to show that he or she had no meaningful choice but to enter the contract—a “Hobson’s choice.” This can result from a threat by the other party, as with duress,²⁰⁹ or because the thing contracted for was, for example, a necessity and there

208. MILL, *supra* note 33, at 51.

209. Under the defense of duress, a contract is unenforceable if “a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative.” RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

was only one available seller, as with unconscionability.²¹⁰ Thus, in order for consent to be voluntary, parties must generally enter the contract of their own free will, with meaningful options, including the option of walking away from the contract. The existing marriage contract violates this basic principle of contract law.

Choice must, of course, be real, and based on paramount contract principles—participants must engage in private agreements voluntarily and without coercion. In this Section, we set out to show that the existing state-sponsored marriage contract is based on veiled economic coercion and the lack of other meaningful alternatives.

First, the State gives such large economic incentives to marry²¹¹ that a rational economic actor has no economic choice (unless he or she is sufficiently wealthy) but to marry.²¹² Requiring marriage as a means of receiving government benefits and protections artificially restricts private decisions and behavior regarding intimate relations, making marriage effectively “compulsory,”²¹³ rather than freely chosen. Indeed, if given the economic choice, some couples would undoubtedly choose not to marry, because of, for example, the traditional norms and trappings of that institution, the hetero-normative implications, or the general government control over family.²¹⁴ Across her published works, Professor Robson argues that matrimony, like

210. A contract is generally unenforceable due to unconscionability where there is the “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

211. *See supra* note 139 and accompanying text; *see also* Zalesne, *supra* note 137, at 1036–37.

212. *See supra* Section II(A)(1).

213. Robson, *supra* note 18, at 314 (2009) (arguing that “marriage is a political institution” and that “the desire or choice to marry” should be “open to question”).

214. *See* Robson, *supra* note 17, at 712 (noting that “marriage implicates serious and insoluble problems of equality”).

heterosexuality, may not be a “preference at all but something that has had to be imposed, managed, organized, propagandized, and maintained by force.”²¹⁵

Then, if individuals “choose” to marry because of financial necessity or because it is economically wise to do so, they in effect have no *meaningful* choice when the State mandates that marriage be between two people. A choice is not a true choice where there are no other options. Such “coercive aspects of the phenomenon of marriage”²¹⁶ delegitimize the “choice.” Of course, individuals or couples are free to reject the single, default, state-sanctioned terms, but only at the expense of equal access to a variety of economic benefits.

To legitimize the significance of the two-person marriage option and to recognize the rich variety of possible alternative relationships and the wide array of possible conceptions of the good life, polygamy, polyamory, and other alternative relationships should be available as options. If the choice to legally marry is made without other State-recognized household options, and without the true economic option not to marry, then choice is illusory and marriage success rates should be expected to be low.

Accepting the notion that intimate agreements must be compatible with respect for autonomy, the question remains whether a polygamous relationship, including one that develops based on gender hierarchies, can ever actually be based on autonomy and consent. Is such a marital hierarchy “inextricable from a larger system of oppression, such that it is impossible to consider it as freely chosen and untainted by injustice?”²¹⁷ Certainly if that were the case, then it would be meaningless to offer such relationships only to then regulate

215. *Id.* at 780 (internal citation omitted); Robson, *supra* note 18, at 313 (internal quotations, citations, and alterations omitted).

216. Robson, *supra* note 17, at 746.

217. Elizabeth Brake, *Equality and Non-Hierarchy in Marriage: What do Feminists Really Want?*, in *AFTER MARRIAGE*, *supra* note 19, at 109.

and ultimately prohibit each and every instance of them. We attempt to show, however, that it is not the case.

