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# Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality

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**REGULATING POLYGAMY: INTIMACY, DEFAULT RULES,  
AND BARGAINING FOR EQUALITY**

by

Adrienne D. Davis  
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## ARTICLES

### REGULATING POLYGAMY: INTIMACY, DEFAULT RULES, AND BARGAINING FOR EQUALITY

*Adrienne D. Davis\**

*Most legal scholarship has approached polygamy in one of two ways. Some have framed it as a constitutional question of religious or privacy rights; others have debated decriminalization based on the contested effects of polygamy on matters ranging from women's subordination to democracy. This Article shifts attention from the constitutionality and decriminalization debates to a new set of questions: whether and how polygamy might be effectively recognized and regulated, consistent with contemporary social norms. The Article begins by describing the diverse stakeholders and critics in the polygamy debate, including not only religious fundamentalists but also black nationalists and radical feminists. Next, the Article refutes the analogy between gay marriage and polygamy, disputing it as a miscue from what is legally distinctive about polygamy, its multiplicity. Unlike gay marriage, which is typically envisioned to adhere to a two-person marital model, marital multiplicity both increases the costs of intimate negotiation and complicates it in several ways, including raising questions about how power is bargained for and distributed in marriage. The Article next contends that other legal regimes have addressed polygamy's central conundrum: ensuring fairness and establishing baseline behavior in contexts characterized by multiple partners, ongoing entrances and exits, and life-defining economic and personal stakes. It turns to commercial partnership law to propose some tentative default rules that might accommodate marital multiplicity, while addressing some of the costs and power disparities that polygamy has*

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\* William M. Van Cleve Professor of Law, Washington University School of Law. I would like to thank Annette Appell, Kathy Baker, Bill Bratton, Mary Anne Case, Michael Doran, Maxine Eichner, Victor Fleischer, Elizabeth Glazer, Barbara Glesner Fines, Kevin Haynes, Ethan Leib, Joan Mahoney, Saru Matambanadzo, Elisabeth Perry, Jeff Redding, Larry Ribstein, Chris Robertson, Laura Rosenbury, Mike Siebecker, Philomila Tsoukala, Rebecca Wanzo, and my Ladies Who Do Theory writing group: Gretchen Arnold, Marilyn Friedman, Ruth Groff, Linda Nicholson, and Penny Weiss. Susan Appleton, Scott Baker, John Bowen, and Linda Nicholson were especially helpful in their engagement with this topic and paper. Participants in the Washington University School of Law Workshop Series and the Women, Gender & Sexuality Studies Colloquia also provided much-appreciated feedback as did the University of Colorado Law Faculty Workshop, Georgetown Critical Legal Theory Workshop, University of Chicago Regulation of Family, Sex, and Gender Workshop, and the Tulane University Faculty Workshop. Emily Danker-Feldman, Joey Litman, Joe Whitfield, and especially Elizabeth McDonald, Stephanie Quick, and Bernita Washington provided invaluable research assistance.

*engendered. The Article concludes by showing how theorizing love and commitment beyond heterodyadic marriage sheds light on the debates over recognition, abolition, and privatization of intimate relationships.*

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INTRODUCTION

“Will the polygamy debate ever be the same?” This is the question the *Salt Lake Tribune* posed shortly after the debut of *Big Love*, the hit HBO series about a Utah polygamous family gone suburban.<sup>1</sup> *Big Love*, a star-studded sexual laugh fest, has brought polygamists “out of the compound” as it were, casting them instead as the family next door.<sup>2</sup> Some

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1. Brooke Adams, ‘Big Love’ Debut: Will the Polygamy Debate Ever Be the Same?, *Salt Lake Trib.*, Mar. 12, 2006, at A1.

2. The show premiered with quite a pedigree. Two-time Oscar winner Tom Hanks is the producer. Film stars Bill Paxton, Jeanne Tripplehorn, and Ginnifer Goodwin along with Oscar nominee and independent film star Chloe Sevigny play the four spouses. Emerging actresses Amanda Seyfried (*Mean Girls*) and Tina Majorino (*Napoleon Dynamite*) presumably appeal to adolescent viewers while “veteran freaks” Grace Zabriskie and Bruce Dern round out the older generation. Joy Press, All In The Family, *Village Voice*, Feb. 21, 2006, at <http://www.villagevoice.com/2006-02-21/screens/all-in-the-family/> (on file with the *Columbia Law Review*) (describing show’s premise and listing stars).

have even predicted *Big Love* might do for polygamists what *Will & Grace* and *Queer Eye for the Straight Guy* did for gays: familiarizing the foreign and smoothing the way for recognition and real rights.<sup>3</sup> In fact, the highly acclaimed hit series self-consciously invites viewers to consider analogies between same-sex and polygamous families. In the show's much-anticipated second season, the invitation became more pointed and persistent, with intermittent references to "coming out," "closeted families," and "the state" as repressively surveilling nonconforming "big love."<sup>4</sup> Curiously, this gay analogy is popular among both supporters and detractors of expanded recognition for alternative family structures. Polygamy's proponents liken it to same-sex marriage, urging both as equally legitimate "alternative" lifestyles that should be tolerated and given legal recognition—plural marriage is "the next civil rights battle" proclaims Pro-Polygamy.com.<sup>5</sup> Meanwhile, opponents of gay marriage liken it to polygamy, invoking fears of a fast slide down a classically slippery slope. This Article argues that, while the gay analogy may make for splashy punditry and good television, it distracts us from what is truly distinctive, and legally meaningful, about polygamy—namely, its challenges to the regulatory assumptions inherent in the two-person marital model.

Most legal scholarship approaches polygamy in one of two ways. Some have framed it as a question of how far constitutional protection for religious freedom and privacy rights extends, including what we might think of as "intimacy liberty," particularly in light of *Lawrence v. Texas*.<sup>6</sup> Others have debated decriminalization, based on the contested effects of polygamy on matters ranging from women's subordination, to fraudulent

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3. See *infra* notes 67–74 and accompanying text (discussing how television can familiarize the foreign, particularly with regard to race relations and acceptance of same-sex marriage).

4. *Big Love* premiered on HBO in March 2006. The second season aired in June 2007. Episode List for *Big Love*, IMDb.com, at <http://www.imdb.com/title/tt0421030/episodes> (on file with the *Columbia Law Review*) (last visited Sept. 10, 2010).

5. Polygamy = Marriage, at <http://www.Pro-Polygamy.com> (on file with the *Columbia Law Review*) (last visited Sept. 10, 2010); see *infra* notes 85–95 and accompanying text (discussing use of analogy between gay and plural marriage by proponents of both).

6. 539 U.S. 558 (2003). Compare Marci A. Hamilton, The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence, 29 Ga. L. Rev. 81, 99–111 (1994) (decrying Supreme Court's hostility to religious freedom as evidenced in nineteenth-century polygamy cases), with Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. Rev. 1501, 1593–94 (1997) [hereinafter Strassberg, Distinctions] (defending nineteenth-century constitutional decisions upholding polygamy bans under contemporary theoretical frameworks). Sarah Gordon's important legal history shows how polygamy emerged as a central constitutional conflict shaping federalism in the nineteenth century. See Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 1 (2002) [hereinafter Gordon, Mormon Question] (describing polygamy debate as "constitutional conflict over the meaning and scope of liberty and democracy in the United States").

behavior, to democracy.<sup>7</sup> This Article takes a different approach. It shifts attention from the constitutionality and decriminalization debates to a new set of questions: whether and how polygamy might be effectively recognized and regulated, i.e., licensed, consistent with contemporary social norms. The Article argues that the gay marriage analogy, invoked on both the “left” and the “right,” is a red herring, a distraction from the real challenge polygamy raises for law—how plural marriage transforms the conventional marital dyad and whether law is up to regulating marital multiplicity.<sup>8</sup> Both of the gay analogies, the slippery slope invocation and the alternative lifestyles defense, distract us from the fact that polygamy’s distinctiveness lies not in the spouses’ gender (as is the case for same-sex marriage) but rather in its departure from the two-person marital model. Polygamy’s defining feature—marital multiplicity—generates specific costs and vulnerabilities, as well as opportunities for exploitative and opportunistic behavior, some of which we have seen play out in distressing fashion in recent high-profile conflicts (from Tom Green to Elizabeth Smart to Warren Jeffs and the raids on his Yearning for Zion compound in Texas in the spring of 2008).<sup>9</sup> (Of course, for some, multiplicity also generates upsides, which this Article also considers.) Hence, this Article

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7. Compare Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 *Cornell J.L. & Pub. Pol’y* 101 (2006) (arguing criminalization imposes more harms than benefits with particular emphasis on minimizing fraud and increasing cooperation among spouses), with Strassberg, *Distinctions*, supra note 6, at 1585–93 (urging polygamy harms women and is injurious to liberal democratic state).

8. See, e.g., Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 *Appalachian J.L.* 101, 133 (2006) (“The history of plural marriage . . . reveals a pattern of sexual abuse, incest, child-brides, poverty, and discrimination against women. These social policy concerns do not arise in same-sex unions, but are prevalent in plural lifestyles, revealing that prohibiting polygamous marriages would be justified notwithstanding the legalization of same-sex marriages.”); Strassberg, *Distinctions*, supra note 6, at 1509 (“[M]onogamous marriage creates the foundation for a democratic state [which] make[s] it possible to understand not only why the right to marry should be considered a fundamental right, but also why polygamy could not be included within a fundamental right to marry and why same-sex marriage could . . .”); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 *Conn. L. Rev.* 1065, 1067 (2006) (“Same-sex marriage and polygamy are inherently different. Sexual orientation represents an immutable characteristic and same-sex marriage still respects the binary nature of marriage. In contrast, polygamists are denied the right to marriage based not on sex or other impermissible factors, but on the number of people they choose to marry.”); cf. Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U. L. Rev.* 1543, 1562 (2005) (“[I]ncest, unlike polygamy or bestiality, is neither a stable nor a fixed taboo in slippery slope rhetoric.”).

9. See, e.g., Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 *Wm. & Mary J. Women & L.* 131, 140 (2004) (noting Elizabeth Smart’s kidnapping and Tom Green’s polygamy prosecution brought national attention to polygamy); Ralph Blumenthal, *Court Says Texas Illegally Seized Sect’s Children*, *N.Y. Times*, May 23, 2008, at A1 (reporting fate of children from Warren Jeffs’s sect); Kirk Johnson, *Leader of Polygamist Mormon Sect Is Arrested in Nevada*, *N.Y. Times*, Aug. 30, 2006, at A12 (describing Jeffs’s arrest).

approaches polygamy as a problem of bargaining, cooperation, strategic behavior, and the issues they engender. While analyses of marriage's future have incorporated some attention to polygamy, few legal scholars have considered polygamy on its own and engaged in detail the regulatory challenges it might pose to our current family law system. Even those who have considered polygamy explicitly from a bargaining perspective, such as Gary Becker and Richard Posner, seem to assume it is merely dyadic marriage multiplied.<sup>10</sup>

But, is the law up to regulating marital multiplicity? This Article contends that, in contemplating the design of a plural marriage regime, we are not starting from scratch. While conventional family law, with its assumptions of the marital dyad, may not be up to the task, other legal regimes have addressed polygamy's central conundrum: ensuring fairness and establishing baseline behavior in contexts characterized by multiple partners, ongoing entrances and exits, and life-defining economic and personal stakes. In particular, commercial partnership law has addressed precisely these concerns through a robust set of off-the-rack rules. This Article contrasts polygamy with aspects of partnership law to derive a set of default rules that might accommodate polygamy's marital multiplicity, while addressing some of the costs and power disparities that polygamy has engendered. The point is not to use partnership law as a "map," but rather to make the point that there are already conceptual models for what might be thought of as plural marital associations.

Of course others have urged the decriminalization of polygamy, but they have not taken the additional step to contemplate what full regulation might look like. There are three main possibilities on the intimacy spectrum. The first is our current regime, which prohibits and criminal-

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10. Gary S. Becker, *A Treatise on the Family* 80–107 (enl. ed. 1991) [hereinafter Becker, *Treatise*] (analyzing polygamy and other marriage arrangements in "efficient 'marriage markets'"); Richard A. Posner, *Sex and Reason* 253–60 (1992) (describing how polygamy affects bargaining power in courtship markets). Shayna Sigman and Emily Duncan draw similar conclusions, but limit their analyses to demonstrating the costs of criminally prohibiting polygamy and urging decriminalization. Sigman, *supra* note 7, at 106–07 & n.27 ("This discussion is also a necessary precursor to exploring whether polygamous relationships should be recognized by the state, which would be a significant step beyond merely decriminalizing the practice."); Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is a Many Splendored Thing,"* 15 *Duke J. Gender L. & Pol'y* 315, 316 (2008) ("Thus, if there is to be a rational policy in this area, it should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous communities to emerge from the shadows, and openly assisting the women and children who live in them."). These studies highlight the difference between decriminalization and legalization, a distinction elaborated upon at *infra* notes 97–100 and accompanying text. Michèle Alexandre has urged limited inheritance rights for *de facto* polygamy based on common law marriage, but has not called for recognition of polygamy itself. Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 *Wash. & Lee L. Rev.* 1461, 1464 (2007) [hereinafter Alexandre, *Lessons*] (advocating "that a redefinition of the concept of the surviving spouse in American estate distribution will help to legally protect *de facto* spouses in the inheritance context").

izes plural marriage, denying plural unions recognition, although, ironically, courts often *impose* recognition in order to prosecute “polygamy.”<sup>11</sup> A second possibility, decriminalization, entails lifting prohibitory bans. Finally, legalization incorporates decriminalization, but also entails some sort of official recognition, i.e., licensing and positive legal regulation. Unsurprisingly, those practicing plural intimacy are as diverse in their regulatory end goals as is the dyadic community. Some want merely to be left alone, for the state to stay out of their intimate lives. Others, perhaps the majority of adults, want state recognition and its accompanying regulation.<sup>12</sup> We see this split most visibly right now in the gay rights movement. Following these intimacy politics, within the “poly” community some seek only decriminalization and nonintervention by the state. Others call for full recognition and licensure, frequently invoking *Lawrence* as a strategic step that sets the stage for recognition of plural marriage alongside gay marriage.<sup>13</sup> Hence, while a more radical polygamy may exist outside of movements or desires for legal recognition, this Article limits its focus to polygamists seeking formal recognition and licensure, as it is here that the analogy to gay marriage falls apart. In addition, other legal scholars have recently analogized marriage and intimacy commitments to business associational models. Most notably, Cynthia Starnes and, more recently, Jennifer Drobac and Antony Page, have contended that conventional state-licensed dyadic marriage should be supplemented with a private ordering system derived from commercial partnership norms.<sup>14</sup> Martha Ertman’s typology of intimacy and business associations

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11. In op-eds urging the unconstitutionality of polygamy bans, legal scholar Jonathan Turley has pointed out that since we no longer enforce anti-fornication laws, we tolerate polyamory as long as it does not result in marriage. In fact, some of the most high-profile polygamy prosecutions have been against men who did not have more than one marriage license, but were found to be constructively married or married at common law, and then prosecuted for polygamy, thus violating their right to sexual freedom. Jonathan Turley, Polygamy Laws Expose Our Own Hypocrisy, USA Today, Oct. 3, 2004, at 13A; see also Gordon, Mormon Question, *supra* note 6, at 83 (discussing how proposed nineteenth-century bill would have criminalized plural cohabitation prosecution).

12. Throughout this Article I use the terms “recognition” and “regulation” interchangeably even though I recognize a Foucauldian would radically disagree.

13. Ariela Dubler has pointed out that *Lawrence* is better analogized to *McLaughlin v. Florida* than it is to *Loving v. Virginia*. *McLaughlin* decriminalized “fornication” between intimates of different races, a crucial step on the road to interracial marriage. Ariela R. Dubler, From *McLaughlin v. Florida* to *Lawrence v. Texas*: Sexual Freedom and the Road to Marriage, 106 Colum. L. Rev. 1165, 1174–75, 1184–87 (2006).

14. See generally Jennifer A. Drobac & Antony Page, A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law, 41 Ga. L. Rev. 349 (2007) (exploring “a domestic partnership model based on business partnership law as a vehicle to better serve modern couples and their families in private relationship ordering”); Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault, 60 U. Chi. L. Rev. 67 (1993) [hereinafter Starnes, Divorce and the Displaced Homemaker] (proposing marriage modeled after “contemporary partnership law”); see also Cynthia Lee Starnes, Mothers as Suckers: Pity, Partnership, and Divorce Discourse, 90 Iowa L. Rev. 1513, 1534–38, 1540–44 (2004) [hereinafter Starnes, Pity, Partnership, and Divorce Discourse] (“Like commercial



includes polyamorous relationships.<sup>15</sup> Larry Ribstein rejects the specific analogy between marriage and business partnerships, yet still urges a standard form approach to marriage grounded in commercial law's development of different forms for different types of relationships.<sup>16</sup> All of these insights have moved forward the debate over regulation and recognition of intimate relationships. Yet, none of them has contemplated the particular analogy this Article draws—between the open-ended multiplicity of polygamy and commercial partnerships and how law can ameliorate the opportunism and vulnerability that can result.

My approach will appall some and amuse others. Many will be immediately skeptical of a claim that partnership law, rooted in regulating economic interactions in arms-length commercial contexts, can have much to say about marital interactions, not to mention the extreme gender subordination and other abuses feared from polygamy.<sup>17</sup> Others, those more familiar with the legal literature on the “economics of intimacy,” will recognize this Article as joining the scholarly debate on the turn toward private law to conceptualize intimate associations, and the extent to which what we think of as market norms and the legal logic that regulates them can have anything to say about sexual interactions, gender injuries, or distributive justice within the household.<sup>18</sup> Hence, the Article rejects

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partners, spouses commonly pool their labor, time, and talent to meet responsibilities and to generate income they expect to share.”). Others have embraced private ordering more generally. See, e.g., Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *Calif. L. Rev.* 204, 211–23 (1982) (examining “matrix of options available to the state in governing marriage,” and analyzing “contractual governance option”); see also Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *Ind. L.J.* 453, 481–88 (1998) (examining “contractual terms regulating behavior during the course of marriage”); Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 *Vand. L. Rev.* 397, 425–26 (1992) [hereinafter Stake, *Mandatory Planning*] (urging that state give intimates incentives to enter premarital agreements).

15. Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 *Harv. C.R.-C.L. L. Rev.* 79, 123–31 (2001) [hereinafter Ertman, *Marriage as a Trade*] (“[T]he LLC’s legal structure might be particularly appropriate in providing a way to understand polyamorous relationships.”).

16. See Larry E. Ribstein, *Limited Liability Unlimited*, 24 *Del. J. Corp. L.* 407 (1999) [hereinafter Ribstein, *Limited Liability Unlimited*] (proposing “Domestic Entity” as mechanism to fill gaps in marriage standard form); Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 *Creighton L. Rev.* 309, 317 (2005) [hereinafter Ribstein, *A Standard Form Approach*] (discussing “arguments for distinct statutory standard forms for different types of family relationships”); see also sources cited *infra* note 18 (describing scholars’ recognition of private law norms used to inform regulation of intimate relationships).

17. But see Drobac & Page, *supra* note 14, at 401–17 (describing how “[d]omestic partnership, based on traditional business partnership law, provides a near-perfect structure”); Ertman, *Marriage as a Trade*, *supra* note 15, at 123–31 (analogizing polyamorous relationships to limited liability corporations).

18. I include in this camp the early work by Marjorie Schultz and more recent papers by Jill Hasday, Martha Ertman, Mary Anne Case, and, to some extent, my own previous work on slavery. See, e.g., Mary Anne Case, *Marriage Licenses*, 89 *Minn. L. Rev.* 1758,

“romance” as a palliative for bargaining dilemmas in any long-term relationship. Still, some, particularly my fellow feminists, might protest that this Article essentially ignores the issues that lead many to find plural marriage disturbing and perhaps intrinsically exploitative—its effects on women and children.<sup>19</sup> Yet, in contemplating a default rule structure, this Article confronts head-on the extent to which the law can ameliorate the power and bargaining disparities marital multiplicity engenders, which may actually get right to the heart of our fears.

