Polygamy and Same-Sex Marriage: A Response to Calhoun

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Cheshire Calhoun's paper falls into three parts.[1] In the first, she argues that paying "more careful attention to the historical practice of polygamy *strengthens* [rather than, as is often thought, *weakens*] the case for same-sex marriage."[2] In the second, she argues that "the state would do better to move toward [and advocates of same-sex marriage would do better to advocate] a more *pluralistic* conception of personal relationships."[3] She freely admits that such a pluralistic conception makes room for the legal recognition of polygamous marriages.[4] But in the third section she argues that there is nothing *inherently* wrong with polygamy: in particular, as she puts it, "gender inequality is a contingent, not a conceptual, feature of polygamy."[5] The conclusion to be drawn from her discussion is that advocates of same-sex marriage

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1. 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).

2. *Id*. at 1037.

3. *Id*. (emphasis added).

4. *See id.* (recognizing that "[d]isestablishing a single state form of marriage would, of course, open the doors to state recognition of polygamous marriages").

5. *Id*. at 1039.

should happily bite Scalia's bullet:[6] if we legalize same-sex marriage, then (by the same token) we should legalize polygamy.

In this Comment, I would like to raise some objections to each of the three main sections of Calhoun's paper. I do not think of these objections as fatal to Calhoun's project, but I do think that they represent difficulties that need to be addressed if I am to be brought to agree with her main claims.

Let us begin with Calhoun's claim that attention to the historical practice of polygamy strengthens, rather than weakens, the case for same-sex marriage.[7] As Calhoun points out, opponents of legalization often argue, on traditionalist grounds, (1) that legalization should follow core social values, (2) that core social values are determined by the Judeo-Christian tradition, and (3) that this tradition is overwhelmingly hostile to recognition of same-sex marriage.[8] Although Calhoun recognizes that it is possible to challenge this argument by denying that legalization should follow core social values (or, for that matter, that these values are determined by religious tradition),[9] she claims that the Judeo-Christian tradition is not nearly as hostile to same-sex marriage as traditionalists believe.[10] Calhoun bases this claim on the following evidence: the Old Testament patriarchs engaged in polygamy; the Bible never speaks against polygamy; some European Jews practiced polygamy until the eleventh century, and only banned it under duress; Martin Luther argued that Christianity does not proscribe polygamy; and The Church of Jesus Christ of Latter-day Saints recognized (and, in fact, encouraged) polygamous marriage until 1890, and only banned it under duress.[11] Accordingly, Calhoun concludes that "polygamous marriage cannot be dismissed as a negligible blip in an otherwise consistent tradition of heterosexual monogamous marriage."[12]

In response to this, it might be argued (reasonably, it seems to me) that, even if the practice of polygamy is not a "negligible blip," it has certainly not achieved (and would not have achieved, even in the absence of governmental pressure) the status of anything approaching

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6. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 559 (2003) (Scalia, J., dissenting) ("If . . . the promotion of majoritarian sexual morality is not even a *legitimate* state interest, [criminal laws against bigamy cannot] survive rational-basis review.").

7. *See* Calhoun, *supra* note 1, at 1037.

8. *Id.* at 1027–30.

9. *See id.* at 1027 (pointing out that "[o]ne way of challenging the traditionalist's argument is to challenge the propriety of premising our laws on the majority's moral or religious values . . . .").

10. *See id*. at 1028 (noting "there has been at least a minor thread within the Judeo-Christian tradition of acknowledging same-sex unions").

11. *Id.* at 1028–29.

12. *Id.* at 1029.

monogamy in cultural significance. For one thing, the mainline Christian and Jewish denominations have been uniformly hostile to polygamy for centuries. For another, polygamous sects (such as the Mormons) are clearly offshoots (and would have remained so even in the absence of governmental interference). *Every* religious denomination has its offshoots and dissenters. What the traditionalist will say, I think, is that core social values are determined by the overwhelming majority, rather than a very small minority.