To presume a woman is unable to grant consent to a non-monogamous union presumes that polygamous and polyamorous relationships *inherently* involve men who use greater social power to exploit vulnerable women. It presumes all women have a natural monogamous mating instinct that would prevent them from ever voluntarily choosing otherwise. The presumptions are based on the fundamental premise that absent a religious or financial motive, women would not choose non-monogamous relationships, unless they were being exploited. This set of presumptions tends to be predicated on the market's valuation of monogamy and social expectations that marriage is between two people, rather than on actual preferences borne out by empirical and statistical evidence. The presumptions buy into deep-seeded but untested cultural values and severely undermine women's autonomy and contractual freedom.

Culturally speaking, a more modern conception of polyamory is more likely to be seen as arising from full consent than a polygamous relationship. Indeed, the notion that men are the only ones asking for extramarital partners is not completely true. *OpenMinded.com*, a site for people looking for open relationships, surveyed over 64,000 couples registered to use the site, and discovered that “[o]f the couples engaging in open relationships, two-thirds of them say it was the woman’s idea.”²¹⁸ This contradicts the argument that women are often unwilling and coerced participants of polyamory.

Indeed, there are many legitimate reasons, not involving coercion, that a woman might choose an alternative marriage relationship. Women may choose non-monogamous

218. Ian Lang, *Survey Finds Women More Likely to Propose Open Relationships*, ASKMEN (Sept. 9, 2015), <http://uk.askmen.com/news/dating/survey-finds-women-more-likely-to-propose-open-relationships.html>.

relationships to avoid the limitations that often come with conventional marriage. “Free love rejected the tyranny of conventional marriage, and particularly how it limited women’s lives to child-bearing, household drudgery, legal powerlessness, and, often enough, loveless sex.”²¹⁹

Women might also be steering away from monogamous relationships because of the effects on their sex drive. Per conventional wisdom, women are more likely to want a monogamous relationship because they seek emotional connections, while men simply want sex. However, research has shown that “women’s libidos tend to nose-dive when they are in a long-term relationship, but the same is not true for men.”²²⁰ While a decreased libido might seem to make monogamy easier for women, overall, sex experts believe that a diminished sex drive is not actually a healthy state for women.²²¹

Finally, some women might be willing to relinquish power in the relationship in exchange for access to a higher standard of living. It is thought, for example, that, “[s]ome Mormon women consider polygamy a solution to such difficulties as single motherhood, poverty, loneliness and work/family conflicts.”²²² Deborah Rhode notes that among some African-American women, “man sharing,” as another example, is considered a route to family stability in communities where high rates of imprisonment and unemployment have created a shortage of potential

219. Libby Copeland, *Making Love and Trouble*, SLATE (Mar. 12, 2012, 12:51 PM), http://www.slate.com/articles/double_x/doublex/2012/03/polyamory_and_its_surprisingly_woman_friendly_roots_.html.

220. Melissa Dahl, *Women Aren’t Hardwired for Monogamy, Men Don’t Hit Their ‘Sexual Peak’ Early, and 3 More Things We Get Wrong About Sex*, THE CUT (Jun. 25, 2015, 12:57 PM), <https://www.thecut.com/2014/06/women-arent-wired-for-monogamy-and-more-myths.html>.

221. *Id.* (noting that “women are losing their desire to initiate sex or to have sex with their partners, which does not reflect sexual health”).

222. DEBORAH L. RHODE, *ADULTERY: INFIDELITY AND THE LAW* 122 (2016) (arguing for partial legalization of polygamy—continued prohibition of multiple marriage licenses, but decriminalization of polygamous cohabitation).

husbands.²²³

Given that intimate contracts, household formation, and dissolution planning are private affairs and supremely personal, the State should not involve itself in the terms and conditions of such family planning but for its legitimate role in preventing unconscionable family contracts. By analogy to contract law, the State's role is to enforce the private contracts that free and autonomous persons choose to create. For the State to recognize versions of household constitution that it favors and fail to enforce, even criminalize, contracts that it disfavors, is to trample on autonomy and exclude forms of life. Instead, a paradigmatic shift in the law from marriages to households respects both autonomy and diversity, while the freedom of the individual is honored in the provision of a range of choice within a *laissez-faire* approach to deeply personal, intimate relations.