Finally, some will argue that this Article avoids the real question: Why should the state continue to privilege certain intimate relationships at the expense of others?<sup>20</sup> While personally I am no particular fan of the

1777–82 (2005) [hereinafter Case, Marriage Licenses] (analogizing marriage licenses and corporate charters); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *Stan. L. Rev.* 221, 274–79 (1999) (discussing interplay between contract law principles and interracial marriage in postbellum southern courts); Adrienne D. Davis, Roundtable Discussion: *Subversive Legal Moments?*, 12 *Tex. J. Women & L.* 197, 219–20 (2003) (discussing contract law and marriage); Ertman, *Marriage as a Trade*, *supra* note 15, at 90 (“Business models offer an attractive alternative to naturalized constructions of intimate relations . . . .” (footnote omitted)); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *Harv. L. Rev.* 491, 522–26 (2005) (comparing laws governing lawyer-client and doctor-patient relationships to those governing intimate relationships); Schultz, *supra* note 14, at 219–23 (illustrating usefulness of contract law in marriage context). Related but distinct from the economics of intimacy is the feminist literature on bargaining over care work. See, e.g., Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* 57 (2000) (“In an ideal-worker/marginalized-caregiver household, men have the bargaining advantage because they can always walk away with the chief asset of the family—their ideal worker wage.”); Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 *Pepp. L. Rev.* 359, 379–81 (2007) (discussing how courts view traditional gender marriage roles as a “specializ[ed] contract”); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 *Tex. L. Rev.* 17, 21 (1998) [hereinafter Ertman, *Commercializing Marriage*] (proposing couples enter into agreements that “would grant the creditor/homemaker a security interest in marital property to secure compensation for services she has performed and her foregone opportunities for market participation”); Laura T. Kessler, *The Politics of Care*, 23 *Wis. J.L. Gender & Soc’y* 169, 169–70 (2008) (arguing care work “when practiced by individuals whom the state has historically denied the privilege of family privacy” can be valuable form of political expression). See generally Mary Romero, *Unraveling Privilege: Workers’ Children and the Hidden Costs of Paid Childcare*, 76 *Chi.-Kent L. Rev.* 1651 (2001) (considering how resistance to bargaining affects market for paid child care); Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 *Yale J.L. & Feminism* 81 (1997) (discussing judicial interplay of contract law, home labor, and marital agreements); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65 (1998) [hereinafter Silbaugh, *Marriage Contracts*] (arguing for “equal legal treatment” for home wage labor); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 *Nw. U. L. Rev.* 1, 81 (1996) (“By failing to enforce contracts between spouses providing wages for housework, the law explicitly prohibits attempts to obtain security for labor on the grounds that bargains in families are inappropriate to the affections of family life.”).

19. See *infra* notes 32, 120–122, 127, 232–239 and accompanying text (discussing plural marriage and its effects on women and children).

20. In the legal literature, this argument appears in its strongest form in Martha Fineman’s work. See generally Martha Albertson Fineman, *The Neutered Mother*, the

institution of marriage, and indeed in many ways I am an avid anti-gamist, marriage, like the military, is a dominant and normative institution, with life-altering formal and informal benefits. Even during the height of nineteenth-century women's activism, only a minority completely condemned dyadic marriage or advocated its abolition on the grounds that it was "bad for women."<sup>21</sup> Instead, they agitated, with a significant degree of success, for marriage reform, and most contemporary feminists continue this approach. Hence, while this Article does not advocate for polygamy, explicitly declining to endorse it as the "next civil rights battle," it does attempt to move beyond the polygamy question framed as good versus bad, disputes between liberalism and pluralism, and decriminalization versus prohibition, to a pragmatic assessment of whether and how polygamy might be recognized and regulated, consistent with contemporary norms of equality and fairness in family life.

This Article starts with a brief primer in Part I, summarizing some of the anthropological, economic, and sociological insights on polygamy. It then describes contemporary criticisms of polygamy, as well as the dominant discourses urging it as a lifestyle in the United States, distinguishing religious fundamentalism from various strains of identitarian pragmatism and idealism, including two odd bedfellows, feminism and black nationalism. Contrary to popular imagination, there are diverse stakeholders in the polygamy debate.

Part II of this Article focuses on a curious alliance between proponents of polygamy and opponents of same-sex marriage. It shows how polygamy's advocates are increasingly "coming out of the closet" to piggy-back on the lobbying, legal, and cultural work done to achieve civil rights for "conventional" sexual minorities, i.e., gays and lesbians. On the other hand, those who oppose gay marriage frequently urge that it will open the door to more intimacy horrors, chief among them, polygamy. Thus the gay analogy features prominently in what I will characterize as the alternative lifestyles defense and the slippery slope invocation. While the gay analogy is a compelling one, this Part ends by disputing it as a miscue from what is legally distinctive about polygamy: its multiplicity. Marital multiplicity both increases the costs of intimate negotiation and compli-

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Sexual Family and Other Twentieth Century Tragedies (1995) (criticizing effects of marriage on legal and political construction of intimate relationships); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 *Stan. L. & Pol'y Rev.* 89, 93 (1998) [hereinafter *Fineman, Inevitability of Dependency*] (criticizing encouragement of traditional marriage as solution to dependency); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 *Va. L. Rev.* 2181, 2181 (1995) [hereinafter *Fineman, Masking Dependency*] (arguing "continued adherence to an unrealistic and unrepresentative set of assumptions about the family affects the way we perceive and attempt to solve persistent problems of poverty and social welfare"). For an additional perspective, see Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* 117 (2000) (describing marriage as a program for privilege).

21. See *infra* notes 265–268 and accompanying text (discussing nineteenth-century calls for marriage reform).

cates it in several ways, including raising questions about how power is bargained for and distributed in marriage, and, as long as marriage is limited to heterosexuals, inevitably then between men and women.

Part III turns to partnership law to propose some tentative default rules that might accommodate marital multiplicity, while insuring against some of its historic and ongoing abuses. This Part starts with a brief recounting of how the scholarship on default rules has sought to address bargaining dilemmas in arms-length contexts, giving particular weight to the Ayres/Gertner penalty default norm and the notion of sticky versus slippery default rules. It then rehearses some proposed defaults for plural marital associations. It argues that because both the stakes (intimacy) and the context (intimacy) make arms-length, self-regarding bargaining difficult, the rules might incorporate penalty defaults (as information-forcing devices or to discourage opportunistic behavior) and also be particularly sticky, to avoid easy contrary negotiations. Finally, this Part confronts polygamy's effects on third parties, or its "externalities": concerns that it injures children and encourages fraud against the state. This Part contends that sunlight is the best disinfectant against fraud and that, with regard to children, family law already accommodates intimate multiplicity, or what might be thought of as "de facto" and "serial" polygamy.

As described in Part IV, this Article is inextricably tied to the broader debate about whether the state should remain in the marriage "business." A dominant trend within debates over state recognition of intimate relations is to analogize marriage and intimacy commitments to business associational models, or to turn to private ordering more generally. The Article concludes in this Part by contemplating the significance of incorporating polygamy into the marriage pantheon for the broader debate over state regulation of intimacy. It parses the debate over recognition, abolition, and privatization into what it calls intimacy exceptionalism, urging instead a functional approach. This Article ends by asking, in effect, how big is our love?

In tackling this subject, several important caveats are in order. Obviously, polygamy is a hot button issue, more so since authorities in Texas argued abuses in plural families justified their summary removal of hundreds of children from the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), thus putting front and center the question of whether the state owes any deference to polygamists' family and parental rights.<sup>22</sup>

Polygamy is also complex, and there is much that this Article will not address. Although it is a worldwide practice with a long legal history, this

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22. For a discussion of the FLDS controversy, see, e.g., Joshua S. Press, *The Uses and Abuses of Religion in Child Custody Cases: Parents Outside the Wall of Separation*, 84 *Ind. L.J. Supp.* 47, 47-48 (2009), at [http://www.indianalawjournal.org/articles/84/84\\_Press.pdf](http://www.indianalawjournal.org/articles/84/84_Press.pdf) (on file with the *Columbia Law Review*); see also Angela Campbell, *Bountiful Voices*, 47 *Osgoode Hall L.J.* 183, 222-23 (2009) [hereinafter Campbell, *Bountiful Voices*] (discussing FLDS community in Bountiful, British Columbia).

is not a comparative law piece. With the exception of considering some implications of this debate for immigrant families, the Article limits itself to the discourse and debate over plural marriage in the United States.<sup>23</sup> In addition, because the Article focuses on the domestic debate over plural marriage, it largely restricts its focus to the dominant discourse of polygamy in the United States, family structures of one husband with multiple wives, formally known as polygyny. Nor does this Article give much attention to polyamory more generally, because the focus is limited to bargaining dilemmas engendered by marital relationships in particular. While Elizabeth Emens has done fascinating work on intimates who are committed to nonmonogamy, polygamists are better described as embracing “polyfidelity.”<sup>24</sup> Relatedly, while it uses the terms polygamy and plural marriage interchangeably, this Article rejects the term “monogamy” as suggesting a false dichotomy between conventional and plural marriage. As the widespread rejection of covenant marriage reinforces, when put to the test, the vast majority of marital practitioners believe law should permit more than one spouse, albeit serially instead of simultaneously.<sup>25</sup> In addition, very few advocate criminal prosecutions for adultery.

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23. There has been interesting comparative work on polygamy recently. Comparative feminists like Michèle Alexandre and Adrien Wing have urged a more global and comparative approach. Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 *Hastings Women's L.J.* 3, 6 (2007) [hereinafter Alexandre, *Big Love*] (urging reform of Muslim marital law and polygamy as consistent with Islamic jurisprudence); Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 *J. Contemp. Legal Issues* 811, 844–62 (2001) (describing discussions with plural wives in southern Africa, Britain, and United States); see also Sigman, *supra* note 7, at 144–66 (offering fascinating digestion of comparative literature on polygamy). For an excellent comparative text, see David Pearl & Werner Menski, *Muslim Family Law* 237–78 (3d ed. 1998) (summarizing legal status of polygamy in traditional Muslim law, South Asia, and Britain).

24. Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. Rev. L. & Soc. Change* 277, 283, 308 (2004) (“Polyamory is a lifestyle embraced by a minority of individuals who exhibit a wide variety of relationship models and who articulate an ethical vision that I understand to encompass five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy.”). Emens describes polyfidelity as “a sexually exclusive model analytically distinct from monogamous relationships primarily in the number of the participants.” *Id.* at 308–09; see also Julie Dunfee, “Living the Principle” of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century, 10 *Feminist Stud.* 523, 532 (1984) (linking polygamy historically to the “social control of sex, specifically identifying sex with procreation, and by containing the troubling potential of the erotic,” which is the conceptual opposite of polyamory); Christian Klesse, *Polyamory and Its ‘Others’: Contesting the Terms of Non-Monogamy*, 9 *Sexualities* 565, 566–67 (2006) (exploring boundaries of polyamory as contested within polygamy movement and urging more pluralistic sexual definition); Maura Strassberg, *The Crime of Polygamy*, 12 *Temp. Pol. & Civ. Rts. L. Rev.* 353, 413 (2003) [hereinafter Strassberg, *The Crime of Polygamy*] (defining polyfidelity as sexually exclusive to group).

25. For description and discussion of covenant marriage, see *infra* notes 180, 188, and accompanying text.

Hence, the Article uses the term dyadic marriage, or occasionally conventional marriage, to characterize the current marital legal regime.

### I. A POLYGAMY PRIMER

Despite its intermittent, and inevitably splashy, eruption into the news cycle, most Americans know very little about polygamy. This first Part offers a brief introduction to marital multiplicity, proffering some basic demographics and then focusing on the diversity of groups who endorse and oppose it.

While currently a global “hot button” issue, many cultures have long accommodated polygamy, overwhelmingly between a single husband married to multiple wives, or what is termed “polygyny.” Polygamy, or group or plural marriage, is the gender-neutral term for marriages with multiple spouses, regardless of the gender combination. In seventy-eight percent of cultures, plural marriage is practiced as polygyny.<sup>26</sup> The converse, polyandry, or one wife with multiple husbands, is far less common.<sup>27</sup> Interestingly, contra the notion that polyandry is the feminist’s answer to polygyny, “male dominance is a characteristic of polyandrous societies as well.”<sup>28</sup> Finally, only a few cultures seem to support the gen-

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26. The vast majority of the roughly one hundred thousand practicing polygamists in the United States are polygynists. See *infra* note 33 and accompanying text; see also Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* 28–29, 33–36 (2008) (classifying societies on a polygamy continuum and summarizing polygamy in the major world religions); Melvin Ember et al., *Comparing Explanations of Polygyny*, 41 *Cross-Cultural Res.* 428 (2007) (exploring variables that predict polygyny).

27. Polyandry is confined primarily to the Himalayan regions of South Asia and other regions where living conditions are sufficiently harsh that men hope to obtain a fraction of a wife in a time sharing mechanism, when the total number of wives a man could afford to support is less than one. Zeitzen, *supra* note 26, at 109–13 (discussing history and potential causes of polyandry in India). Polyandry is counterintuitive because paternity is difficult, if not impossible, to establish. In much of the Himalayas, polyandry is largely fraternal, practiced typically among brothers who share a father. *Id.* at 113; see Melvyn C. Goldstein & Cynthia M. Beall, *Tibetan Fraternal Polyandry and Sociology: A Rejoinder to Abernathy and Fernandez*, 84 *Am. Anthropologist* 898, 901 (1982) (arguing fraternal polyandry is “result of social, political, and economic factors operating in the context of a particular kind of encapsulated environment which motivated younger brothers to relinquish a portion of their reproductive potential to obtain and maintain other, more valued, sociocultural ends” (citation omitted)); see also Melvyn C. Goldstein, *Pahari and Tibetan Polyandry Revisited*, 17 *Ethnology* 325, 325 (1978) (arguing similarities among polyandrous groups have obscured “significant and . . . fundamental differences”). Polyandry is sufficiently rare that Zeitzen speculates that “[p]olyandry’s only hope for the future . . . is when it becomes a religious, political or nationalistic symbol, which may then be practised for quite different reasons than it may originally have been.” Zeitzen, *supra* note 26, at 182.

28. Sigman, *supra* note 7, at 162. Sigman relates:

While polygyny may be oppressive to women, this effect is not precisely because men can marry many women, while women may only marry one man. If this were the case, then polyandrous communities would be subjugating of men. But the reality is that the few existing polyandrous societies are as oppressive to women as any other polygamous community—if not more so.

der neutral form, group marriage, i.e., multiple husbands *and* multiple wives.<sup>29</sup>

Scholars from a variety of disciplines have attempted to identify the factors that give rise to and support plural marriage, particularly in its polygynous form. Sociologists, anthropologists, and economists have considered wealth disparities, religious beliefs, economic options, sex ratios, pathogen stress, agricultural productivity, and rent seeking as influencing marital multiplicity.<sup>30</sup> They also have given considerable attention to polygamy's effects on fertility, household wealth, individual health, politics, and democracy.<sup>31</sup> And of course, intensely debated is

Id. at 170 (footnotes omitted); see also Zeitzen, *supra* note 26, at 131–32, 138–44 (“Generally, a woman’s social status is not a function of the number of husbands she has.”).

29. Zeitzen, *supra* note 26, at 12–14; see also *supra* note 24 and accompanying text (defining polyfidelity as being sexually exclusive to a group).

30. See, e.g., Gary M. Anderson & Robert D. Tollison, *Celestial Marriage and Earthly Rents: Interests and the Prohibition of Polygamy*, 37 *J. Econ. Behav. & Org.* 169, 171–76, 180 (1998) (considering political restriction on polygamy as form of rent seeking); Cynthia T. Cook, *Polygyny: Did the Africans Get It Right?*, 38 *J. Black Stud.* 232, 234 (2007) (considering polygamy as adaptive practice in some countries, which has positive effect on population growth and fertility but is harmful to health and well-being of women and children); Ember et al., *supra* note 26, at 437 (finding two main cross-cultural predictors of nonsororal polygyny to be high male war mortality for nonstate societies and high pathogen stress in more densely populated state societies); Eric D. Gould et al., *The Mystery of Monogamy*, 98 *Am. Econ. Rev.* 333, 334 (2008) (contending more developed societies tend to be monogamous, but take account of inequality among women more than traditional societies that are polygamous); Hanan G. Jacoby, *The Economics of Polygyny in Sub-Saharan Africa: Female Productivity and the Demand for Wives in Côte D'Ivoire*, 103 *J. Pol. Econ.* 938, 939 (1995) (linking polygyny in Africa to agricultural productivity, or “cost,” of women); Marina E. Adshade & Brooks A. Kaiser, *The Origins of the Institutions of Marriage I* (Queen’s Univ. Dep’t of Econ., Working Paper No. 1180, 2008), available at [http://www.econ.queensu.ca/working\\_papers/papers/qed\\_wp\\_1180.pdf](http://www.econ.queensu.ca/working_papers/papers/qed_wp_1180.pdf) (on file with the *Columbia Law Review*) (suggesting agricultural externalities may cause monogamy to prevail even when resource inequality predicts polygyny); Theodore C. Bergstrom, *On the Economics of Polygyny I* (Aug. 25, 1994) (unpublished manuscript), available at <http://www.bec.ucla.edu/polygyny3.pdf> (on file with the *Columbia Law Review*) (exploring economics of polygyny in “well-functioning markets for marriage partners”).

31. See, e.g., Bala Audu et al., *Polygamy and the Use of Contraceptives*, 101 *Int’l J. Gynecology & Obstetrics* 88, 91 (2008) (comparing contraceptive use among women in monogamous and polygamous marriages in Nigeria); Michèle Tertilt, *Polygyny, Fertility, and Savings*, 113 *J. Pol. Econ.* 1341, 1342–43 (2005) (finding polygyny in sub-Saharan Africa generates high bride prices to “ration” women, thus crowding out other investments; banning polygamy decreases fertility, increases savings, and increases output per capita); Juan R. de Laiglesia & Christian Morrisson, *Household Structures and Savings: Evidence from Household Surveys* 38, 45 (Org. for Econ. Co-operation & Dev. Ctr., Working Paper No. 267, 2008), available at <http://www.oecd.org/dataoecd/16/61/39922188.pdf> (on file with the *Columbia Law Review*) (comparing polygamous households in Africa and Asia and finding lower rates of capital accumulation as well as education in polygamous ones); see also Paul H. Rubin, *Democracy, Dictatorship, and Polygamy, Regulation*, Summer 2008, at 4, 5 (discussing difficulty for polygamous societies to become open and democratic). Economists Gary Becker and Richard Posner have both speculated

women's status in polygyny, and whether it empowers women, subordinates them, or both.<sup>32</sup>

In the United States, estimates are that somewhere between thirty thousand and a hundred thousand families currently practice plural marriage.<sup>33</sup> Those who do risk criminal prosecution, with authorities relying on substantial religious, regional, and "ethnic" profiling to do so.<sup>34</sup> Although marriage had historically been left to state regulation, polygamy became a matter of federal policy in the mid-nineteenth century. Following decades of anti-Mormon activism and the struggle over the Utah Territory, between 1862 and 1887, Congress enacted a series of laws designed to criminalize plural marriage. In the process, Congress altered the shape of constitutional federalism, as well as the Mormon faith.<sup>35</sup>

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that polygamy advantages women. For this discussion, see *infra* notes 128–131 and accompanying text.

32. Zeitzen discusses the debate over female choice versus male dominance and whether co-wives compete or cooperate. Zeitzen, *supra* note 26, at 127–34; see also *id.* at 176 ("Many of the wives and sexual partners of polygynous men . . . fear becoming HIV-infected, as they have little control over the sexual behaviour of other members of their household."); Sigman, *supra* note 7, at 146 (refuting "gender bloc" approach to determining whether men or women motivate polygamy).