In support of her second claim, which is that the state and proponents of same-sex marriage would do better to support a pluralistic conception of marriage,[13] Calhoun says this: there are two ways to look at civil marriage. On the one hand, one can think of civil marriage as a private contract entered into only by voluntary consent.[14] On the other, one can think of civil marriage as a public status, like citizenship, the nature of which is appropriately determined by the state according to its conception of what conduces to the general welfare.[15] Calhoun argues that these two conceptions of civil marriage "pull against each other":[16] the principle that persons should be free to enter into binding contracts as long as this does not violate the rights of others pushes in the direction of hymeneal pluralism;[17] but the principle that only civil marriages that conduce to the public good should be recognized pushes in the direction of hymeneal monism.[18] Calhoun then argues that, of these two principles, the state should adopt the first (pluralistic) principle, rather than the second (monistic) principle.[19] For, as she puts it, "maintaining a single state definition of marriage is at odds with the fundamental premises of a liberal political society, with the private, contractual aspect of marriage, and with satisfying individuals' multiple relational needs."[20]

In response, I want to take issue with the dichotomy that forms the basis of Calhoun's argument for hymeneal pluralism. Even within a liberal political society, there is nothing sacrosanct about private contracts *per se*. Bars to contract enforcement include the risk of danger

13. *Id.* at 1037.
14. *Id.* at 1033.
15. *Id.* at 1034.
16. *Id*.
17. *See id.*
18. *See id.* at 1034.
19. *Id.* at 1037.
20. *Id*.

to oneself or others as a result of ignorance or irrationality. Some contracts are simply void *ab initio*. The liberal state's role is not merely to *enforce*, but also to *regulate* private contracts in order to protect the contracting parties against their own ignorance and irrationality. (For example, it would be well within the purview of the liberal state to declare contracts into slavery or indentured servitude null and void.) Of course, this is not to say that liberal paternalism knows no bounds: there are limits to what a liberal state may do in the name of protecting the parties to private contracts. But it remains true that the regulative model of the state vis-à-vis private contracts differs from, and offers us something of a middle way between, both of the models Calhoun offers: on the one hand, perfect freedom of contract, and on the other, state definition of marriage for the public good.

I would argue further that the regulative model makes it possible to explain, in a principled way consistent with good old-fashioned liberalism, how one might coherently support the legalization of same-sex marriage without thereby being committed to supporting the legalization of polygamy. The relevant issue is whether there are sufficiently weighty paternalistic reasons to ban polygamy (or certain forms of polygamy), without there being sufficiently weighty paternalistic reasons to ban same-sex marriage. Arguably, there are. At least as currently practiced in the United States, polygamy takes the form of polygyny (one husband, many wives) rather than polyandry (one wife, many husbands).[21] The most common polygynous relationships, at their inception, involve a much older husband and a very young wife (usually still in her teens).[22] At least within the offshoots of Mormonism that look kindly on polygyny, the wife-to-be has been raised to believe that it is her religious duty to enter such a marriage and then bear as many children as possible.[23] These circumstances suggest that polygamy survives only on

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21. *See* D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, *in* FUNDAMENTALISMS AND SOCIETY: RECLAIMING THE SCIENCES, THE FAMILY, AND EDUCATION 240 (Martin E. Marty & R. Scott Appleby eds., 1993) ("[Mormon fundamentalists believe] that God sanctions and commands that righteous men of a divine latter-day Covenant marry more than one wife.").

22. *Id*. at 259 ("But plural wives are often teenagers and sometimes twenty years younger than their polygamous husbands."). As this Comment goes to press, the New York Times reports that the head of the polygynous Fundamental Church of Jesus Christ of Latter-day Saints, Warren Jeffs, who is reported to have 60 or 70 wives, "is a fugitive, indicted [in June 2005] on sexual abuse charges that he forced a 16-year-old girl to marry a 28-year-old married man. Opponents of Mr. Jeffs say he ordered hundreds of such unions, often between girls barely in their teens and men decades older." Nick Madigan, *After Fleeing Polygamist Community, an Opportunity for Influence*, N.Y. TIMES, June 29, 2005, at A1.