II. FROM MARRIAGES TO HOUSEHOLDS: RESPECT FOR MEANINGFUL CHOICE

Today, a majority of families in the United States can now be considered what historically has been “non-traditional,” including unmarried cohabitating couples,²²⁴ same-sex couples,²²⁵ single-parent households,²²⁶ and

223. *Id.* at 123.

224. The number of non-married heterosexual couples has been increasing rapidly, and the numbers are predicted to continue escalating. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 34 (2007).

225. With growing social acceptance, more and more same-sex couples are openly living together and starting families. Jason M. Merrill, Note, *Two Steps Behind: The Law's Struggle to Keep Pace with the Changing Dynamics of the American Family*, 11 J.L. & FAM. STUD. 509, 510 (2009).

226. Single-parent families are the quickest growing family form in America, tripling since 1960. Single-parent families constitute approximately thirty percent of all families with children under age eighteen. CHILD TRENDS DATABANK, FAMILY STRUCTURE: INDICATORS OF CHILD AND YOUTH WELL-BEING 2-3 (2015), https://www.childtrends.org/wp-content/uploads/2015/12/59_Family

extended-family households,²²⁷ as well as older parents.²²⁸ Consistent with this trend is the rise of non-monogamous intimate relationships and arrangements, including relationships involving more than two people. Sexually non-monogamous couples in the United States number in the millions.²²⁹ Although the lack of a single definition for who counts as “polyamorous” makes determining how many of those people are “poly” a bit more difficult, the general trends toward greater tolerance in family formations are clear and are unlikely to reverse course any time soon.

Multigenerational family living (a household that includes two or more adult generations) is also common and on the rise. In 2016, according to a new *Pew Research Center* analysis of census data, a record 64 million Americans or 20% of the United States population lived in multigenerational households.²³⁰ Though there are very few statistics, there are also various forms of intimate, nonsexual partnerships. Some anecdotal evidence suggests that intimate (nonsexual) partnerships take the form of platonic parenting (married people who end their love-based marriage but who choose to stay together to raise the

_Structure.pdf (last visited July 8, 2018).

227. Families with multiple caregivers can form a “family network” that may include stepparents, grandparents, and a variety of other caregivers such as blood relatives, neighbors, or family friends, either as primary or in addition to primary caregivers. *See id.* at 2. Such extended families often offer children a community of adults that they can consistently rely on for care and support. *See id.*

228. M. Elliott Neal, *Protecting Women: Preserving Autonomy in the Commodification of Motherhood*, 17 WM. & MARY J. WOMEN & L. 611, 613 (2011).

229. “[M]ost researchers estimate that a full 4–5 percent of Americans participate in some form of ethical non-monogamy. Estimates based on actually trying sexual non-monogamy are around 1.2 to 2.4 million, and an estimate based solely on the agreement to allow satellite lovers is around 9.8 million.” Brenden Shucart, *Polyamory By the Numbers*, ADVOCATE (Jan. 8, 2016, 8:01 AM), <http://www.advocate.com/current-issue/2016/1/08/polyamory-numbers>.

230. D’vera Cohn & Jeffrey S. Passel, *A Record 60.6 Million Americans Live in Multigenerational Households*, PEW RESEARCH CENTER (Aug. 11, 2016) <http://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/> (last updated Apr. 5, 2018).

children)²³¹ and people (oftentimes gay men or women) who decide to raise a child with a friend.²³²

The solution we propose, in order to accommodate these alternative arrangements and respect autonomy, is to treat marriage as a contract like any other. Reflecting the existing social reality regarding marriage and intimate relationships, we offer a new legal category meant to supplant marriage that we call households, which identifies a unit of people that has chosen to enter a contractual relationship. The contractual household, rather than marriage status, would serve as the general, non-parochial unit of people relevant to state policymaking. As already built into the law of contracts, in order to show consent to a household, the relationship must be entered voluntarily, with full capacity, and without undue influence, duress, or unconscionability.