33. See Ward, *supra* note 9, at 132 n.14 (citing sources estimating thirty thousand to one hundred thousand polygamists among fundamentalist Mormons alone). These statistics, which are compiled by the U.S. Attorneys' offices for Utah and Arizona, may reflect an ongoing anti-fundamentalist bias by mainstream Mormons and Mormon institutions in those states. See, e.g., Mary Farrell Bednarowski, *Gender in New and Alternative Religions*, in *Introduction to New and Alternate Religions in America* 206, 233 (Eugene V. Gallagher & W. Michael Ashcroft eds., 2006) (discussing public officials' religious persecution of fundamentalist Mormons by "stereotyping polygamists" and Governor Pyle's characterizing fundamentalists as a cult and charging them with "rape, statutory rape, carnal knowledge, polygamist living, cohabitation, bigamy, adultery, and misappropriation of school funds . . .").

34. Several communities practice underground polygamy undisturbed. See *infra* note 236 (noting prevalence of enforced silence and privacy in underground polygamist communities). Law enforcement appears to target primarily Mormon fundamentalists. See *infra* note 90 (discussing criminal prosecutions targeting polygamists). Jurisdictions impose disparate criminal sanctions for polygamy. For instance, in Utah, it is punishable by up to five years in prison and a \$5,000 fine; in Arizona, it entails a four-year prison term and a \$150,000 fine; and in Montana, polygamy is only a misdemeanor punishable by six months in jail and a \$500 fine.

35. See Gordon, *Mormon Question*, *supra* note 6, at 80–83, 149–55 (discussing anti-polygamy federal legislation in late nineteenth century); see also Sarah Barringer Gordon, "The Liberty of Self-Degradation": Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America, 83 *J. Am. Hist.* 815, 817–20 (1996) [hereinafter Gordon, *Liberty*] (exploring how debates over polygamy implicated notions of political liberty); Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 *Chi.-Kent L. Rev.* 739, 747–64 (2003) [hereinafter Gordon, *War of Words*] (assessing discursive strategies in conflicts over Mormonism); Sigman, *supra* note 7, at 118–34 (summarizing legal history of anti-polygamy legislation and prosecutions in nineteenth century). Six years earlier, in 1854, Congress contemplated a homestead bill that would have made it illegal for polygamists residing in the Utah Territory to acquire title to land from the federal government. However, this bill was not passed and subsequent versions did not incorporate that provision. Michael G. Myers,



*A. Polygamy's Stakeholders*

While polygamy continues to be associated with Mormonism, particularly in light of such high-profile incidents as Elizabeth Smart's 2002 kidnapping and the FLDS controversies of 2008, those who practice, endorse, and lobby for polygamy comprise a diverse cross-section of America.

The dominant domestic voices urging not only decriminalization but full legal recognition of polygamy remain religious ones. As noted, plural marriage became the battleground on which the federal government and the Church of Jesus Christ of Latter Day Saints fought for control of Utah Territory during the second half of the nineteenth century.<sup>36</sup> The Mormon Church (LDS) finally conceded, formally banning plural marriage in 1890 and eventually backing the ban with the threat of excommunication for those who continued its practice or advocacy. Some Mormon leaders, however, rejected the ban as breaking with Church founder Joseph Smith and his 1848 Declarations and Covenants; they created fundamentalist offshoots of Mormonism that continued to embrace polygamy and to practice it underground. These non-LDS sects of Mormonism organized their faith around plural "celestial marriage," or "the Principle," arguing it was at the core of their religious faith, structure of government, and constitutional freedom.<sup>37</sup> Their nineteenth-century counterparts had contended, "[P]olygamy is included in the ordinance of marriage, and in the everlasting covenant and laws of God . . . under proper regulations, it is an institution holy, just, virtuous, pure, and, in the estimation of God, abundantly calculated to bless, preserve, and mul-

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Comment, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 *Hous. L. Rev.* 1451, 1461 (2006). Kerry Abrams has shown how, during this same period, immigration law was federalized to resist polygamy and prostitution and designed to exclude Chinese women and prevent growth of Chinese-American communities. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 *Colum. L. Rev.* 641, 643 (2005) ("While California could not exclude Chinese women for being 'Chinese,' it could exclude them by classifying them as outside the acceptable category of 'wives.'").

36. See Gordon, *Mormon Question*, supra note 6, at 111–12 (discussing federal officials' and Mormon leaders' attempts to wrest control of Utah).

37. See, e.g., Richard K. Scott, *Celebrating Celestial Marriage* 109 (2005) [hereinafter Scott, *Celebrating*] (mentioning "celestial marriage"). This remains the case today. Joe Jessop, a member of FLDS with five wives and forty-six children said, "My family came to Short Creek [Arizona] for the same reason as everyone else, to obey the law of plural marriage, to build up the Kingdom of God." Scott Anderson, *The Polygamists: An Exclusive Look Inside the FLDS*, *Nat'l Geographic*, Feb. 2010, at 34, 46–47.

tively a nation.”<sup>38</sup> Successor fundamentalists in the twentieth century concurred they were “the true keepers of the faith.”<sup>39</sup>

While less vocal and visible than Mormon polygamists, other religious groups also endorse polygamy as mandated, or permitted, by their faith. These include evangelical Christians, African Hebrew Israelites of Jerusalem, and Muslims, affiliated both with the Nation of Islam and also Sunni sects.<sup>40</sup> The religious fundamentalist embrace of polygamy, rooted in strict interpretation of and uncompromising adherence to sacred texts and traditions, does dominate the political and cultural discourse favoring polygamy. But it is also important to look beyond religious defenses, which can obscure the diversity of current interests and stakeholders in plural marriage.

Less familiar than the Mormon and other religious endorsements are secular defenses of polygamy, including two from unlikely bedfellows: radical feminists and black nationalists. Some groups in the United States have urged polygamy as a way of preserving the black family, viewed by many as the bedrock of the black community. Made in its weaker form, the argument is a pragmatic one: Distorted gender ratios, lack of economic options, and sexual norms have reduced black marriage to a statistical oddity.<sup>41</sup> The result: 67.1% of black children are born

38. Gordon, *Mormon Question*, supra note 6, at 91. Gordon elaborates:

The Saints defended polygamy as a positive religious command, which they had designated “the Principle,” and attacked monogamy as evil and unnatural. They offered their own theories of male and female sexual nature and eugenically focused claims that the children of polygamous marriages were physically superior. They also derided the hypocrisy of profligate opponents, calling themselves honest and forthright polygamists, and made arguments based on biblical mandates for polygamy as well as the power of the New Dispensation. Defending the Principle, Mormons constructed what one scholar has called a “denigration of the monogamous ethic.”

Id. at 85; see also Duncan, supra note 10, at 323 (describing four dominant fundamentalist Mormon sects operative today); Sigman, supra note 7, at 134–37 (describing rise of Mormon fundamentalism in first half of twentieth century).

39. Eve D’Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 *Int’l J.L. Pol’y & Fam.* 373, 375 (2005) (quoting Kathleen Tracy, *The Secret Story of Polygamy* 80 (2002)).

40. Kay S. Hymowitz, *I Wed Thee . . . and Thee . . .*, Wall St. J., Oct. 18, 2004, at A18 (“Christian polygamists are conservative evangelicals who base their beliefs on the Old and New Testaments; by contrast, Mormons cite extra-biblical revelations of their founding prophet Joseph Smith.”).

41. See, e.g., Sigman, supra note 7, at 166 (“For the vast majority of Americans, polygamy is still a second best response . . . . An important exception is the African-American community, which seems to possess characteristics indicative of polygamous society and currently struggles under existing government definitions of family and households.”). One NPR story about black Muslims in Philadelphia offers at least anecdotal confirmation: “The single women at the mosque say polygamy is a fact of life. But it’s not their first choice.” *Philly’s Black Muslims Increasingly Turn to Polygamy* (NPR radio broadcast May 28, 2008), at <http://www.npr.org/templates/story/story.php?storyId=90886407> (on file with the *Columbia Law Review*). Compare Alexandre, *Lessons*, supra note 10, at 1469–70 (describing informal practice of polygamy in some

outside of marriage and 34.5% grow up in poverty.<sup>42</sup> In this view, what might be thought of as “crisis” polygamy, or “pragmatic” or “charitable” polygamy,<sup>43</sup> represents a practical way of providing black women with (black) husbands, and black children with more present and committed fathers.<sup>44</sup> In its stronger form, the black nationalist argument embraces polygamy as a way to rescue black masculinity and restore patriarchy to the black community, a sort of identitarian idealism.<sup>45</sup> In this view, polygamy offers not only pragmatic multiplicity, but also reinforces conven-

black communities), with Wing, *supra* note 23, at 858–61 (raising research questions about informal polygamy in black communities and how to distinguish it from infidelity).

42. U.S. Census Bureau, 2007 American Community Survey tbl. B13002B (2007), available at [http://factfinder.census.gov/servlet/DTTTable?\\_bm=y&-state=dt&-ds\\_name=ACS\\_2007\\_1YR\\_G00\\_&-mt\\_name=ACS\\_2007\\_1YR\\_G2000\\_B13002B&-redoLog=true&-caller=geoselect&-geo\\_id=01000US&-geo\\_id=NBS&-format=&-lang=en](http://factfinder.census.gov/servlet/DTTTable?_bm=y&-state=dt&-ds_name=ACS_2007_1YR_G00_&-mt_name=ACS_2007_1YR_G2000_B13002B&-redoLog=true&-caller=geoselect&-geo_id=01000US&-geo_id=NBS&-format=&-lang=en) (on file with the *Columbia Law Review*); id. tbl. C17001B, available at [http://factfinder.census.gov/servlet/DTTTable?\\_bm=&-state=dt&-ds\\_name=ACS\\_2007\\_1YR\\_G00\\_&-mt\\_name=ACS\\_2007\\_1YR\\_G2000\\_C17001B&-redoLog=true&-caller=geoselect&-geo\\_id=01000US&-geo\\_id=NBS&-format=&-lang=en](http://factfinder.census.gov/servlet/DTTTable?_bm=&-state=dt&-ds_name=ACS_2007_1YR_G00_&-mt_name=ACS_2007_1YR_G2000_C17001B&-redoLog=true&-caller=geoselect&-geo_id=01000US&-geo_id=NBS&-format=&-lang=en) (on file with the *Columbia Law Review*).

43. In this sense, the “crisis” is a shortage of men, akin to the shortage of men in cultures in which wars or immigration patterns led to polygamy. By “charitable” polygamy, I mean instances in which a dyadic family turns to plural marriage in order to help a single woman. Charitable polygamy is instantiated in some religions and may or may not entail conjugal relations.

44. One polygynist husband “believes ultimately, polygamy is good for society—especially in the inner city, where intact families are rare and many kids grow up without their fathers.” In the same story, a single mother in south Philadelphia said, “We’re dealing with brothers who are incarcerated—that is, unavailable. . . . And then, unfortunately, you have the AIDS and HIV crisis, where HIV has struck the African-American community disproportionately than to others. So when you look at it that way, there is a shortage.” Hagerty, *supra* note 41 (internal quotation marks omitted). Interestingly, providing black children with black fathers is the opposite of the “lost boys” concern of polygamy’s critics. See *infra* notes 60–62 and accompanying text (discussing harmful effects of polygamy on children). In some ways, these polygamists have identified a paradox I will discuss later in this Article: Black children will either grow up in formal or de facto polygyny. See *infra* notes 241–246 and accompanying text (describing how many groups already practice plural intimacy resulting in multiple families).

45. As one website argues:

In these times, when the Black Family finds itself in absolute chaos, under this western system/culture/order, polygamy needs to be discussed and reviewed, as a Nation, for we are today more fragmented then [sic] ever. There are many more women to men, why should one sistah be honored, provided for and protected, while the other be dishonored by being neglected and relegated to being “my baby’s mama.” Why shouldn’t we pull our resources together, strengthen the Kingman, and give the youths extra security? Why shouldn’t we consider returning to our ancient traditions, especially when we have seen the results of Western culture? It is simply amazing to me that sistahz grudgingly accept that men “cheat” and dishonor them, but absolutely reject our ancient tradition, where economics are shared, work is shared, motherhood is shared, and things are done in the light, with honesty and balance. Why fight something which may prove to be beneficial to us all as a collective?

Empress Tsahai, Polygamy as a Choice for the Black Family (2002), available at <http://www.rastafarispeaks.com/newspapers/articles/polygamy2002.html> (on file with the *Columbia Law Review*); see also Scot Brown, Fighting for US: Maulana Karenga, the US

tional gender roles as well. This pro-polygamy stance differs in a crucial respect from the mainstream conservative urging of black “monogamous marriage” (I use that term intentionally here). Black nationalists and conventional conservatives may both view marriage as the best antidote to poverty and sexual immorality, far preferable to government entitlements or restructuring the family.<sup>46</sup> Yet, while mainstream conservatives additionally support black marriage as an assimilationist strategy, black nationalists advocate *plural* marriage as a way to further separate the black community culturally, morally, and, ultimately, politically and economically from mainstream American culture.

Meanwhile, some radical feminists urge polygamy as a potential weapon in dyadic marriage’s ongoing battle of the sexes. Decades after Betty Friedan’s *The Feminine Mystique*, even after substantial shifts in gender roles, many women continue to complain that conventional marriage leaves them craving deeper emotional intimacy and more equitable divisions of household labor.<sup>47</sup> Thus far, frustrated wives have had three options: surrender and consign themselves to gender inequity and personal exhaustion; remain locked in battle with their husbands; or divorce.<sup>48</sup> Polygamy presents another option. For some women, increasing the ratio of women to men in a household might be more effective than pressuring husbands to “change” and conform to women’s expectations. Done properly—that is, among women committed to feminist principles—polygamy can provide a “sisterhood” within marriage, generate more adults committed to balancing work/family obligations, and allow more leisure time for each wife.<sup>49</sup> As Luci Malin, vice chairman of Utah’s National

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Organization, and Black Cultural Nationalism 62–65 (2003) (situating experiments and tensions with polygamy within conflicts over male dominance in black nationalism).

46. See, e.g., Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 4 (2006) [hereinafter McClain, *The Place of Families*] (arguing families are “significant sites” for “producing persons capable of responsible personal and democratic self-government”); Linda C. McClain, “Irresponsible” Reproduction, 47 *Hastings L.J.* 339, 403–07 (1996) (describing alliances between black communities and mainstream conservatives to change childbearing patterns in black families).

47. See, e.g., Williams, *supra* note 18, at 47–48, 66–72, 272 (describing studies and statistics on “the leisure gap”); Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 *J. Econ. Persp.* 3, 7–8 (2007) [hereinafter Lundberg & Pollak, *American Family*] (describing 2005 survey showing sixteen hours per week of housework for women versus less than eleven hours for men—a thirty percent gap).

48. Of course, these three manifest in complex and nuanced ways. Confronting the classic “leisure gap,” some wives may delegate to paid careworkers or other family members as “kincare” or deny there is any “conflict.” Others may not label marital tension over care work as a “battle of the sexes” but instead as the personal deficiencies of their husbands.

49. One co-wife explains:

The thing that I love most about our relationship is the support that we all have for each other. Karen has frequently helped me and Martin out of a few disagreements as have I with the two of them. I like that I can support Karen in the things she loves to do. She likes to work outside in the yard for several hours at a time, and Martin likes to have someone nearby and not feel left by himself. So I can fulfill this need for the both of them, by being with Martin when Karen

Organization for Women, once remarked, “[Polygamy] seems like a pretty good idea for professional women, who can proceed with their careers and have someone at home they can trust to watch their children.”<sup>50</sup> In fact, lawyer and polygamist Elizabeth Joseph has called plural marriage “the ultimate feminist lifestyle.”<sup>51</sup> Contra polygyny as identitarian bonding among women, others laud polygamy as destabilizing the conventional gender roles assigned by dyadic marriage’s “yin and yang.”<sup>52</sup> In this view, polygamy arguably has the potential to “queer” marriage.

Feminist endorsements of polygyny might seem to have little in common with black nationalist ones: The latter sees polygamy as patriarchy’s savior, the former as its death knell. Still, what they share is attention to the material realities that shape intimacy and the ways marriage can foster such things as “gender” or “racial” community. In the end, what the feminist and black nationalist endorsements of polygamy share is a fascinating combination of pragmatism and identitarian idealism.

likes to work outside. Also Karen likes to take trips to see her daughter out of state frequently. I can stay at home with Martin so he doesn’t feel left behind. So Karen gets what she needs without feeling guilty, Martin gets what he needs without feeling left behind. And I get my needs met by feeling [sic] that I have an important part of holding things together. I also have a strong need to not be alone too much, so this also fulfills my need in this way by being with Martin.

It is so symbiotic, that we frequently don’t have to even discuss these matters. We just know intuitively what each other needs. We also can be honest with each other and all sit down and say what’s on our mind if we aren’t feeling great about something or feel that we have a need that isn’t being met. We probably know more about each other than anyone has ever known about us personally. The realness and honesty are beautiful and really bond us together.

Noah Smith, Lisa, Martin, and Karen: Our Family Profile (Jan. 28, 2007), at <http://pilegesh.blogspot.com/2007/01/lisa-martin-and-karen.html> (on file with the *Columbia Law Review*).

50. Joyce Price, *New NOW Answer: Polygamy for Moms*, *Wash. Times*, Aug. 12, 1997, at A1 (internal quotation marks omitted) (discussing polygamy as “a solution for the problems of working mothers”).

51. Joseph contends that polygamy “provides me the environment and opportunity to maximize my female potential without all the tradeoffs and compromises that attend monogamy.” Elizabeth Joseph, *Polygamy Now!*, Address at Utah Chapter of the National Organization of Women, *Harper’s Mag.*, Feb. 1998, at 26, 26–27; see also Elizabeth Joseph, *Op-Ed.*, *Feminism Finds Empowerment in Polygamous Lifestyle*, *Chi. Trib.*, Mar. 1, 1998, at 10 (noting as polygamous co-wife she does not have to choose between work and family); Elizabeth Joseph, *My Husband’s Nine Wives*, *N.Y. Times*, May 23, 1991, at A31 (“I am sure that in the challenge of working through [monogamy’s] compromises, satisfaction and success can be realized. But why must women only embrace a marital arrangement that requires so many trade-offs?”).

52. 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, 1037–42 (2005) (discussing relationship between polygamy and gender equality in marriage). Some advocates of polyamory also endorse polygamy, but many polyamorists reject parsing intimacy multiplicity into the marital form. See, e.g., Emens, *supra* note 24, at 283–84 (contending women might find satisfaction in nonmonogamous relationships).

A final defense of polygamy that does not fall neatly into either of the above categories rests on a sort of gendered pragmatic moralism rooted in an essential distinction between male and female nature. The logic runs as follows. Men are, by nature, sexually unfaithful. Women, who are less interested in sex, are not. To the contrary, women prefer monogamy.<sup>53</sup> Part of the virtue, then, of polygamy is its transparency: It permits men's basic (base?) instincts while using the marital structure to domesticate and discipline them. Following this logic, men may serve their biological impulses for multiplicity, but may not be deceitful or disrespectful. They may have multiple sexual partners, but they may not turn women into "prostitutes."<sup>54</sup> In sum, in this essentialist, biologically determinative, and, of course, heteronormative, view, plural marriage is defended as preferable to the alternative of men's inevitable adultery and infidelity.