23. According to Mormon theology, the spirit-children of gods wait to be born as humans. Since a spirit-child cannot become a god without his faith's having been tested as a human being, unborn spirit-children cannot reach the state of divine exaltation.

the backs of young girls who have been brainwashed into submitting to a practice to which they would not otherwise freely consent. Even if Calhoun were right that the state has no business regulating polygamous marriages freely entered into by knowledgeable and rational adults, the practical consequences of banning the particular kinds of polygyny just discussed would be no different from the practical consequences of banning polygamy altogether.

Still, as Calhoun might argue, the regulative model by itself does not speak against polygamous marriages generally, but only against particular *kinds* of polygamous marriages (polygynous marriages in which the wives-to-be are cognitively or emotionally immature). This brings us to Calhoun's third point, which is that there is nothing inherently wrong with polygamy: if polygamy conduces to gender inequality, it does so only contingently.[24] At least in principle, it might be possible for some polygamous marriages to survive the state's paternalistic interest in protecting the contracting parties.

In reply, I want to suggest that there are reasons to believe that polygamy *is* essentially problematic and unstable. A marriage is a committed relationship designed to facilitate the rearing of children and the fulfillment of deep emotional needs, including most notably sexual and other personal forms of intimacy. Suppose now that we have a polyandrous marriage in which Carol is married to both Bob and Ted. Even if Bob and Ted enter such a marriage with their eyes open, reason and experience suggest that neither husband should have any confidence that his relationship with Carol will be able to survive Carol's relationship with another husband. Imagine the possibilities. Suppose Bob and Carol are childless, while Ted and Carol have four children. Or suppose Bob stays fit while Ted, whether culpably or nonculpably, contracts a serious illness. Or suppose Bob has a well-paying job, but Ted is unemployed. Even if Carol is scrupulously fair, it stands to reason that Ted's problems or responsibilities under these sorts of circumstances will place enormous emotional pressure on Bob. If Ted is caring for four children, or Ted is seriously ill, or Ted is depressed

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Thus, the more children a human woman begets, the more spirit-children are given the chance of achieving exaltation. *See* JAMES H. SNOWDEN, THE TRUTH ABOUT MORMONISM 141 (1926) ("[The glory of Mormon men] is in proportion to the number of their wives and children.").

24. *See* Calhoun, *supra* note 1, at 1039 (stating that "gender inequality is a contingent, not a conceptual, feature of polygamy").

because he cannot find a job, then Carol will naturally feel the need to spend more time with Ted and correspondingly less time with Bob. Under these circumstances, it is natural for Bob to feel shortchanged, especially if he thinks that Ted is in any way responsible for the relevant circumstances. Even under ideal circumstances, each husband's need for emotional intimacy conduces to competition for Carol's attention. The fact is that all marriages face crises and that many monogamous partners fail to manage these crises effectively. By reason of their very structure, polygamous marriages are even less likely to withstand such pressure over the long term.[25] One result of this is that the children of such marriages are likely to suffer because their emotional needs are not fulfilled, whether or not the marriage survives.

Now it seems to me that, on the regulative model, the state, exercising legitimate paternalistic powers, ought to be able to ban marriages that are *structurally* problematic in this way. Notice that same-sex marriage *per se* does not suffer from this kind of structural infirmity. Nor, for that matter, do marriages that take the form of *ménages-a-trois*, or *ménages-a-quatre*, and so on—marriages in which (in some sense) each of the spouses is "married" to each of the other spouses. Structural problems arise only in the context of the sort of asymmetrical relationship definitive of polygamous marriage.

Ultimately, then, I do not believe that Calhoun has provided sufficiently compelling reasons to bite Scalia's bullet.[26] And given the rest of the bullets in Scalia's arsenal of slippery slope arguments, this may be a good thing, too.

25. *See* D. Michael Quinn, *supra* note 21, at 261. D. Michael Quinn also reports that "jealousy can be corrosive even for the most devoted fundamentalist families." *Id.*

26. *See* Lawrence v. Texas, 539 U.S. 558, 559 (2003) (Scalia, J., dissenting).