The concept and empirical reality of various types of households are compatible with our vision of political liberalism and State neutrality articulated above in that the household is the most primary or general unit encompassing sub-arrangements worth contracting for and is due equal state recognition and treatment. The household is the common genus over and above monogamous, polygamous, and polyamorous marriages, as well as over intimate friendships, sibling and inter-generational child raising, or a flat of bachelors. State equal treatment and recognition of households threatens no basic principles of political liberalism and State neutrality.

Business partnerships offer a legal model for households.²³³ We take from the “business” element the

231. Vicki Larson, *Forget Conscious Uncoupling: The Way Forward for Families is Platonic Parenting*, THE GUARDIAN (Apr. 15, 2015), <https://www.theguardian.com/lifeandstyle/2015/apr/15/forget-conscious-uncoupling-families-platonic-parenting>.

232. Ephi Stempler, *Platonic, Until Death Do Us Part*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/24/fashion/platonic-gay-relationship-couple.html>.

233. For use of the partnership model as a guide to departure from the two-

notion that the State need not interfere with the private activity of free individuals pursuing their own ends. We take from “partnership” the notion that each participant’s voluntary contribution to the association is based on trust among all that “we’re in this together.”

The Uniform Partnership Act of 1914 (UPA) defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit”²³⁴ There are no formalities to become a partnership, though parties can enter a partnership agreement defining the contours of the relationship. Importantly, partnership law does not limit partnerships to two people.²³⁵ Similarly, with households, the parties themselves would define who is a member of the household, with no limits on the number of participants. Households would replace marriages in receiving the State allocated benefits traditionally provided to married couples.

Though our justification for the household paradigm is lengthy, our definition of households is intentionally brief because the concept is as open-ended as a contract. We envision households encompassing associations of various types. Some may pertain to childcare, others to single sisters’ sororities. Our proposed framework would allow for the formation of communal families not dependent on romantic love, but also undoubtedly compatible with it, as business partners may be either life-long friends or strangers.

This framework would also separate marriage from parenting. Professors Brennan and Cameron make the case for thinking about “children as a possible basis for family building, outside the aegis of marriage or even romantic love.”²³⁶ Separating marriage from parenting (“free standing

person marital model, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010).

234. Sec. 6 (Partnership Defined).

235. See *id.* While partnerships do require two or more people, sole proprietorships allow for organizations to be run by just one person.

236. Samantha Brennan & Bill Cameron, *Is Marriage Bad for Children? Rethinking the Connection Between Having Children, Romantic Love, and*

parenting”) can be viewed as a panacea for various issues in family law, including the problems arising from “illegitimate” children, divorce, intestacy, and other issues. This way, a child may have two “legal parents” for the relevant purposes, but the parents could be married to each other and a third person, married separately, or any other agreed upon combination. As foreign as this may seem, it is already the reality given the ever-growing divorce rate²³⁷ and growing number of children born out of wedlock.²³⁸ The prevailing policy of tying marriage to parenthood denies social reality.

We propose our vision and the rough paradigm—not a comprehensive doctrine—because we understand there are potential pitfalls that require attention. For example, what result if twenty people desire to register as a household and demand health care from the employer of one member of the household? Such an incidental unwelcome consequence might require reform of the entire health care system (long overdue) by, for instance, taking the employer role out of the healthcare system altogether. How precisely to address such a difficult broader question is beyond the scope of this Article. Likewise, as marriage becomes more complicated, so too, inevitably, does divorce. But continuing with the partnership analogy, dissolution of associations of large numbers of people is not impossible. The difficult question of dissolution of a household is also beyond the scope of this Article.

History has proven that marriage customs continually evolve. As non-monogamous unions become more attractive,

Marriage, in AFTER MARRIAGE, *supra* note 19, at 84, 86.