As in any discursive analysis, there is overlap between the religious fundamentalist and various pragmatist and identitarian idealist endorsements of polygamy. For example, some black communities urge polygamy as a matter of both religious principle and racial pragmatism. (For instance, Philadelphia has the highest density of polygamy, due to a combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment.<sup>55</sup>) Similarly, "feminist" arguments often appear in some form in religious fundamentalist defenses of polygamy. For instance, fundamentalist Mormon wives believe they will comprise one family with their sister wives

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53. In sociobiology this is known as the Bateman Effect. See, e.g., Sigman, *supra* note 7, at 147 (describing how Bateman Effect or Bateman Principle operates). Of course, such characterizations are also made by evolutionary biologists. See, e.g., Donald Symons, *The Evolution of Human Sexuality* 27 (1979) (arguing one "primary male-female difference [ ] in sexuality among humans" is that men are inclined to polygyny while women may be equally satisfied in polygynous, monogamous, or polyandrous arrangements).

54. Polygamists claimed that "polygamy was the only reliable antidote for prostitution," and one suffragist, "testifying at a congressional hearing on woman suffrage, endorsed the theory that polygamy was a protection against prostitution." Gordon, *Liberty*, *supra* note 35, at 844 & n.66. For further discussion of the proposition that "monogamy and prostitution went hand in hand," see *id.*; Dunfey, *supra* note 24, at 527-28, 531 (nineteenth-century Mormon women made frequent references to "fallen women, mistresses, prostitutes, and the necessity of alternative sexual outlets for men"); Gordon, *Mormon Question*, *supra* note 6, at 92 (listing "whoredoms" among "vile abominations" considered incident to monogamy); see also Janet Bennion, *Evaluating the Effects of Polygamy on Women and Children in Four North American Mormon Fundamentalist Groups: An Anthropological Study* 35 (2008) (interviewing contemporary Mormon polygamists "[m]any [of whom] suggest that if polygamy were adopted throughout the United States, prostitution would be eliminated"). This is curiously reminiscent of some pro-slavery discourse, in which defenders argued that slavery was preferable to white prostitution. See, e.g., W. Gilmore Simms, *The Morals of Slavery*, reprinted in *The Pro-Slavery Argument* 175, 229-30 (Walker, Richards & Co. 1853).

55. See, e.g., Hagerty, *supra* note 41 (discussing experience of wives in Philadelphia's black Muslim polygamist families).

in the afterlife.<sup>56</sup> The inevitability of male infidelity predictably pops up across pro-polygamy discourse.<sup>57</sup>

My point is not to caricature or misrepresent any of these groups or their ideological commitments to plural marriage. Rather, it is to show that the conflict over recognizing polygamy is not just an academic debate, nor does it affect the material and intimacy interests of only one religious group. While curtailing Mormonism may have driven early federal policy defining marriage as dyadic, currently there are diverse stakeholders in the plural marriage debate.

### B. *Polygamy's Critics*

Polygamy offends a diverse array of interests: traditionalists who believe in “family values” (they suspect it to be promiscuity in disguise), mainstream Christians who resent religious fundamentalism, children’s rights advocates, liberals who suspect that polygamy is a combination of parental exploitation of children and religious brainwashing, hindering realization of individual desires and will (one might view earlier conflicts over the Amish as a more diluted version of this tension), romantics invested in the companionate bond that conventional marriage is imagined to engender, and even those who argue polygamy provides a cover for a range of fraudulent behavior from welfare abuse to tax fraud. And, of course, there are those who believe polygamy is an inherently patriarchal institution that subordinates women.

Two legal scholars capture many of these concerns. Maura Strassberg, one of the most vocal scholars urging the ongoing criminalization of polygamy, contends it injures the liberal democratic state, individual well-being, and the flourishing of the specific populations who practice it: “[P]olygyny not only fails to produce critical building blocks of liberal democracy, such as autonomous individuality, robust public and private spheres, and affirmative reconciliation of individuality and social existence, but promotes a despotic state populated by subjects rather

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56. See, e.g., Scott, *Celebrating*, supra note 37, at 109 (“The gate to eternal life is celestial marriage, which holy order of matrimony enables the family unit to continue in eternity, so that the participating parties may have posterity as numerous as the sands upon the seashore or the stars in heaven.” (citation omitted)); Dunfey, supra note 24, at 534 (quoting nineteenth-century Mormon woman on polygamy: “Only for the sake of its expected joys in eternity, could I endure its trials through time.”).

57. As one advocate for polygamy put it: “So, I ask the question: Why are we all so coy about the thought of men having other women in their lives? That’s the way they’re designed.” Admin, *Men Are Designed to Chase Skirts . . .*, Polygamy (Dec. 6, 2009), at <http://www.polygamy.com/index.php/commentary/men-are-designed-to-chase-skirts/#comments> (on file with the *Columbia Law Review*); see also Dunfey, supra note 24, at 528–29, 530 (“Just as the ideology of the larger [nineteenth-century] society stressed the pure and passionless qualities of the ideal woman in contrast to the lust of man, so too did Mormon women see themselves as curbing the passion of depraved men.”).

than citizens.”<sup>58</sup> Shayna Sigman, on the other hand, urges polygamy’s decriminalization. But she concurs with Strassberg that, in the United States, Mormon enclaves have retreated from civil society, cloaking their members in insular, theocratic-fundamentalist polygamous enclaves that segregate themselves from society and perpetuate both abuse against their members and fraud against the state.<sup>59</sup> For Sigman and Strassberg then, polygamy is a symptom of an illiberal and antidemocratic political community.

Both scholars also stress the injuries of systemic polygamy to individual well-being, which are often manifested in gendered ways. Unlike occasional polygamy, systemic polygamy is practiced by substantial portions of the population and it either rests on unequal demographics of sex and intimacy, as exemplified by the aforementioned “crisis polygamy,” or it generates them:

Unless war, migration, or some other significant event occurs to change the sex ratio in a society from its natural state, polygyny is a zero sum game among the men—some have multiple wives at the expense of others. One way of curing this imbalance is to recruit female converts. Another way is to tap into a population of even younger girls. Yet another solution is to get rid of some of the males.<sup>60</sup>

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58. Strassberg, *The Crime of Polygamy*, supra note 24, at 356 (footnotes omitted); see also D’Onofrio, supra note 39, at 374 (“[T]he patriarchal nature of plural Fundamentalist[ ] families and communities undercuts the public’s legitimate interest in promoting an appreciation for justice, equality, and liberty among society’s youngest members.”); Duncan, supra note 10, at 326 (arguing religious teachings compel women to “obey not only the prophet, but the entire male hierarchy as well”).

59. Sigman, supra note 7, at 177–84 (listing ways polygyny disproportionately burdens state and harms adolescent members). Unlike Strassberg, Sigman contends that polygamy is merely a symptom of other harms and of chronic under-enforcement. She does, however, offer a fascinating summary of the main arguments against polygamy, particularly her parsing of the two theories of the polygamy-despotism connection. The first version (which she calls the Lieber-Reynolds theory due to its influence on the Supreme Court’s *Reynolds* decision) contends that “people who accepted familial despotism would legitimate the existence of political despotism, though [Lieber] never explained just how this connection would be bridged.” *Id.* at 174. In the second version, Strassberg-Hegel says:

[M]onogamous marriage is a fundamental aspect of the liberal state, because monogamy fosters the development of autonomous individuals who fall in love, based on unique characteristics. These fully-developed autonomous individuals are then able to interact within private spheres to fulfill their emotional and intimate needs, as well as in public spheres that recognize rights and liberty. . . . Polygamous marriage, on the other hand, stifles individual development in favor of religious and communal goals, diminishing an opportunity for individualized romantic love. Accordingly, polygamy blurs the development of distinct spheres of public versus private life. It also prevents the transcendence of individuals, because it reinforces inequalities that exist between different groups of men and between men and women.

*Id.* at 175 (footnotes omitted).

60. *Id.* at 182. Maura Strassberg elaborates:

Given the crucial importance of teenage plural brides to the Mormon fundamentalist practice of polygyny and the extreme difficulty of regulating



While polygamy within the United States overall is occasional, some insular communities do practice it systemically, engendering exactly these described dynamics. Whether the result is “lost boys,” teen brides, widespread statutory rape and incest, or an uneducated and excessively controlled population, the outcome is the same: demographics that are not consonant with high rates of individual well-being.<sup>61</sup> Similarly, polyandry, which generates more husbands per wife, is associated with high rates of female infanticide.<sup>62</sup>

While today’s sustained discourse against plural marriage by and large avoids the racism and xenophobia of the earlier campaigns, the concerns remain largely the same.<sup>63</sup> Whether manifest as nineteenth-

polygyny in any way in the isolated, theocratically governed communities that practice such polygyny, it would be impossible to protect teenage girls and very young women from the identified evils of polygynous marriage for them while allowing polygynous marriage in general. This in itself provides some justification for banning all polygynous marriages, even those involving mature adult women, on the grounds that the practice viewed more widely will inevitably and significantly target and victimize teenagers as plural wives.

Strassberg, *The Crime of Polygamy*, supra note 24, at 357–58; see also Zeitzen, supra note 26, at 173–74 (describing expulsion of young males from polygamous communities).

61. See, e.g., Karel Kurst-Swanger & Jacqueline L. Petcosky, *Violence in the Home: Multidisciplinary Perspectives* 21 (2003) (“Aside from public debate regarding the utility of polygamy, professionals are concerned about child sexual abuse, wife battering, intermarriage, child marriage, reliance on welfare and Medicaid, high levels of child poverty, tax, welfare fraud, and educational deprivation.”); Simon LeVay & Sharon McBride Valente, *Human Sexuality* 300 (2d ed. 2006) (“However, law enforcement and child welfare officials cite many social ills that are associated with Mormon polygamy, incest, physical and sexual abuse of children, poverty, welfare and tax fraud, criminal nonsupport of children, and diminished educational opportunities and health care.”).

62. See, e.g., Zeitzen, supra note 26, at 141 (discussing relationship between polyandry and female infanticide, but rejecting claims of “simple causality” between the two); see also James Peoples & Garrick Bailey, *Humanity: An Introduction to Cultural Anthropology* 171 (8th ed. 2009) (noting although female infanticide is not the only explanation for polyandry, “female infanticide does indeed have the effect of decreasing the number of marriageable women”).

63. Sarah Gordon and Martha Ertman have both highlighted the association of polygamy with barbarism, slavery, and race treason. Gordon returns to the 1856 Republican Party platform describing polygamy and slavery as “the twin relics of barbarism,” political economies characterized by tyrannical and lascivious despots who subjugated and abused their wives or slaves, respectively. Gordon, *Mormon Question*, supra note 6, at 55–83; see also Gordon, *War of Words*, supra note 35, at 747–57 (assessing discursive strategies employed by opponents of Mormonism). Martha Ertman has taken a different track, showing how popular discourse associated Mormon polygamy with “race treason,” characterizing Mormons as miscegenistic degenerates threatening the newly reunified nation. Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 *Colum. J. Gender & L.* 287, 365 (2010) [hereinafter Ertman, *Race Treason*] (noting widespread view that “the progeny of Mormons constituted a new species that resembled those supposedly backward races, degenerating the White race and undermining white supremacy” and arguing “[c]onsequently, we should read American antipolygamy law in light of [the legal doctrine shapers’] intent to remedy political and race treason”). What both of these racialized analogies share with the contemporary “despotism” charge is the view of polygamy as barbaric, tyrannical, and incompatible with

century theocracies struggling with the federal government for control of the Utah Territory, or twentieth-century “compounds” that have withdrawn from civil society, the claim is that the injury of polygamist communities is twofold: Polygamists do not contribute to secular government and instead “game the societal demographics and economics to create artificial characteristics that are favorable to polygamy in order to sustain [it],” in the process wreaking significant harm on the populations who practice the institution.<sup>64</sup> While differing in the remedy—continued criminalization versus decriminalization—Strassberg and Sigman both capture this concern that polygamy’s harm to the liberal state is its production of “unregulated communities” that are incompatible with liberal democracy and its commitments to individual well-being.<sup>65</sup>

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democracy. See also Abrams, *supra* note 35, at 642–43 (“Congress not only feared the Chinese practices of polygamy and prostitution, but also believed that these customs rendered the Chinese unfit for self-governance. Congress viewed these institutions as reflective of an underlying ‘slave-like’ mentality, fundamentally at odds with citizenship in a participatory democracy.”); Alexandre, *Lessons*, *supra* note 10, at 1467–68 (discussing social outcry against polygamy in nineteenth-century America); John Tierney, *Op-Ed.*, *Who’s Afraid of Polygamy?*, *N.Y. Times*, Mar. 11, 2006, at A15 (noting implicit racism of Supreme Court’s dismissal of polygamy as “a feature of the life of Asiatic and of African people” (internal quotation marks omitted)).

64. Sigman, *supra* note 7, at 166–67. In fact, Sigman contends this is what distinguishes polygamy in the United States from its other global incidences:

Because American polygamy lacks the stronger demographic- and economic-based rationales that produce polygamy in other countries, and instead relies on religious ideology and other belief systems, it is not inherently self-supporting. . . . Rather than presenting a threat to the nation and the underpinnings of a liberal democratic state, what makes American polygamy dangerous is the extent to which it requires polygamous communities to game the societal demographics and economics to create artificial characteristics that are favorable to polygamy in order to sustain itself. . . . Polygamy is harmful precisely because it cannot survive within the United States without deliberate efforts to make it viable in a system that is geared from a demographic, economic, and sociological standpoint toward monogamy.

*Id.* In fact, Strassberg does not oppose polyamory because it is not community-creating in the same way polygamy is. Strassberg, *The Crime of Polygamy*, *supra* note 24, at 413 (“[P]olyfidelity does not facilitate the creation of a homogenous community engaged in group marriage.”); see also Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 *Cap. U. L. Rev.* 439, 561 (2003) (asserting “polyandry is too diffuse as a social phenomenon to currently have any significant impact”).

65. The Fundamentalist Church of Jesus Christ of Latter Day Saints in Eldorado, Texas typified this threat to the liberal state and self-determination. Church leaders would scare young women away from exploring the world outside of the church’s compound by portraying the outside world as one in which the women would be exploited for sex and ostracized for their background. *Court Documents Show Polygamist Sect Married Girls at Puberty*, Associated Press, Apr. 9, 2008, available at <http://www.foxnews.com/story/0,2933,348148,00.html> (on file with the *Columbia Law Review*). Within this insular community, girls just entering puberty were married to older “strong” men, forced to have sex, and regularly abused. *Id.*; see also Bennion, *supra* note 54, at 39 (“A side effect of the belief in communalism and polygamy is a psychological pre-disposition toward anti-government sentiment, mistrust of ‘Babylon,’ the outside modern world, and isolation.”).

In sum, both polygamy's stakeholders and its critics are far more diverse than we might imagine. Indeed, Philadelphia's black Muslim community, not Utah's Mormon one, has the highest concentration of polygamists.<sup>66</sup> Meanwhile polygamy's critics fear an array of harms, ranging from abuse of women and children to its intrinsic incompatibility with democracy and propensity for despotism. The next Part explores the forces that have recently ramped up the debate over polygamy. It also considers why, despite all the heat, they still have failed to shed light on the regulatory challenges polygamy poses for law and equality.

## II. THE GAY ANALOGY AND MARITAL MULTIPLICITY

In the 1960s, Ed Firmage, an intern working on Vice President Hubert Humphrey's civil rights initiatives, leaned on television advertisers to feature black Americans in commercials: "Once you do that, the game is over."<sup>67</sup> When HBO premiered *Big Love* four years ago, Firmage, now a retired law professor at the University of Utah, speculated that the series could have a similar effect for polygamists.<sup>68</sup> If African Americans could sell soap powder, perhaps polygamists could be the family next door.<sup>69</sup>

Firmage's analogy is both tempting and telling. What he anticipated in the 1960s was the visual power of television to collapse social taboos. By humanizing the unfamiliar and normalizing the foreign, the then-new media could smooth the way for social acceptance and, eventually, rights recognition. As noted in the Introduction, the hit show, now in its fourth season, has introduced mainstream America, or at least its vast cable-

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By contrast, another insular religious community, the Amish, urges its adolescents to make an informed choice about their commitment to the religion and the community. During rumspringa, Amish adolescents are encouraged to experiment with mainstream culture, dress, customs, and practices so that they may decide for themselves if they want to return for baptism and immersion in the traditional Amish lifestyle. See Tom Shachtman, *Rumspringa: To Be or Not to Be Amish* (2006), excerpt available at <http://www.beliefnet.com/Faiths/Christianity/2006/05/Partying-With-The-Amish.aspx> (on file with the *Columbia Law Review*) (discussing Amish tradition of rumspringa).

66. See Hagerty, *supra* note 41 (discussing increases in polygamy in Philadelphia's black Muslim community).

67. Adams, *supra* note 1. Firmage, the author of a book on Mormon history, also endorses decriminalizing polygamy. Ed Firmage, *Polygamy, Monogamy and Monotheism: The One and the Many, One Utah* (June 3, 2006), at <http://oneutah.org/2006/06/03/polygamy-monogamy-and-monotheism-the-one-and-the-many/> (on file with the *Columbia Law Review*).

68. The *New Yorker* concurred: "The hook has also snagged a boatload of cultural critics and reporters, commenting both on its controversial subject and on what it means that that subject has bubbled up to the level of acceptability for television." Nancy Franklin, *Triple Threat: Polygamy Goes Mainstream in HBO's "Big Love,"* *New Yorker*, Mar. 27, 2006, at 78, 78.

69. Indeed, during a meeting with the Utah Attorney General, a group of polygamist women compared themselves to Rosa Parks. Nancy Perkins, *Plural Wives Plead Case*, *Deseret News* (Utah), Sept. 28, 2003, at B.1.

viewing population, to plural marriage, even taking out ads on the wedding pages of the *New York Times*.<sup>70</sup>

“Big Love” sets up Bill’s clan as an exemplar of family values, with some of the same problems that conventional marriages can have: petty jealousies; misunderstandings; conflicting timetables when it comes to sexual desire; in-law problems; a toddler eating mayonnaise out of the jar while you’re trying to change the diaper of a screaming baby; and requests of the “can you pick up the dry cleaning, I’m running late” variety.<sup>71</sup>

If this strategy of familiarizing the foreign through quirky families sounds familiar, it’s for a reason. HBO has framed the series as “yet another look at the human condition through an unconventional lens: the Mafia, funeral homes, single thirty-something women, and now polygamists.”<sup>72</sup>

Just a few years ago, some contended that polygamists were too far outside the cultural mainstream to be virtually integrated:

When the high court struck down anti-sodomy laws in *Lawrence v. Texas*, we ended decades of the use of criminal laws to persecute gays. However, this recent change was brought about in part by the greater acceptance of gay men and lesbians into society, including openly gay politicians and popular TV characters.

Such a day of social acceptance will never come for polygamists. It is unlikely that any network is going to air *The Polygamist Eye for the Monogamist Guy* or add a polygamist twist to *Everyone Loves Raymond*.<sup>73</sup>

And yet, that is exactly what *Big Love* has done, issuing frequent, typically tongue-in-cheek invitations to its sophisticated viewers to consider polygamy as valid an “alternative lifestyle” as gay marriage. In fact, *Big Love* itself is a product of the gay marriage analogy. The show’s creators, Mark Olsen and Will Scheffer, who are romantic as well as creative partners, have explained they were intrigued by polygamists’ enthusiastic response to the Supreme Court’s 2003 decriminalization of homosexual sodomy in *Lawrence v. Texas*: “[W]e thought that just made such interesting, strange, and perverse bedfellows that it was just too delicious to not use.”<sup>74</sup> Hollywood is onto something. In the last several years, in law and policy—in addition to popular culture—the gay analogy has ridden high.

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70. See, e.g., N.Y. Times, Mar. 12, 2006, § 9, at 1.

71. Franklin, *supra* note 68, at 79; see also Larry E. Ribstein, Business and *Big Love*, Ideoblog (May 10, 2006, 9:26 AM), at [http://busmovie.typepad.com/ideoblog/2006/05/business\\_and\\_bi.html](http://busmovie.typepad.com/ideoblog/2006/05/business_and_bi.html) (on file with the *Columbia Law Review*) (“[T]he show forces us to think about real people and their problems, rather than a theoretical abstraction, and makes sure these are real people we like. This brings us closer to accepting legal rights that would enable these people to be comfortable with their chosen lifestyle.”).

72. Adams, *supra* note 1. This refers to other HBO shows that were both critically acclaimed and highly popular: *The Sopranos*, *Six Feet Under*, and *Sex and the City*.

73. Turley, *supra* note 11.

74. Adams, *supra* note 1. Mark Olsen and Will Scheffer elaborated, “[t]he show’s hook is ‘the overall social, largely revulsion, against the lifestyle and the marriage they

Indeed, debates about decriminalizing same-sex sodomy and legalizing same-sex intimacy have generated a veritable cottage industry on the law's stance toward polygamy. And, since the Supreme Court's ruling in *Lawrence v. Texas*, the import of the gay analogy has achieved more than hypothetical force. Indeed, the *Lawrence* ruling has generated intriguing and unexpected alliances, and, as I'll explain, some fascinating rifts.

### A. Intimacy Liberty

In its much-anticipated ruling in *Lawrence v. Texas*,<sup>75</sup> the Supreme Court declared unconstitutional state statutes banning sodomy, explicitly overturning its previous ruling in *Bowers v. Hardwick*. Legal scholars are still trying to make sense of the import and scope of the ruling. While clearly a victory for the very existence of same-sex relationships, less clear is whether *Lawrence* will provide the foundation for recognizing sexual minorities as warranting constitutional status, which ultimately could lead to gay marriage as a federal right.<sup>76</sup> As the legal and policy communities continue to debate and predict what *Lawrence* will mean for gay rights, others have seized on the decision's implications for plural marriage. If *Lawrence* opens the door for same-sex marriage, can polygamists follow through?<sup>77</sup> Curiously, the gay analogy is popular among both supporters and detractors of expanded recognition for alternative family structures, or "big love."

Perhaps not surprisingly, opponents of same-sex marriage draw analogies between it and polygamy. One *National Review Online* review of *Big Love* started: "It's getting tougher to laugh off the 'slippery slope' argument—the claim that gay marriage will lead to polygamy, polyamory, and ultimately to the replacement of marriage itself by an infinitely flexible partnership system."<sup>78</sup> But this argument can claim an older and more

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practice' . . . ." Id. Olsen and Scheffer spent three years researching how to most fairly present plural marriage in an entertainment format.

75. 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

76. Currently, a state by state approach exists alongside the federal Defense of Marriage Act, which permits both the federal government's refusal to recognize same-sex marriages authorized by the states and individual states' refusals to extend conventional marital comity principles to same-sex marriages.

77. For polygamists seeking full recognition and rights, reliance on *Lawrence* is a strategic step in analogizing their intimacy liberty to that of the most visible sexual minorities, gays and lesbians, and setting the stage for recognition of plural marriage alongside gay marriage. See Dubler, *supra* note 13, at 1187 ("Or, perhaps, *Lawrence* will be seen as the beginning of the extension of constitutional protection to a range of sexual practices that do not fall within monogamous marriage.").

78. Stanley Kurtz, *Big Love*, from the Set, Nat'l Rev. Online (Mar. 13, 2006), at <http://www.nationalreview.com/kurtz/kurtz.asp> (on file with the *Columbia Law Review*) ("*Big Love*'s lovable polygamists also serve as subtle standard bearers for gay marriage, as the show explicitly notes from time to time."); see also Adams, *supra* note 1 ("The slippery slope corollary between the two goes something like this: Approve of one and the other is sure to follow."); Megan Basham, Pushing for Polygamy, Nat'l Rev. Online (Apr. 18, 2005), at <http://old.nationalreview.com/comment/basham200504180745.asp> (on file with the

premium vintage. In 1996, Justice Scalia's dissent in *Romer v. Evans* cautioned:

But there is a much closer analogy [to regulation of homosexuality than prohibitions on alcohol], one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The Constitutions of [several states] to this day contain provisions stating that polygamy is "forever prohibited." . . . The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.<sup>79</sup>

Likewise, during debates over the federal Defense of Marriage Act (DOMA), which authorized states to refuse recognition of same-sex marriages entered in other states, Representative Bob Inglis of South Carolina asked, "If a person had an 'insatiable desire' to marry more than one wife . . . what argument did gay activists have to deny him a legal, polygamous marriage?"<sup>80</sup> (Utah implicitly recognizes the analogy, as its adoption statute prohibits adoption by people who live with someone in

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*Columbia Law Review*) ("The primary tactical difference between polygamist communities and gay-marriage activists is that the former have traditionally neither sought nor desired government recognition or even government involvement . . . . [But] they too are beginning to push for unqualified endorsement in the eyes of the law.")

79. *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting). Seven years later, Justice Scalia reiterated the position in his dissent in *Lawrence v. Texas*: "State laws against bigamy . . . [are] called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding." *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting). In its decision declaring the exclusion of same-sex couples from marriage unconstitutional, the Massachusetts Supreme Court forestalled the slippery slope issue by stating the plaintiffs "do not attack the binary nature of marriage." *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 965 (Mass. 2003).

80. Ruth K. Khalsa, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 *Duke L.J.* 1665, 1665 & n.3 (2005) (referencing article citing Inglis's statement). Senator Rick Santorum expressed a similar opinion in the debates over *Lawrence*: "If the Supreme Court says that you have the right to consensual (gay) sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." Sean Loughlin, *Santorum Under Fire for Comments on Homosexuality*, CNN (Apr. 22, 2003), at <http://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays> (on file with the *Columbia Law Review*). Elizabeth Marquardt of the Institute for American Values warns: "Though most advocates of same-sex marriage say they do not support group marriage, the partial success of the gay-marriage movement has emboldened others to borrow the language of civil rights to break open further our understanding of marriage." Elizabeth Marquardt, *Two Mommies and a Daddy: The Future of Polygamy*, *The Christian Century*, July 25, 2006, at 8. Marquardt directs the Center for Marriage and Families at the Institute for American Values; see also David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 *Hofstra L. Rev.* 53, 56-60 (1997) [hereinafter *Chambers, Polygamy*] (summarizing use of polygamy analogy in Defense of Marriage Act hearings and debates).

an intimate relationship not recognized by law, which applies to both gay couples and polygamists.<sup>81</sup>) Academics, too, have weighed in. One law professor argued:

Gay activists champion autonomy in intimate relationships and charge that traditionalists simply fear what is different and mindlessly mouth religious prejudice. On these grounds polygamy is even easier to support because, unlike gay marriage, it has been and still is condoned by many religions and societies. The Equal Protection argument for same-sex marriage also applies to polygamy.<sup>82</sup>

Each of these arguments shares the fear that recognizing gay marriage will lead all sexual minorities to make similar claims. An Amherst professor of jurisprudence sums it up: “Every argument for gay marriage is an argument that would support polygamy.”<sup>83</sup> Every first year law student will recognize this for what it is: a classic invocation of the slippery slope.<sup>84</sup>

Perhaps more surprisingly, polygamists too have endorsed the analogy between gay and plural marriage. As noted in Part I, the most vocal and visible advocates of polygamy historically have rooted their arguments in religious fundamentalism, which would seem to reject the LGBT community as coalition-mates. Unlike feminist endorsements of polygamy, many strains of both religious fundamentalism and black nationalism are explicitly patriarchal, mandating specific roles for men and women. At worst they are homophobic; at best they reject same-sex marriage as inconsistent with their religious principles. Yet fundamentalist polygamists seem to have overcome their condemnation of homosexuality, “coming out of the closet” to join the fight for rights recognition for “sexual minorities.” Pro-polygamy activists vociferously proclaim slogans linking polygamy and the same-sex marriage campaign, such as “polyg-

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81. Utah State Law asserts: “A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state,” where “cohabiting” is defined as “residing with another person and being involved in a sexual relationship with that person.” Utah Code Ann. §§ 78B-6-103(9), -117(3) (LexisNexis 2008); see also Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. Pub. L.* 289, 316 & n.184 (2008) (discussing Utah’s adoption statute in context of gay and lesbian couples).

82. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 *J.L. & Pol.* 581, 628 (1999) (footnotes omitted); see also Myers, *supra* note 35, at 1471–76 (arguing *Lawrence* may provide precedent for recognition of polygamous marriages).

83. Dent, *supra* note 82, at 628 (quoting Hadley Arkes’s statement in *One Man, One Woman*, *Wash. Watch*, Jan. 26, 1998, at 1). In the same vein, Arkes argues: “If marriage is detached from that ‘natural teleology of the body,’ on what ground of principle could the law rule out the people who profess that their own love is not confined to a coupling of two, but woven together in a larger ensemble of three or four?” Hadley Arkes, *A Culture Corrupted*, *First Things*, Nov. 1996, at 30, 31.

84. See Cahill, *supra* note 8, at 1544 (discussing polygamy and slippery slope in context of incest taboos).

amy is the next civil rights battle”<sup>85</sup> and “two mommies and a daddy.”<sup>86</sup> Even more explicitly, Pro-Polygamy.com proclaims “[f]reely-consenting, adult, non-abusive, marriage-committed [polygamy] is the next civil rights battle. *Lawrence v. Texas* has just guaranteed it.”<sup>87</sup> The slogans are more than mere rhetoric.

One threesome denied a marriage license has filed suit against the Salt Lake City county clerk’s office, arguing that if Texas cannot criminalize sodomy then Utah should not be able to criminalize polygamy.<sup>88</sup> Tom Green’s attorney sought to have his polygamy conviction thrown out in light of *Lawrence*.<sup>89</sup> Meanwhile, polygamy has found some heavyweight allies. The ACLU has embraced the comparison, urging that *Lawrence*’s defense of intimacy liberty extends to the polygamist lifestyle. In challenging the denial of a marriage license to a plural union, one ACLU leader contended that “[t]alking to Utah’s polygamists is like talking to gays and lesbians who really want the right to live their lives, and not live in fear because of whom they love. So certainly that kind of privacy expectation is something the ACLU is committed to protecting.”<sup>90</sup> Hence,

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85. Pro-Polygamy.com, *supra* note 5.

86. One polygamist activist argued in *Newsweek*, “If Heather can have two mommies, she should also be able to have two mommies and a daddy.” Elise Soukup, Polygamists, Unite!, *Newsweek*, Mar. 20, 2006, at 52, 52. Similarly, Carol Smith of the Women’s Religious Liberties Union, a pro-polygamy group, concurs: “[Y]ou can’t discriminate against us because of our life choices.” ACLU of Utah to Join Polygamists in Bigamy Fight, Am. Civ. Liberties Union (July 16, 1999), at <http://www.aclu.org/religion-belief/aclu-utah-join-polygamists-bigamy-fight> (on file with the *Columbia Law Review*); see also Felicia R. Lee, Real Polygamists Look at HBO Polygamists, N.Y. Times, Mar. 28, 2006, at E1 (quoting polygamist widow’s thoughts on *Big Love* premiere as, “[polygamy] can be seen as a viable alternative lifestyle between consenting adults”).

87. Pro-Polygamy.com, *supra* note 5 (emphasis omitted). The home page also includes an excerpt from *Lawrence v. Texas*. *Id.* (noting “individuals have ‘the full right to engage in private conduct without government intervention’” and that “[o]bviously, this brings enormous ramifications for the civil rights of adult, freely-consenting, non-abusive, marriage-committed polygamists” (quoting syllabus of *Lawrence*)).

88. Complaint at 8, *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2004) (No. 02:04-CV-21-TS). The district court stated that Utah’s criminal prohibition of polygamy did not violate any substantive due process right. *Bronson*, 394 F. Supp. 2d at 1334. However, on appeal the Tenth Circuit held that there was no justiciable controversy, and therefore the district court lacked subject matter jurisdiction. *Bronson v. Swensen*, 500 F.3d 1099, 1113 (10th Cir. 2007).

89. Green was charged with four counts of bigamy and also criminal nonsupport. He appealed his bigamy convictions, but the Utah Supreme Court affirmed them. *State v. Green*, 99 P.3d 820, 822 (Utah 2004); Catherine Blake, Note, I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court’s Re-Affirmation of Anti-Polygamy Laws in *Utah v. Green*, 7 J.L. & Fam. Stud. 405, 405 (2005).

90. Basham, *supra* note 78 (quoting Steven Clarke, the ACLU’s Salt Lake City legal director). Justice Ruth Bader Ginsburg once questioned the constitutionality of laws mandating monogamy while serving as general counsel of the American Civil Liberties Union. Ruth Bader Ginsburg & Brenda Feigen Fasteau, Report of Columbia Law School Equal Rights Advocacy Project: The Legal Status of Women under Federal Law 190–91 (1974). Constitutional scholar Jonathan Turley also invokes the gay analogy, opposing criminal prosecutions of plural marriage and arguing that the abuse laws have been used



from multiple quarters, the alternative lifestyles defense is rapidly on its way to becoming a legal trope, with all of the accompanying analogical power.

Finally, perhaps most intriguingly of all, polygamists have gained some gay allies, exposing somewhat of a rift in the gay rights community. Many in the campaign for same-sex marriage reject any common cause with polygamists.<sup>91</sup> Yet, others have broken with the party line. Scholars such as David Chambers, Chesire Calhoun, and Martha Ertman have compared the persecution of Mormon polygamists and the contemporary LGBT community, drawing links between nineteenth-century bans on polygamy and the 1996 DOMA as the only two instances in which Congress intervened in state regulation of marriage. They also point out that, while DOMA targets same-sex couples, it also limits marriage to “monogamous,” or dyadic, unions. DOMA thus entrenches heterodyadic marriage as a federal norm. Each cautions the gay rights movement against excluding polygamists from the campaign for intimacy liberty. Professor Calhoun explains: “[D]espite their apparent radicalism, both the pro-polygamy and pro-same-sex marriage campaigns have been marked by an antipluralist and exclusionary conception of marriage. Neither debate seized the opportunity to question the desirability of defining a *single form* of state marriage.”<sup>92</sup> She and Martha Ertman have both urged that the gay rights movement should embrace more fully the disestablishment of the traditional marriage ideal.<sup>93</sup> Michigan law professor David Chambers concludes:

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to target polygamists, much as sodomy laws have been used to persecute gays. See Turley, *supra* note 11 (discussing this issue in relation to *Green*).

91. On the academic front, several legal scholars have rejected the analogy. See, e.g., sources cited *supra* note 8. Conservative columnist and political commentator Charles Krauthammer has said:

In an essay 10 years ago, I pointed out that it is utterly logical for polygamy rights to follow gay rights. After all, if traditional marriage is defined as the union of (1) two people of (2) opposite gender, and if, as advocates of gay marriage insist, the gender requirement is nothing but prejudice, exclusion and an arbitrary denial of one’s autonomous choices in love, then the first requirement—the number restriction (two and only two)—is a similarly arbitrary, discriminatory and indefensible denial of individual choice.

This line of argument makes gay activists furious. I can understand why they do not want to be in the same room as polygamists. But I’m not the one who put them there. Their argument does.

Charles Krauthammer, Editorial, Pandora and Polygamy, Wash. Post, Mar. 17, 2006, at A19. But see Jaime M. Gher, Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement, 14 Wm. & Mary J. Women & L. 559, 603 (2008) (acknowledging linkages but urging gay marriage activists to continue distancing themselves from polygamy to preserve social and political capital); see also Emens, *supra* note 24, at 280–81 (“In short, both sides in the debate over same-sex marriage seem to agree on one thing: whatever happens with gay marriage, multiparty marriage should remain impossible.”).

92. Calhoun, *supra* note 52, at 1036–37.

93. Calhoun notes:

One of the lessons to be derived from exploring the history of reactions to Mormon polygamy is that all of us, including those of us who favor same-sex marriage, find difference threatening, and that all of us, including those who favor same-sex marriage, need to work harder to understand those who are different from us.<sup>94</sup>

Analogies are powerful weapons in the liberal legal arsenal.<sup>95</sup> Thus, if the gay marriage analogy holds, a strong case can be made to treat likes alike. For opponents of expanding recognition for alternative lifestyles, permitting gay marriage means opening the flood gates to other sexual minorities, including polygamists. For polygamy's proponents the analogical force tilts in the other direction, meaning that the growing acceptability of gay intimacy should yield acceptance for plural relationships as well. In many ways then, the gay analogy is the battleground on which the cultural war over expanded recognition for alternative family structures is being fought.

### B. *A Miscue*

Despite Hollywood's efforts to market *Big Love* as a "quirky family," the next *Sopranos*, *Sex and the City*, or *Six Feet Under*, the controversy over polygamy is more than just another unconventional lifestyle debate. Although compelling and provocative, the gay analogy is a miscue, a distraction from polygamy's meaningful distinctiveness and the actual challenges it poses for law and its regulation of intimate relationships. Both the slippery slope invocation and the alternative lifestyles defense fall prey to this. Each relies on the notion that polygamy's distinctiveness lies in the fact of its deviation from conventional intimacy norms—no different than same-sex marriage. This analogy may hold when gay and plural

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Same-sex marriage advocacy loses much of its radical (and plain old liberal) potential by refusing to take up the banner of disestablishing a single state form of marriage. Disestablishing a single state form of marriage would in turn, of course, open the doors to state recognition of polygamous marriages.

*Id.* at 1037; see also Ertman, *Race Treason*, *supra* note 63, at 357–65 ("DOMA's supporters raised status-based arguments to ban same-sex marriage that eerily echo nineteenth century concerns about polygamy fostering chaotic households and feral relationships that threaten civilization.").

94. Chambers, *Polygamy*, *supra* note 80, at 54; see also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 *Mich. L. Rev.* 447, 491 (1996) ("By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more.").

95. As Serena Mayeri points out, law works by analogy, and hence commensurability claims may be an unavoidable consequence. See Serena Mayeri, Note, "A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective, 110 *Yale L.J.* 1045, 1046 (2001) (exploring constitutional trajectory of analogical arguments in civil rights jurisprudence); see also Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 *Wm. & Mary L. Rev.* 1789, 1792 (2008) (challenging standard account of sex equality jurisprudence as resting on imperfect and incomplete analogy to race and instead positing more reciprocal relationship in 1970s sex equality advocacy).

marriage are viewed as matters of intimacy liberty, privacy, autonomy, and agency, or even an incipient constitutional respect for “sexual minorities.”<sup>96</sup> However, from a regulatory perspective, and the question of what stake the law has in how intimates treat each other, the challenges posed by dyadic marriage, gay or straight, and plural marriage differ substantially.

Recall that this Article relies on the crucial distinction between decriminalization and legalization, i.e., between repealing the prohibitions on plural marriage and enacting positive regulations to license and govern it.<sup>97</sup> There are important differences in the legal histories of same-sex and plural intimacy, including the fact that sodomy was criminalized but same-sex marriage was not. Such unions were denied recognition and licensure, but there were no prosecutions for attempting same-sex marriage.<sup>98</sup> The regulation of plural intimacy has been the converse. Plural intimacy has only been criminalized in conjunction with monogamous marriage, that is, as adultery.<sup>99</sup> On the other hand, plural *marriages* are a crime, with prosecutions often based on courts finding “constructive marriages,” an ironic and bizarre form of recognition.<sup>100</sup>

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96. In her work on polygamy in South Africa, Penny Andrews questions whether this aspect of the analogy holds up:

But arguably, the recognition of the rights of gay people to marry is somewhat different than the recognition of polygamy. The institution of polygamy is embedded in patriarchal traditions that raise profound questions about the volition of women who choose to enter into a polygamous arrangement. Whether the exercise to marry a polygamous husband is a free choice or not, it is arguably circumscribed by economic pressures. The reality is that women’s continuing subordinate status in South Africa curtails the free exercise of her choice in a range of situations, including whom she chooses to marry.