237. The national divorce rate in 2016 was about 37%. See CTR. FOR DISEASE CONTROL AND PREVENTION, NATIONAL MARRIAGE AND DIVORCE RATE TRENDS FOR 2000–2016 (2016), https://www.cdc.gov/nchs/data/dvs/national_marriage_divorce_rates_00-16.pdf.

238. In 2014, forty percent of all births took place out of wedlock in the United States. Joseph Chamie, *Out-of-Wedlock Births Rise Worldwide*, YALEGLOBAL ONLINE (Mar. 16, 2017), <https://yaleglobal.yale.edu/content/out-wedlock-births-rise-worldwide>.

their forms will evolve into more acceptable dynamics. In other words, the normatively idealized forms of life associated with these names will be refined and more widely socially tolerated. For example, legal polygamy “could be structured in [a] way[] similar to civil monogamy, so that [its] impact on gender equality and marital privacy would be, at worst, neutral and, at best, empowering for all involved.”²³⁹

The most effective and efficient way for the law to keep pace with changing “family values” is through contract. Because family and intimate relationships are highly unique and individual, they often do not fit within the limitations of government regulations, and may be more functionally structured through contracts. Families that do not fit the traditional mold should not have to wait for government approval to attain status equivalent to their married counterparts. Instead, such partners should be able to secure their rights and status through state recognition. Recognition of family arrangements through contract is consistent with cultural and legal momentum, as attitudes regarding marriage continue to evolve. Expanding “family” to include the broader array of possibilities of a household achieves these goals.

III. CONCLUSION

The approach to marriage and the law articulated in this Article, positing the moral and legal permissibility of non-monogamous marriage, is part of a growing awareness in the academy of the coercive, exclusive, restrictive, parochial, and illiberal features of the prevailing policy. Ruthann Robson’s article, *Compulsory Matrimony*, makes the case that because “U.S. economic policies foster and subsidize the economics of marriage,” it follows that “the present legal regime operates as one of the forces that ‘organize’ and ‘manage’ people’s

239. Shrage, *supra* note 24, at 160–61.

‘choice’ whether or not to marry.”²⁴⁰ We claim additionally that while the state should not involve itself in the choice *to marry*, it must also not involve itself in the choice *among marriages*. Jeremy Garrett argues for a position called “marital contractualism,” explaining that the State has not justified its policy of marriage regulation.²⁴¹ Instead, the contract paradigm protects: (1) efficiency; (2) equality [state neutrality]; (3) diversity; and (4) informed consent.²⁴² Finally, Adrienne Davis advocates for the business partnership model as a workable, precedential solution.²⁴³

Perhaps ironically, our approach to marriage and household formation may likely have the consequence of a golden age of monogamous marriage. The choice to marry one person till death under our proposed legal framework would regain that magical significance. No longer the dry, default choice, choosing monogamy among alternative arrangements affirms the unadulterated two-person romantic union because in such a case, monogamous marriage is cherished for its inherent value from the point of view of the participants, not the State.

When Alexis de Tocqueville visited America, he found small associations of different forms and creeds flourishing alongside each other. He spoke to representatives of as many as he could and found that they:

agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or

240. Robson, *supra* note 18, at 316.

241. JEREMY GARRETT, A PRIMA FACIE CASE AGAINST CIVIL MARRIAGE (2009). See also Elizabeth Brake, *Marriage and Domestic Partnership*, STAN. ENCYCLOPEDIA OF PHIL. (July. 11, 2009), <https://plato.stanford.edu/entries/marriage/> (last updated Nov. 29, 2016).

242. Brake, *supra* note 240.

243. Davis, *supra* note 232, at 2002–04.

cleric, who did not agree about that.²⁴⁴

Monogamy, similarly, may just as well flourish under the separation of church and the marriage paradigm in an authentically liberal State.

244. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (G. Lawrence trans., J. Mayer ed., 1969) (1835).