Penelope E. Andrews, *Who’s Afraid of Polygamy? Exploring the Boundaries of Family, Equality and Custom in South Africa*, 2009 Utah L. Rev. 351, 368 [hereinafter Andrews, *Who’s Afraid of Polygamy?*] (footnotes omitted).

97. Several legal theorists recently re-clarified the crucial distinction between decriminalization and legalization. Discussing sex work, they say, “Legalization involves complete decriminalization coupled with positive legal provisions regulating one or more aspect of sex work businesses.” Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 Harv. J.L. & Gender 335, 339 (2006). Decriminalization may be partial, i.e., decriminalizing the activities of sex workers alone, or complete, eliminating all criminal legislation.

98. C.f. Case, *Marriage Licenses*, supra note 18, at 1759–60 (distinguishing between states where same-sex couples can legally acquire marriage licenses and those where such licenses may be conferred upon such couples in contravention of law and left to state courts to evaluate for legality and enforcement).

99. Of course adultery was criminalized along with fornication outside of marriage, and remains so in some states. But there have never been heightened penalties for *plural* fornication.

100. See, e.g., Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 Hous. L. Rev. 759, 768–71, 778 (2009) (describing states’ insistence that they have power to recognize marriages when they wish to regulate polygamy and to refuse to recognize marriages when they wish to deny benefits to same-sex couples).

While the decriminalization projects of same-sex and plural intimacy are by and large the same, i.e., repealing prohibitory legislation, their legal recognition—their licensing and regulation—are not.

Much has been written about game theory and bargaining in dyadic marriage, most of it focusing on disparities in bargaining power between men and women, i.e., husbands and wives. Early scholars of the household, such as Gary Becker, downplayed conflicts within households, contending that husbands had incentives to be “altruistic” in managing resources to the benefit of the household.<sup>101</sup> Subsequent empirical studies, though, have challenged Becker’s hypothesis. The now vast literature on household bargaining has identified two primary points of conflict between husbands and wives: the struggle to control resources during the marriage and the distribution of resources at the end of the marriage. For instance, Robert Pollak and Shelly Lundberg have shown that husbands and wives allocate resources differently in marriages.<sup>102</sup> In addition, economists have documented a variety of factors that make women vulnerable as marriages proceed, thereby diminishing their bargaining power.<sup>103</sup> Women as a group do the majority of child-rearing, thereby losing market capital, while at the same time aging and also losing “beauty capital.” Men, on the other hand, enjoy enhanced market capital, due in part to the “flow of domestic labor” they enjoy from their wives, and while men may lose their looks as they age, they gain social and economic capital, which may be more attractive to other women.<sup>104</sup> The upshot is the much-studied divorce threat, in which husbands’ ability to leave their marriages and start afresh diminishes wives’ bargaining power. For all of its insight and richness, this vast literature has largely limited

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101. Becker noted:

Altruism is common in families not only because families are small and have many interactions, but also because marriage markets tend to “assign” altruists to their beneficiaries. . . . [For example,] [a]ltruistic parents might not have more children than selfish parents, but they invest more in the human capital or quality of children because the utility of altruistic parents is raised by the investment returns that accrue to their children.

Gary S. Becker, *Altruism in the Family and Selfishness in the Market Place*, 48 *Economica* 1, 12 (1981); see also Becker, *Treatise*, *supra* note 10, at 277–306 (elaborating on altruism theory).

102. Shelly Lundberg, Robert A. Pollak & Terence J. Wales, *Do Husbands and Wives Pool Their Resources? Evidence from the U.K. Child Benefit*, 32 *J. Hum. Resources* 463, 464 (1997).

103. See, e.g., Williams, *supra* note 18 (describing how market and domestic norms economically marginalize women, leaving them financially vulnerable within their marriages).

104. See generally Lenore Weitzman, *The Divorce Revolution* (1985) (describing unintended and negative consequences of no-fault divorce in California on women and children); Williams, *supra* note 18 (showing how allocation of domestic labor allows men to become ideal workers with increased earning capacity while women become increasingly economically marginalized); Shelly Lundberg & Robert A. Pollak, *Bargaining and Distribution in Marriage*, 10 *J. Econ. Persp.* 139, 141–52 (1996) [hereinafter Lundberg & Pollak, *Bargaining and Distribution*] (discussing familial bargaining models).

itself to assumptions and studies of dyadic marriages involving only two spouses.<sup>105</sup> Marital multiplicity however engenders distinct interactions and dynamics.

First, in the two-person marital model, scholars have distinguished “formation,” “midgame,” and “end game” (i.e., divorce), as the relevant bargaining time frames.<sup>106</sup> Plural marriages proceed in a way that necessarily complicates these dynamics and assumptions. Polygamous unions as practiced typically envision the serial addition of new spouses, thereby contemplating ongoing formation, and, as some communities’ higher rates of divorce demonstrate, ongoing exits.<sup>107</sup> In other words, they form

105. Economists Shelly Lundberg and Robert Pollak point out that “[m]ost bargaining models of family behavior allow two decision makers—the husband and the wife.” Lundberg & Pollak, *Bargaining and Distribution*, supra note 104, at 142; see also Robert A. Pollak, *Bargaining Around the Hearth*, 116 *Yale L.J. Pocket Part* 414, 416 (2007) [hereinafter Pollak, *Bargaining Around the Hearth*], at <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/property-law/bargaining-around-the-hearth/> (on file with the *Columbia Law Review*) (“Economists achieve specificity and simplicity by focusing on two-person households or, more precisely, on households in which only two persons play roles in household governance.”).

106. Compare Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *Yale L.J. Pocket Part* 226, 238, 297 (2007), at <http://www.yalelawjournal.org/the-yale-law-journal/content-pages/unpacking-the-household-informal-property-rights-around-the-hearth/> (on file with the *Columbia Law Review*) (analyzing relationships in household “formation,” “midgame,” and “endgame”), with Pollak, *Bargaining Around the Hearth*, supra note 105, at 417 (using four models to refute Ellickson’s midgame analysis).

107. One historical study found that “many Mormon marriages during [the Brigham Young period] were rather unstable, and official attitudes toward divorce were quite lenient,” resulting in higher rates of divorce. Eugene E. Campbell & Bruce L. Campbell, *Divorce Among Mormon Polygamists: Extent and Explanations*, 46 *Utah Hist. Q.* 4, 5 (1978). The authors found that “although statements about the family and the eternal nature of the marriage covenant might lead one to conclude that the barrier against divorce in Mormon polygamy was strong, there were other factors tending to reduce that barrier.” *Id.* at 12. In fact, “[i]n addition to the normal problems that arise in marriage relationships, the Mormon concepts of millennialism, the feelings of romantic love, and the lack of proven standards of conduct and behavior all contributed to the relatively high ratio of divorce among Mormon polygamists.” *Id.* at 8. Speculating on reasons for higher divorce rates in this context, the authors noted: “The pressure to marry polygamously appears to have been intense, and little attention was paid to the future stability of such marriages because of the belief that the coming millennium would solve such earthly problems.” *Id.* at 10. In his famous quote, Brigham Young himself acknowledged the stresses polygamy could bring to families:

And my wives have got to do one of two things; either round up their shoulders to endure the afflictions of this world, and live their religion, or they may leave, for I will not have them about me. I will go into heaven alone, rather than have scratching and fighting around me.

*Id.* at 11. In keeping with this, Young was generous in granting divorces. See Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-Day Saints, 1830–1900*, at 325 (1988) (“The emphasis placed on reconciliation, however, did not preclude divorce, and polygamy increased its likelihood. Though for Mormons divorce had grave consequences, if the couple insisted, the brethren did not stand in the way . . .”).

incrementally. This open-ended multiplicity complicates the basic logistics of marital registration and licensing, a relatively minor, but still noteworthy point from the perspective both of plural families themselves as well as the administrative systems that license intimacy. But, more to the point, unlike dyadic marriage, in polygamy, there is no “midgame.” The marriage is constantly forming and constantly dissolving.

From a bargaining perspective, this has significant and material effects. In the two-person model, marriage formation fixes certain spousal rights and entitlements that typically are not altered until dissolution.<sup>108</sup> While the division of spousal property at divorce will be uncertain in all but the eleven community property states, other rights, such as inheritance, retirement, and employment benefits, are fixed by law. Mary Anne Case refers to this as “reciprocal default designations.”<sup>109</sup> Jane gets fifty percent of John’s government or employment benefits; reciprocally, John gets fifty percent of Jane’s. However, plural marriage substantially complicates this easy reciprocity. First, it blurs the application of automatic reciprocity; when the unit is John, Jane, and Jo, it is less clear whether Jane or Jo, or both, are John’s reciprocals in benefits and entitlements. At least as significantly, the addition of each subsequent spouse increases the claims on the marital “pie,” thereby reducing the proportion of the existing spouses’ “draw.”<sup>110</sup> It also may alter a spouse’s influence within the unit, reducing it from the presumptive fifty percent of “voting power.”

Similarly, daily “inputs” and “outputs”—income flows and consumption patterns—are less predictable and controllable in plural unions. A “mono-wife” can more easily control her own reproduction and the consumption patterns of and investments in her children than can a co-wife for a “poly” household.<sup>111</sup> Economist Robert Pollak and others have con-

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108. See, e.g., Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 *Utah L. Rev.* 1227, 1233–74 [hereinafter Rosenbury, *Two Ways*] (analyzing differences between state laws regulating distribution of property following divorce and death). All of this, of course, is against the background of what Martha Fineman calls the privatization of dependency. See, e.g., Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 38 (2004) (“Instead of a societal response, inevitable dependency has been assigned to the quintessentially private institution—the traditional, marital family.”); Martha Albertson Fineman, *Contract and Care*, 76 *Chi.-Kent L. Rev.* 1403, 1405–06 (2001) (“[T]he public nature of dependency is hidden, privatized within the family . . .”).

109. Case, *Marriage Licenses*, *supra* note 18, at 1783 (“Among the chief functions civil marriage today serves is as a series of reciprocal default designations . . .”); see also Laura A. Rosenbury, *Friends with Benefits?*, 106 *Mich. L. Rev.* 189, 226–33 (2007) [hereinafter Rosenbury, *Friends with Benefits?*] (urging social insurance functions of intimate associations, including non-sexual ones).

110. Of course, the pie could be enlarged, in theory.

111. This is consistent with studies showing “a strong positive association between child well-being and the mother’s relative control over family resources” or what I call the “kids-do-better hypothesis.” Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 104, at 140.

tested game theory approaches to intrahousehold distribution as reliant on misguided unitary or common preference models of households that “treat[ ] the family as though it were a single decision-making agent, with a single pooled budget constraint and a single utility function that included the consumption and leisure time of every family member.”<sup>112</sup> Polygamy in particular has long confounded standard models of “intrafamily distribution” predicated on “single-agent models.”<sup>113</sup> While common preference models do not accurately describe “mono” households, they are even less likely to capture the complexity of negotiation or consumption and distribution in “poly” ones.

Hence, as typically practiced, the serial and open-ended nature of polygamy’s multiplicity means that one doesn’t know whether one will end up as a mono-wife or as one of ten co-wives.<sup>114</sup> Without veto power, poly wives cannot accurately predict change and diminution. In sum, polygamy’s serial entrances and exits means that these unions are constantly forming and constantly dissolving, which engenders substantial uncertainty and vulnerability for plural spouses.

In addition to the transaction costs of managing instability and vulnerabilities, marital multiplicity and seriality also enable intimate opportunism and strategic behavior. As Bob Ellickson observes, “[a] household setting is rife with possibilities for an opportunist.”<sup>115</sup> Polygamy enhances these possibilities. Anthropologists studying polygynous cultures report that husbands threaten to marry an additional wife to exert power over existing wives.<sup>116</sup> And perhaps suggesting that a gendered dynamic is at

112. *Id.* at 142. The “common preference” model of the family “may be the outcome of consensus among family members or the dominance of a single family member, but all such models imply that family expenditures are independent of which individuals in the family receive income or control resources.” *Id.* at 139; see also Shelly Lundberg & Robert A. Pollak, *Efficiency in Marriage*, 1 *Rev. Econ. Household* 153, 153–54 (2003) [hereinafter *Lundberg & Pollak, Efficiency*] (countering the proposition that marriage provides “stationary environment” in which repeated interactions lead to efficient outcomes and allocations).

113. Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 104, at 140–41. Such models also “rule out analysis of intrafamily distribution or of the connection between marriage markets and marital behavior.” *Id.* at 154; see also Lundberg & Pollak, *American Family*, *supra* note 47, at 12 (explaining “[u]nitary models imply that spouses pool their resources” so that “behavior . . . depends on prices, wage rates, and total nonlabor income”). In contrast, other family economics models that try to take account of the “multiplicity of decision makers in the family” are more helpful in considering polygamy. Lundberg & Pollak, *Bargaining and Distribution*, *supra* note 104, at 141–42.

114. See *infra* notes 192–193 and accompanying text (discussing uncertainty of monogamy contracts).

115. Robert C. Ellickson, *Norms of the Household*, *in* *Norms and the Law* 59, 64 (John N. Drobak ed., 2006) [hereinafter *Ellickson, Norms of the Household*].

116. See Ellen E. Foley, *Your Pocket Is What Cures You: The Politics of Health in Senegal* 120 (2010) (“The permanent threat of a co-wife serves as an effective mechanism to ensure that women live up to dominant expectations about their roles as wives and mothers.”); see also Pearl & Menski, *supra* note 23, at 210–14 (describing cases involving this dynamic).

work, studies of polyandry do not seem to have uncovered a similar dynamic.<sup>117</sup> This intimate blackmail midgame is not the innovation of polygynous husbands, of course. The ubiquitous, much studied, and intensely gendered “divorce threat” demonstrates that men’s greater options outside of marriage give them more bargaining power within it.<sup>118</sup> However, husbands in polygynous unions can threaten the economic or emotional diminution of an existing wife’s status without risking the other losses, and potential litigation, of complete exit or divorce.<sup>119</sup> Hence polygyny’s “marriage threat” gives husbands even more bargaining power to accompany the divorce threat.

Nor is strategic or opportunistic behavior limited to intergender interactions and negotiations. Plural wives can find themselves in intensely competitive relationships.<sup>120</sup> Polygamy can heighten and intensify household conflicts as co-wives jockey for either formal or informal status that accompanies rank and favor with the husband, as well as for daily and long-term economic and emotional resources for themselves and their children. The possibility of a “runt wife” is real.<sup>121</sup> Some findings suggest these conflicts weigh particularly heavily on first wives, who may have anticipated, hoped for, or been promised a dyadic marriage as a mono-wife. But, under polygamy, all wives must make ongoing assessments of whether to submit, renegotiate, or exit as their household constantly shifts.<sup>122</sup>

117. See *supra* note 28 and accompanying text (noting women in polyandrous societies are also oppressed and do not measure social status by number of husbands).

118. See generally Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 *Int’l Econ. Rev.* 31 (1980) (discussing marriage as decision based on relative bargaining power and preferences); Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 *Int’l Econ. Rev.* 333, 346 (1981) (finding decision to marry “depends upon the maximum value of (indirect) utility each person can obtain outside of the household”). But see Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 *J. Pol. Econ.* 988, 988 (1993) (displacing conventional divorce threat model with threat of noncooperative marriage).

119. See, e.g., Alexandre, *Big Love*, *supra* note 23, at 14–16 (describing how husbands foment rivalry among co-wives as way of maintaining power).

120. There is substantial literature as to whether women in polygynous households are competitive or cooperative. See, e.g., Zeitzen, *supra* note 26, at 32–33, 126 (“Broadly speaking, cooperation and competition among co-wives vary markedly even within local regions, making generalizations about them . . . difficult.”); see also Bennion, *supra* note 54, at viii, 160, 173–74 (noting attraction of some to polygamy’s “economic communalism” and “fierce interdependence” but also finding conflicts between wives over resources for their children and manipulation of husbands for resources); Remi Clignet & Joyce A. Sween, *For a Revisionist Theory of Human Polygyny*, 6 *Signs* 445, 452–58 (1981) (discussing differences in polygynous wives’ background experiences and concluding, “[w]hether these variations enhance competition or cooperation among co-wives or facilitate a more egalitarian pattern of division of labor among them should depend on the degree to which they confirm the prerogatives attached to matrimonial rank”).

121. I owe this term to Kathy Baker.

122. As two scholars have put it:



All of these dynamics—uncertainty, vulnerability, and opportunism—run counter to the sharp trend in family law, which has been to promote egalitarianism and fairness in marriage.<sup>123</sup> Nor is family law, as currently structured, equipped to deal with these bargaining dilemmas. Family law is a licensing scheme, necessary for formation (marriage) and dissolution (divorce), but with little to say, or do, in between. Rights are fixed at formation and do not change until endgame, or divorce. Family law has taken the not uncontroversial decision not to intervene in “intact” families midgame. In fact, prenuptial or postnuptial agreements specifying marital behavior or allocating household responsibilities are unlikely to be enforced during the life of the marriage.<sup>124</sup> What Saul Levmore has

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While a man decides successively whether to marry, to divorce, or to add a new wife to his household, a woman must first decide whether to enter a monogamous household or to enter a polygynous one as a junior co-wife. Should she take the first route, she must later decide whether to divorce her husband or to accept the role of a senior co-wife. If she divorces, she must decide whether she will retain such a status, whether she will remarry a monogamous male, or whether she will reenter a polygynous household as a junior co-wife.

Clignet & Sween, *supra* note 120, at 450. According to one “first wife” in Philadelphia, “polygamy isn’t easy for either wife,” though she thinks it is “harder on the first.” She explained, “The second wife is receiving something, where a first wife will feel that something is being taken away from her. I mean, I’m devoted to you for my whole life, but then you’re only devoted to half of my life.” All Things Considered: Philly’s Black Muslims Increasingly Turn to Polygamy (NPR radio broadcast May 28, 2008), available at <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=90886407&m=90907215> (transcript on file with the *Columbia Law Review*). Zeitzen’s findings confirm this: “Overall, junior wives were less dissatisfied . . . .” Zeitzen, *supra* note 26, at 128.

123. Several scholars argue the trajectory in family law in the last half century has been to incorporate fairness and anti-exploitation in *state-sanctioned* intimate relations. See, e.g., Susan Frelich Appleton, Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate, 16 *Stan. L. & Pol’y Rev.* 97, 110–11 (2005) (“American family law has changed dramatically with the elimination of official gender roles emerging as perhaps the most significant and pervasive transformation.”); Katharine T. Bartlett, Feminism and Family Law, 33 *Fam. L.Q.* 475 (1999) (reviewing feminism’s influence on family law norms); Jana B. Singer, The Privatization of Family Law, 1992 *Wis. L. Rev.* 1443, 1508–22 (describing emergence of individual autonomy and privacy and formal gender equality as norms in family law); Naomi R. Cahn, The Moral Complexities of Family Law, 50 *Stan. L. Rev.* 225, 229 (1997) (reviewing Nancy E. Dowd, *In Defense of Single-Parent Families* (1997) and Barbara Dafoe Whitehead, *The Divorce Culture* (1997) and stating that family law’s “new ideology is based on fairness and equality both within and among families rather than on concepts of fairness and equality for the head of the family hiding within the language of family solidarity and interdependence”). But see Rosenbury, *Friends with Benefits?*, *supra* note 109, at 194–96 (contending family law has achieved gender neutrality but not necessarily gender equality).

124. See, e.g., Rasmusen & Stake, *supra* note 14, at 456 (“Anglo-Saxon courts have traditionally abstained from intervening in conduct during marriage and this has not changed with the no-fault revolution.”); see also Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 *Colum. L. Rev.* 75, 76 (2004) (“Because [the legal rules surrounding marital property] practically apply most often at the moment of divorce, commentators tend to focus more on their impact on divorced and divorcing couples than on ongoing marital relationships.”); Silbaugh, *Marriage Contracts*, *supra* note 18, at 70–71

characterized as exclusivity of remedies, or “love-it-or-leave-it” rules, require parties in some relationships to “simply end the relationship or not litigate at all.”<sup>125</sup> Marriage, again controversially, is one of those relationships with little recourse for dispute resolution midgame.<sup>126</sup> The only option is dissolution, and with the advent of no-fault divorce, many mid-game wrongs may never be litigated.

Yet polygamous marriages defy family law’s binary between intact and dissolving families. Polygamy’s serial additions and exits mean that rights and status are in an ongoing process of alteration and in a context in which vulnerabilities are heightened and chances for opportunism grow with the addition of each spouse. As Levmore says of commercial partnerships, “[i]t is easy to imagine that this exclusivity (of remedies)

(“Premarital agreements . . . are enforceable when the terms of the agreement fix property rights at the end of marriage. . . . But they are generally unenforceable insofar as the attempt to govern [nonmonetary agreements].”). For an argument in favor of prohibiting the enforcement of all prenuptial agreements on equality grounds, see Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 *Clev. St. L. Rev.* 359 (2005) (contending prenuptial agreements are overenforced, creating inequality between married and unmarried couples).

125. Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, *Law & Contemp. Probs.*, Spring 1995, at 221, 224 [hereinafter Levmore, *Love It or Leave It*]. Levmore characterizes such regimes as adopting property rules at the expense of liability rules:

In contrast, a shareholder of a corporation can pursue a claim against an agent, or fiduciary, while continuing to own stock in the corporation. Somewhat similarly, an employee can sue her employer (and, conversely, the employee can be sued) without severing the employment relationship. . . . Other fiduciaries can also be sued while their services continue.

*Id.* at 226 (footnote omitted). The “implicit question is whether a love-it-or-leave-it rule generates more or less private bargaining or compromise than a scheme that permits ongoing appeals or judicial intervention.” *Id.* at 228. See generally Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *Tul. L. Rev.* 855, 856–57 (1988) (reexamining spousal support regimes in light of no-fault divorce and increased economic opportunities for women).

126. Saul Levmore states:

The love-it-or-leave-it rule governing marriage might be regarded as economizing on valuation work, among other things, because, even when parties proceed to divorce, courts can often avoid performing the valuation tasks that would be necessary if married persons had liability rights. It is, after all, often the case that decisions about divorce, child custody, support payments, and so forth can be made without assessing the harm imposed earlier by implicit or explicit breaches of the marriage arrangement. For this reason alone, it is not surprising that the law of partnership remedies has moved further and more quickly toward a liability rule than has the law of marriage and divorce.

Levmore, *Love It or Leave It*, *supra* note 125, at 243 (footnotes omitted). Martha Ertman concurs:

One of the reasons that business relationships and intimate relationships are described as private is the purported lack of state intervention in those relationships. The end of a partnership (romantic or business) is one of the few instances in which the state can play an active role. During the course of the relationship, the state generally allows the parties to regulate their own affairs. Ertman, *Marriage as a Trade*, *supra* note 15, at 104 (footnote omitted).

rule can leave wrongs uncorrected and in this way permit an unhealthy degree of exploitation of a minority partnership interest," or, in this context, of a plural marital partner.<sup>127</sup>

In the end, then, the analogy between same-sex marriage and polygamy is both inaccurate and incomplete. The battle for same-sex marriage is fought on dyadic terrain; that is, gays and lesbians want the ability to enter the current couples-only regime. The sex of the spouses makes no regulatory difference, only a moral one. In contrast, as argued above, the number of spouses creates a distinct set of dynamics. Multiplicity can generate additional chances for opportunistic and exploitative behavior that runs counter to contemporary family law's investment in formal equality and fair treatment. Hence, the gay marriage analogy, as provocative as it is, is a red herring, a distraction from the distinct regulatory issues polygamy poses that gay marriage, as long as it is dyadic, does not.

### C. *A New Game: The Polygamy Paradox*

This is a very different account of polygamy than that given by other scholars of economics and bargaining. Both Gary Becker in his landmark work on the economics of the household and Richard Posner in his work on sex and bargaining have contended that, from a bargaining perspective, polygamy is "good" for women because of the sexual competition it induces between men that advantages women in the marital "marketplace" (my term, not theirs).<sup>128</sup> According to Becker, "[m]y analysis of efficient, competitive marriage markets indicates . . . that the income of women and the competition by men for wives would be greater when polygyny is greater . . . ."<sup>129</sup> Posner concurs: "[P]olygamy with the consent of all of the husband's wives would be the unambiguously best regime for women because it would expand their choice set."<sup>130</sup> In other words, in cultures that do not limit men to one wife, the "demand" for marriageable women exceeds the "supply," giving women heightened bargaining power, *ex ante*, in the courtship market.<sup>131</sup>

127. Levmore, *Love It or Leave It*, *supra* note 125, at 222.

128. Becker, *Treatise*, *supra* note 10, at 80–104 ("[P]olygynous men have more incentive to invest in superior skills when the marginal contribution of women to output is greater . . . ."); Posner, *supra* note 10, at 253 ("Polygamy increases the effective demand for women . . . .").

129. Becker, *Treatise*, *supra* note 10, at 98.

130. Posner, *supra* note 10, at 257.

131. Posner continues:

The prohibition of polygamous marriage may appear to make no sense from the standpoint of protecting women. Polygamy increases the effective demand for women, resulting in a lower average age of marriage for women and a higher percentage of women who are married . . . . [R]arely is a person made better off by having an option removed. Forbidding polygamy withdraws one option from a woman, namely that of being a nonexclusive wife. By doing so it reduces competition among men for women and thus reduces the explicit or implicit price that a woman can demand in exchange for becoming a wife—even a sole wife.

What this model misses, however, is how marital multiplicity shifts gender power after marriage, *ex post*. In polygamy, women go from being a “scarce resource” when being courted to an “abundant” one as wives, thereby losing bargaining power. Following Becker and Posner’s own logic, polygyny induces competition *between wives* over the now scarce resource, the husband. The wives must compete for his affection, his economic resources, any employment or government benefits, and any other entitlements or social insurance that might flow through him.<sup>132</sup> Indeed, empirical and other studies support this game speculation, documenting competition and frustration among co-wives.<sup>133</sup> Absent prenuptial agreements, which would formalize and preserve the power Becker and Posner hypothesize *ex ante*, polygamy’s complication of the two-person marital model does indeed seem to disadvantage women.<sup>134</sup>

Moreover, these post-marital dynamics also challenge Becker and Posner’s hypotheses about the *ex ante* marital “market.” As courted women predict that their *ex post* bargaining power will diminish, this will inevitably shape courtship dynamics. Men who promise, or at least signal, a willingness as husbands to diffuse co-wife competition may well find themselves in higher demand, assuming that fair, or preferential, treatment is at a premium for wives. In addition, women may sacrifice other valued negotiations in order to secure this fairness or preferential premium.<sup>135</sup> Taking account of the full run of intimate relationships, through courtship and the marriage itself, not only demonstrates that polygamy disadvantages women after marriage, but also invalidates, or at least weakens, the claim that they are advantaged before marriage. Becker and Posner both underestimate the extent to which multiplicity complicates marriage markets. In sum, the set of bargaining dynamics

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Id. at 253.

132. Posner does take note of other “factors” shaping polygamy’s gender dynamics, such as the propensity to establish household hierarchies of co-wives to manage costs, and surveillance of wives to prevent them from seeking adulterous unions elsewhere. He acknowledges that both of these reduce the freedom polygamy might otherwise give women. Id. at 255–57.

133. Michèle Alexandre and Cynthia Cook have each documented various ways in which polygamy is frustrating or painful for women. See, e.g., Alexandre, *Big Love*, *supra* note 23, at 13–17 (describing struggles polygamous families face when moving from Muslim to non-Muslim countries); Cook, *supra* note 30, at 239–49 (relating findings from interviews with women in polygamous marriages in Africa); see also Clignet & Sween, *supra* note 120, at 457–58 (describing examples from Cameroon). Theodore Bergstrom disagrees with Becker’s hypothesis using a formal economic model. Bergstrom, *supra* note 30, at 11–12.

134. See generally Barbara R. Bergmann, *Becker’s Theory of the Family: Preposterous Conclusions*, 39 *Challenge* 9 (1996) (refuting Becker’s contention that women fare better under polygamy than monogamy by showing abysmal status of women in polygamous societies).

135. See, e.g., Jean Tirole, *The Theory of Industrial Organization* 24–25 (1989). Tirole also points out that people will invest less in relationships they fear will become asymmetrical. Whether this is characteristic of polygamous marriages is an empirical question.

this Article has identified challenges existing efforts to apply game theory to marital multiplicity. Following Becker and Posner's hypothesis, polygamy should enhance women's power in marriage markets. And yet, the opposite seems to be true. This Part has suggested some reasons why.<sup>136</sup> Becker and Posner focus solely on ex ante competition for wives. However, if men must compete for wives in the polygynous courtship market, then, once married, women spend the rest of their lives competing for resources as wives. This diminished bargaining power ex post also inevitably shapes the gender allocation of bargaining power ex ante. We might think of this bargaining conundrum as the "polygamy paradox."

#### D. Summary

The current structure of family law assumes a two-person marital model and is designed to regulate and address the concerns that arise in that context. The only meaningful difference between same-sex and heterosexual marriage, is, of course, the gender of the spouses. I do not mean to minimize the cultural or political significance of this distinction—some find it immoral and intolerable; others a real but tolerable difference, even helpful in exploding gender stereotypes; and still others find it irrelevant and meaningless. But, from the perspective of legal logistics, the gender of the spouses matters little. Incorporating same-sex couples into conventional dyadic marriage would portend some changes for our current marital regime, but these are largely a matter of changing linguistic gender assumptions. "Gay marriage" does not challenge the logistical administration or change the underlying legal assumptions of the prevailing marital model (and, definitionally, same-sex marriages, whether dyadic or plural, would not entail the same gender dynamics). Indeed, same-sex marriage advocates primarily seek to be admitted into the current heterodyadic regime, not to undermine it.

In contrast to the gay marriage analogy, plural marriage is fundamentally different from dyadic marriage, whatever the gender of the spouses. In asserting gay marriage's analogical force, we miss that polygamy's differences, and hence its regulatory challenges, stem not from gender difference but from marital multiplicity. For people who care about distributive justice *within* the household, polygamy may fairly be cause for concern. Same-sex marriage, as long as it adheres to the current dyadic regime, will not engender the heightened transaction costs, vulnerabilities, and opportunism that polygamy does.

None of the domestic discourses of polygamy—fundamentalist, black nationalist, or radical feminist—have addressed the regulatory questions, which I argue are a central challenge for polygamy. Similarly, neither the slippery slope proponents nor advocates of expanded recognition for alternative families have grappled with the regulatory implica-

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136. Of course, there are many other reasons for women's subordinate status in polygamous communities. Cultural, religious, and legal norms also affect women's status.

tions of multiplicity, largely limiting their arguments to assuming polygamy's ongoing criminalization as a fringe practice or to urging its decriminalization in the name of "big love." Nor have other legal scholars involved in the polygamy debate confronted regulation. Liberal pluralists who defend polygamy based on constitutional principles of religious freedom and intimacy liberty and those who urge toleration of polygamy as a matter of protecting vulnerable populations have largely limited their arguments to urging decriminalization of polygamy, avoiding the prickly questions of regulating marital multiplicity.<sup>137</sup> And finally, those economists who have endorsed polygamy as "good for women" also have limited their analysis to demand and supply *ex ante*, avoiding the polygamy paradox and the distinct question of *ex post* negotiations. In sum, neither polygamy's stakeholders nor the legal literature have confronted polygamy's distinctive features, instead assuming it is merely dyadic marriage multiplied.<sup>138</sup>

Can we effectively regulate marital multiplicity? The dilemmas polygamy engenders pose challenges that the two-person marital model is not equipped to handle. If polygamy is to be permitted, it will almost certainly require distinct regulation to catch up to dyadic norms. We are not starting from scratch though. The next Part considers these regulatory issues from the perspective of default rules, and whether we could design a set that might measure up to the standards to which we currently hold dyadic marriage.

### III. BARGAINING FOR EQUALITY

Whether conducted in constitutional or public policy terms, scholarly debates over polygamy overwhelmingly have focused on decriminalization. Of course, ending the prohibition on plural marriage is a preliminary and crucial question. Yet, as described above, decriminalization is a precursor to legalization, but the latter is distinct, entailing formal recognition and positive regulation. As Part II just illustrated, plural marriage can yield heightened opportunities for opportunism and exploitation. Decriminalization would not necessarily change that. Full legalization

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137. But see Michèle Alexandre, who urges some limited reforms:

A women-centric form of polygamy is a system where all the decisions are made by, and for the benefit of, the women involved. All marriage contracts should include the terms by which a male spouse might be allowed to marry one or more additional wives. In addition, all potential co-wives should negotiate among themselves the terms of the partnership without any influence or coercion from the male spouse. A women-centric form of polygamy should also grant each co-wife the unilateral right to divorce. Finally, any equitable form of polygamy should allow for the possibility of polyandry and must set up safeguards for the physical and emotional protection of all the parties involved.

Alexandre, *Big Love*, *supra* note 23, at 26.

138. Even other scholars who have refuted the gay marriage analogy have not confronted polygamy's distinctive bargaining dynamics and vulnerabilities.

might. The rest of this Section explores the possibility of recognition and regulatory amelioration.

### A. *Default Rules*

Default rules are those that govern a transaction in the absence of parties' specifying their own rules. Unlike immutable rules, which are mandatory, default rules can be avoided by negotiating, bargaining, or drafting around them. Classic examples of default rules include the price and delivery terms in the Uniform Commercial Code (avoided by specifying these terms), expectation damages in common law contracts (avoided by stipulating damages in advance), the mailbox rule (avoided by an offeror specifying the requirements for an offer to be accepted), and intestacy (avoided by executing a will).<sup>139</sup> Hence, the essence of a default rule is that it determines outcomes when parties have been silent, that is, when they have left a transaction incomplete.

As a matter of legal ideals, the design of any given set of default rules should turn on underlying legal and policy goals. Following Ayres and Gertner's classic distinction, majoritarian defaults are based on outcomes that law determines most people would prefer.<sup>140</sup> If the underlying theory is that parties can and will bargain around default rules when it is in their interest to do so, then the majoritarian approach reduces transaction costs and hence facilitates arrangements. Classic majoritarian rules include the reasonable price term in sales of goods and intestacy defaults to family members. In contrast, penalty defaults are designed to shape and direct behavior, typically to punish and deter strategic or opportunistic behavior.<sup>141</sup> For instance, information-forcing defaults shift costs to

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139. See, e.g., U.C.C. § 2-305 (2005) (stating rules for contracts viewed as completed despite absence of specific price); *id.* § 2-308(a) (noting in absence of specific place for delivery, default delivery location is seller's residence); see also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 822-24 (1992) (explaining conceptual role of "gap-filling" function default rules play under "implied-in-law" theory in contract law); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Calif. L. Rev. 261, 264-89 (1985) (detailing function and risk of default rules).

140. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989); see also Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan. L. Rev. 1591, 1591 (1999) [hereinafter Ayres & Gertner, *Defaults*] (exploring causes of contractual incompleteness to discern appropriate default rules).

141. See Ayres & Gertner, *Defaults*, *supra* note 140, at 1591 ("Penalty default rules demonstrate how efficient rules cannot be derived by simply asking what most parties would have contracted for had they written a complete contract."). Compare Ian Ayres, *Yah-Huh: There Are and Should Be Penalty Defaults*, 33 Fla. St. U. L. Rev. 589 (2006) (defending penalty defaults against contentions that they do not exist or are inefficient), with Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 Fla. St. U. L. Rev. 557 (2006) (criticizing Ayres & Gertner's model). For a discussion of penalty defaults in the public sphere, see Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 Geo. Wash. L. Rev. 663 (2004) (discussing penalty defaults in context of statutory incompleteness); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum.

those who purposely leave contracts incomplete in order to avoid disclosing information.<sup>142</sup> Defaults such as construing contract ambiguities against the drafter reduce opportunistic behavior by eliciting information disclosure. Relatedly, while the essence of default rules is that they can be bargained around, some default rules are stickier than others. Bargaining around sticky rules generates higher transaction costs; the stickier the default, the closer to a norm it becomes.<sup>143</sup>

Default rules are crucial in family law. In the absence of prenuptial agreements, or, even rarer, postnuptial ones, marital default rules govern intimate relationships. In fact, the marital context heightens the need for thoughtful defaults precisely because people are unlikely to bargain in intimate contexts.<sup>144</sup> Romantic denial is one reason people do not bargain in such contexts. Signaling is another. Even if a party is pragmatic about an intimate partnership, he or she may still fear that revealing a desire to bargain will be perceived as announcing disinvestment or anticipation of failure in the relationship. In addition, marriages are long-term relational deals and suffer from their perils, including imperfect information *ex ante* and increased vulnerability *ex post*. Finally, at bottom, there is a widespread distaste for bargaining in the intimate sphere, reinforced by law's hesitancy about enforcing prenuptial agreements. These "allergies" may stem from a (false) equation of the "economic" with the "commercial," which is the antithesis of "romance" and "family," a classic manifestation of the public/private split. For all of these reasons—denial, signaling, information deficits, bargaining power, and social norms—few couples avail themselves of their right to bargain

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L. Rev. 2162 (2002) (arguing default rules are meant to elicit legislative and party preferences); Einer Elhauge, Preference-Estimating Statutory Default Rules, 102 Colum. L. Rev. 2027 (2002) (asserting judges should choose probabilistic default rules that "minimize the expected dissatisfaction of enactable preferences"); see also Rachel Leiser Levy, Comment, Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule, 72 U. Chi. L. Rev. 695, 697 (2005) (characterizing common law penalty default rule as information-forcing).

142. See, e.g., Barry E. Adler, The Questionable Ascent of *Hadley v. Baxendale*, 51 Stan. L. Rev. 1547, 1554 (1999) ("A default rule properly designed to elicit information . . . would penalize the better-informed party for failing to contract around the rule."); Lucien Ayre Bechuk & Steven M. Shavell, Information and the Scope of Liability for Breach of Contract: The Rule of *Hadley v. Baxendale*, 7 J.L. Econ. & Org. 284, 285–86 (1991) (employing formal model to conclude that information-forcing default rule minimizes transaction costs).

143. See, e.g., Adam J. Hirsch, Default Rules in Inheritance Law: A Problem in Search of its Context, 73 Fordham L. Rev. 1031, 1042–52 (2004) (explaining sticky default rules in intestacy context).

144. See, e.g., Andrew Blair-Stanek, Comment, Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints, 24 Touro L. Rev. 31, 34 (2008) ("States have used their powers to set default terms of the marriage contract in only a very limited way, however, typically dealing solely with disposition of assets upon divorce." (footnote omitted)).



around marital defaults in the form of prenuptial or postnuptial agreements.<sup>145</sup>

In addition, marital default rules are notoriously sticky. Even when parties are predisposed to bargain around them, their best efforts to do so may come under heightened legal scrutiny and not be enforced. Echoing Levmore's love-it-or-leave-it principle, Stake and Rasmusen observe that while courts might uphold the financial agreements that couples create, they remain reluctant to enforce behavioral conduct in an existing marriage.<sup>146</sup> Attempting to avoid marital defaults also generates more hurdles and higher costs, including disclosure and counsel mandates. Much has been written about courts' reticence to enforce contracts made between intimates, whether prenuptial agreements, postnuptial agreements, or other related agreements.<sup>147</sup> This, along with various

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145. See, e.g., Anne C. Dailey, *Imagination and Choice*, 35 *Law & Soc. Inquiry* 175, 201–06 (2010) (using psychoanalytic psychology to consider propensity to enter prenuptial agreements); Saul Levmore, *Norms as Supplements*, 86 *Va. L. Rev.* 1989, 2021 (2000) (arguing raising subject of prenuptial agreements signals distrust because there is no norm of entering into such agreements); Stake, *Mandatory Planning*, *supra* note 14, at 425–26 (explaining why few couples make premarital agreements); see also Williams, *supra* note 18, at 117–18 (describing anxiety over commodifying intimate relationships in distribution of marital property at divorce); Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 *Ind. L.J.* 503, 505–09 (1998) (stating prenuptial agreements may be avoided because they fail to account for lack of relevant information by parties, the change in a mate's character, or other inherent defects that can exist in marriage contract, and noting modern restrictive marriage contracts exemplify intrusion of private ordering into an institution traditionally considered public); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *Stan. L. Rev.* 211, 254–58 (1995) (citing prenuptial agreements as example of bounded rationality); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497, 1497–99 (1983) (arguing traditional market/family dichotomy limited reforms aimed at improving lives of women and transcending dichotomy can improve lives of all individuals); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *Va. L. Rev.* 1225, 1231 (1998) (arguing contractual paradigm of marriage encourages stability and mutual investment in marital relationship). On relational contract theory, see generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 *Nw. U. L. Rev.* 854 (1978).

Jeffrey Stake contends that making prenuptial agreements mandatory or incentivized might eliminate bases for negative inferences, reduce bargaining costs, and force parties to try to overcome their own irrationality. Stake, *Mandatory Planning*, *supra* note 14, at 425–27. He also speculates that mandatory bargaining rules, as opposed to rules generated by the state, might make intimates more likely to honor their own commitments. *Id.* at 418.

146. Rasmusen & Stake, *supra* note 14, at 464–65; see also Silbaugh, *Marriage Contracts*, *supra* note 18, at 76–79 (discussing courts' reluctance to enforce nonmonetary provisions, such as those dictating division of labor, or restricting right to divorce, in premarital agreements).

147. See *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“[W]hen the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change.”); see also Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 *Wm. & Mary L. Rev.* 145, 150–58 (1998) (discussing some courts' willingness to invalidate premarital agreements that are substantively or procedurally unfair); Brian Bix, *Domestic Agreements*, 35 *Hofstra*

allergies to marital bargaining, reinforces the importance of marital defaults as the “social norm,” and hence as crucial in the operation of family law.

### B. *Partnership & Polygamy*

One might assume that the task of generating default rules for polygamy would be daunting. Yet, there is an extant analogy, even if it is not to same-sex marriage. Commercial partnership law addresses some of the same conundrums that plural marriage generates, i.e., an association characterized by open-ended and serial multiplicity. In other words, it addresses ongoing entrances and exits that continually alter and transform the association, as well as the individual property and other rights of its members. Whether a plural marriage or a business partnership, this form of association generates unique transaction costs, bargaining uncertainties, and possibilities for economic vulnerability and opportunism. To address these concerns and minimize the costs of doing so from scratch, partnership law has generated a robust set of default rules that govern formation, entrance, exit (whether voluntary exit or expulsion), dissolution, and property rights. These rules minimize the costs of managing both the intrinsic instability and also the economic and status vulnerability of partners.

The Uniform Partnership Act, as revised by the National Conference of Commissioners on Uniform State Laws in 1997 (RUPA), defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit.”<sup>148</sup> Unlike the corporate form, partnership unifies ownership, control, and liability. The general partnership is a default, one that is created explicitly or implicitly in the absence of parties choosing a different organizational form, such as a corporation or a limited liability association.

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L. Rev. 1753, 1755–70 (2007) (discussing courts’ responses to co-parenting agreements between gay couples, premarital agreements, separation agreements, and agreements with egg/sperm donors or surrogates); Rasmusen & Stake, *supra* note 14, at 501 (stating courts have not kept up with changing societal sensibilities concerning marriage and thus may not enforce marital contracts); Sherman, *supra* note 124, at 375–83 (discussing evolution and enforceability of prenuptial agreements); Silbaugh, *Marriage Contracts*, *supra* note 18, at 74–75 (discussing how courts treat premarital agreements differently than regular contracts by scrutinizing them according to fairness criteria before enforcement); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 *Calif. L. Rev.* 1479, 1495–97 (2001) (discussing courts’ willingness to enforce marital agreements concerning services incidental to marriage, leaving such agreements in legal limbo). A leading case on other contracts between intimates is *Borelli v. Brusseau*, 16 *Cal. Rptr.* 2d 16, 20 (Ct. App. 1993) (refusing to enforce contract stipulating compensation for spouse who stayed in marriage and cared for other spouse during illness).

148. Revised Uniform Partnership Act (RUPA), § 101(6) (1997). States almost uniformly adopted the Uniform Partnership Act of 1914, and thirty-two states have adopted some version of the revised Act, although with less uniformity than the 1914 version.

One of the challenges that has plagued the field is whether the addition or departure of a partner necessitates a reformation or dissolution of the partnership. Partnership law has generated a comprehensive set of entrance and exit rules that attempt to reduce the costs of managing this constant instability. New parties may join an existing partnership without necessitating the formation of a brand new association. By the same token, the 1997 revised rules expand and formalize the circumstances under which a partner may exit, or dissociate, without necessitating dissolution of the entire association. An individual partner can leave the partnership for any reason. Or, under some circumstances, the existing partners may vote for expulsion or seek judicial expulsion.<sup>149</sup> Per the revisions, partner exits, whether voluntary or not, yield one of two consequences: The partnership may be dissolved and business wound up, or the remaining partners can buy out the exiting partner, seeking judicial appraisal of the stake if need be.<sup>150</sup> These defaults provide mechanisms for the ongoing entrances and exits that so often characterize partnership associations, while minimizing the costs of continual dissolution and formation.

Permitting partnerships to remain intact through member transformation, though, generates another concern: the adverse effects of ongoing entrances and exits on the rights and statuses of existing partners. By default, partners are jointly and severally liable and distribute debts equally, not according to contribution.<sup>151</sup> Yet, the uncertainty of future entrants into the membership means that one's ownership percentage and economic stake are also unknown. Without control over partnership admission, one can start off in a fifty-fifty partnership and eventually find oneself with a minority economic stake through a series of entrances, each of which diminishes the ability to vote down a subsequent admission. In short, the partnership form generates real uncertainty and potential for strategic and opportunistic behavior. Partnership defaults attempt to ameliorate these various vulnerabilities.

First, partnership law imposes fiduciary obligations on partners. Partners owe each other, as well as the partnership, well-defined duties of loyalty, care, and good faith.<sup>152</sup> This rule is perhaps better described as a quasi-default and quasi-immutable rule, as it can be "modif[ied] but not waive[d]."<sup>153</sup> Relatedly, equality is a governing default principle for partnership. Partnerships default to a one-person-one-vote model, giving

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149. *Id.* §§ 103(b)(6) & cmt. 8, 601(5), 602(a), 703 cmt., 801 cmt. 1. But see Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 *Bus. Law.* 45, 62–65 (1993) (contending RUPA dissociation changes are mainly illusory).

150. The 1997 RUPA provides a complex set of rules for when dissolution is triggered. RUPA § 801.

151. *Id.* § 306(a) & cmt. 1.

152. *Id.* § 404(a)–(d); see also Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 *U. Ill. L. Rev.* 209, 215–16 [hereinafter Ribstein, *Partners*] (discussing function and nature of fiduciary duties).

153. Stephen M. Bainbridge, *Agency, Partnership & LLC's* 148 (2004).

partners equal governance rights, and, in most situations, partnerships are governed by majority rule. In addition, default rules entitle partners to an equal share of the association's profits.<sup>154</sup> Describing the curiosity of this principle, especially when compared to corporate rules, Stephen Bainbridge notes, "[e]qual division . . . is both a prominent solution and also one that enjoys the benefit of strong social support."<sup>155</sup>

However, there are some crucial deviations from egalitarianism, emblematic of other vulnerabilities that partnership's inherent instability can introduce. For instance, unanimity is required to amend the partnership agreement. Similarly, entrance and exit rules are governed by unanimity principles. Once the partnership association is formed, other parties can join only with the unanimous consent of the existing partners. By the same token, under certain conditions, the 1997 Revised Uniform Partnership Act (RUPA) permits expulsion of a partner by unanimous vote of the partnership, or by judicial expulsion.<sup>156</sup> In the end, all of these rules minimize the costs of managing instability, keeping partnerships intact regardless of entrance and exit, while ameliorating vulnerability by reinforcing the importance of partner consent, egalitarianism, and good faith norms.

The defaults I propose for plural marriage are based loosely on these partnership rules. The point is not to use partnership law as a literal blueprint, but rather to make the point that there are already conceptual models for what might be thought of as "plural marital associations."

### C. Defaults for Plural Marital Associations

While "off the rack" and frequently bargained around, these formation, exit, and dissolution defaults ameliorate at least some of the particular costs and vulnerabilities that the commercial partnership form generates. Of course, marriage and commercial partnerships are different. Partnerships are characterized by the profit-seeking motive that defines all commercial associations. They also are construed in the legal literature as "arms-length" relations, the conceptual opposite of intimate ones.<sup>157</sup> Still, commercial partnerships share some crucial characteristics with long-term intimate associations. Like partnerships, marriages typically generate wealth and assets through their members' combined ef-

154. RUPA § 401(b).

155. Bainbridge, *supra* note 153, at 127. Bainbridge further explains why corporations follow a different allocation: "Social norms of fairness are most important among players who are part of a close-knit group in which they repeatedly interact. Partnership law is designed for small businesses in which the owners closely cooperate." *Id.*

156. RUPA §§ 401(i)-(j), 601(4).

157. Martha Ertman's work resists this legal segregation. See, e.g., Ertman, *Commercializing Marriage*, *supra* note 18, at 19-20 (proposing use of commercial law norms within marriage to "solve some of the financial problems of divorced homemakers"); Ertman, *Marriage as a Trade*, *supra* note 15, at 103-09 (suggesting strong similarities between intimate relationships and corporate partnerships).

forts, which can confuse ownership and frustrate titling at dissolution (that is, at divorce or death).<sup>158</sup> In the eleven community property states, the law has already recognized these similarities, explicitly incorporating commercial partnership norms into its default principles.<sup>159</sup> More recently, reform of dissolution principles in family and inheritance law in non-community-property states has been driven by the recognition that intimate associations are also characterized by partnership principles.<sup>160</sup>

Like dyadic marriages, plural ones share key attributes with commercial partnership, in addition to other characteristics that are distinct to the plural form. Most saliently, the open-ended multiplicity of both types of plural association, i.e., the ongoing entrances and exits, whether of partners or spouses, will continually alter and often diminish members' rights and influence from a presumptive fifty percent while increasing their liability and vulnerability. In particular, people fear that polygamy's structure yields the potential for the strategic behavior and opportunism, often gendered, described in Part II.B.<sup>161</sup> While the vulnerability induced by commercial associations, typically solely economic, and intimate associations, sexual and emotional in addition to economic, differs in obvious ways, the sources of both, the open-ended serial multiplicity, are analogous. The remainder of this Part uses commercial partnership de-

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158. See generally Rosenbury, *Two Ways*, supra note 108 (summarizing how states distribute property at death or divorce).

159. See, e.g., William A. Reppy, Jr., *Community Property in California: Cases, Statutes, Problems* 1 (1980) ("The crux of the community property system . . . is shared ownership by husband (H) and wife (W) of acquisitions earned by either or both during marriage. . . . Community property thus extends the notion of marriage as a *partnership* to property rights of spouses."); see also Hanoch Dagan, *The Craft of Property*, 91 *Calif. L. Rev.* 1517, 1538–41 (2003) ("The basic principle of the community property form . . . is that spouses are equal owners of all property acquired during marriage resulting out of either one's effort . . . ."); Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 *B.U. L. Rev.* 59, 70–72 (2001) (stating "[p]artnership ideology draws on community property principles" and explaining how system ensures spouses, like partnership members, enjoy more equitable share of marital estate).

160. See, e.g., John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 *Real Prop. Prob. & Tr. J.* 303, 308–10 (1987) (noting movement to common property regime is likely based on contribution theory which recognizes marriage as partnership); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *Divorce Reform at the Crossroads* 130, 136–41 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) ("Perhaps a better legal analogy to no-fault divorce can be found in partnership law."); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 *Iowa L. Rev.* 223, 236–42 (1991) (discussing 1990 UPC reforms of elective share in accord with marriage as partnership). See generally Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 *Emory L.J.* 487 (2000) (comparing UPC reforms and community property in implementing partnership approach to marriage). But cf. Rosenbury, *Two Ways*, supra note 108, at 1282–89 (arguing against partnership theory of marriage as entrenching gender roles in which women are caretakers and men are income earners).

161. Again, this is intragender behavior as well as intergender.

faults to contemplate some analogs for polygamous marriages, or what we might think of as “plural marital associations.” It starts by comparing polygamy and commercial partnerships, then derives a series of norms from partnership rules, including unanimity, dissolution, and buyout norms, considers how plural marital associations would interact with the existing dyadic regime, and ends by contemplating whether the proposed rules are best characterized as majoritarian or penalty defaults.

One first-order point is crucial. An approach to plural marriage based on the default rules of partnership would, as a matter of logic, incorporate the basic precepts of contracts. In their twenty-first century iteration, contracts are only available to consenting adults. Hence, one first principle of plural marriage must be capacity to consent, which requires a certain age and some degree of relevant information.<sup>162</sup> In addition, it should go without saying that we have longstanding prohibitions on both incest and statutory rape, and nothing in a regime recognizing polygamy would change these basic norms.<sup>163</sup> Finally, while dyadic marriage historically mandates a notoriously low standard of capacity and consent, given its risks, plural marriage could logically require more, e.g., raising the age of consent, requiring counseling, waiting periods, etc.<sup>164</sup> In short, where polygamy might run afoul of other first principles of law, such as sexual autonomy, informed consent, and protection of children, it must give way to those prior principles.

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162. From a constitutional perspective, the Supreme Court’s ruling in *Lawrence v. Texas* bolsters these baseline contractual principles in the intimate sphere. Of the intimacy liberty in question, the Court said, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Cf. Annie Bunting, Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue, 14 Soc. & Legal Stud. 17 (2005) (using sociological insights to question wisdom of universal ban on early marriage); Guggenheim, *supra* note 100, at 814–16 (discussing complexity of imposing age norm on polygamous communities).

163. With regard to consensual incest among adults, some scholars have argued that it too should be legalized, as the conventional rationales for its prohibition fade away. See, e.g., Christine McNiece Metteer, Some “Incest” Is Harmless Incest: Determining the Fundamental Right to Marry of Adults Related by Affinity Without Resorting to State Incest Statutes, 10 Kan. J.L. & Pub. Pol’y 262, 279–81 (2000) (reviewing genetic, abuse of power, and other rationales and concluding some incest bans should be lifted). See generally Mary Anne Case, A Few Words in Favor of Cultivating an Incest Taboo in the Workplace, 33 Vt. L. Rev. 551 (2009) (grounding incest taboos in power imbalances between ancestors and descendants to theorize regulation of workplace sexual relationships).

164. Marital age minimums might be raised to ensure comprehension of polygamy’s distinct risks and also to guard against parents coercing their minor children into plural marriage, a real concern given the abuses in some communities that currently practice underground polygamy. Similarly, states might explore heightened requirements such as counseling, waiting periods, or refined informed consent norms. See, e.g., Drobac & Page, *supra* note 14, at 384 (noting some states already require or incentivize premarital counseling).

1. *Open-Ended Multiplicity.* — The defining feature of polygamy is being married to more than one spouse at a time. (In contrast, many people have multiple spouses, but serially instead of contemporaneously. This Article contrasts this “serial polygamy” at the end of Part III.) Typically, polygamists do not present themselves as a complete(d) “group” when they marry, but rather contemplate adding spouses serially, not unlike the way that a partnership admits new members. The defaults for commercial partnership would enable plural marital associations to function in an analogous fashion. Neither the addition of a new spouse nor the departure of an existing one would necessitate the dissolution of a marriage or the creation of a new one. Instead, the marital association itself would remain intact, accommodating the ongoing entrances and exits that define both association forms. A polygamous marriage would be established when an intimate association conformed to the same principles as a commercial association; i.e., when at least two parties committed to the form—here, the plural marital form. Like commercial partnerships, under these defaults, plural marital associations could grow and contract without incurring the costs and instability of continual dissolution and formation.

Key points of contention will be who enters a plural marriage and how they do so; rules and effects of exit and expulsion—that is, divorce, property rules, and, of course, how plural marriage would fit into the current marital landscape. Currently, dyadic marriage requires the consent of both spouses, and unilateral, i.e., non-consensual, no-fault divorce has emerged as the norm. Under what circumstances can a single spouse exit the plural marital association and under what circumstances can a group of spouses expel another? In short, how would plural marital associations operate?

As noted, the advantage of the partnership form, its intrinsic membership flexibility, also generates specific vulnerabilities. These vulnerabilities and, relatedly, opportunities for exploitation, are almost certainly heightened in the intimate context of marriage. As is the case with commercial partners, a spouse’s economic standing and more general power and influence within the association can be unpredictably affected by the addition of subsequent spouses. Rights to inheritance, employment and government benefits such as health care and social security, and market earnings all will be subject to more claims as the plural marital association grows in size. And, unlike commercial associations, in which reduction in percentage draw and influence is balanced in theory by new members’ additional earnings and market contributions, this is a radically less clear proposition in intimate associations. Subsequent spouses may add to household income, or they may not, particularly if the cultural norm in some polygamous communities is that women do only minimal paid work outside of the household. (Note, this is not a universal norm; in other

polygamous societies the opposite is true.<sup>165</sup>) Instead, additional wives can create more claims on a husband's earnings, pension, and other benefits (a point that also will be addressed more fully below), not to mention generate more children as dependents.<sup>166</sup> In addition, the economic stakes are arguably heightened, i.e., they include not only arms-length profits and earnings but also partnering over the most basic elements of people's lives: food, shelter, utilities, etc., that is, the things that comprise a household.<sup>167</sup> Finally, intimate associations generate distinct, noneconomic vulnerabilities, most notably, the sexual and emotional ones elaborated in Part II.

2. *Unanimity Norms.* — To ameliorate these vulnerabilities, plural marital associations can adapt the unanimity defaults from commercial partnerships for adding new partners or expelling existing ones. To protect existing partners, RUPA rejects both unilateral and majority action in favor of more difficult and costly unanimity rules. In practice, this means that if a marriage is established as a plural one, any subsequent spouses must be approved by all existing members of the marital association. Expulsions of a single spouse from the association similarly would require unanimity. Thus, spouses in plural marital associations can neither unilaterally bring others into the marriage nor unilaterally expel anyone. Of course, unanimity norms generate their own problems, most notably of holdouts who gain bargaining power by being the last to give consent. Such a rule also arguably enhances spouses' ability to be emotionally punitive or abusive. But, as with commercial associations, the costs of defaulting to unanimity must be balanced against ameliorating vulnerability and exploitation.<sup>168</sup> Daniel Kleinberger refers to this as the "pick your partner" principle of partnership law.<sup>169</sup>

There remains the difficulty of discerning consent and the fear of duress or other more subtle forms of coercion. Unanimity requirements

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165. See, e.g., Jacoby, *supra* note 30, at 939 (modelling African agricultural economies in which the opposite is true—women do agricultural work). But see Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship and Warfare*, 90 *Am. Anthropologist* 871, 872–73 (1988) (describing economic explanations for polygyny that emphasize family labor rather than wage labor and casting doubt on whether any economic explanation can adequately explain phenomenon).

166. See *infra* notes 229–252 and accompanying text (discussing polygamy's effects on children raised in these households and communities).

167. See, e.g., Lundberg & Pollak, *American Family*, *supra* note 47, at 10 ("Individuals make resource-sharing commitments—often implicitly rather than explicitly—in their roles as sexual, romantic, and domestic partners . . .").

168. In refuting the majoritarian rule predicted by Dagan and Heller for governing liberal commons, Robert Ellickson contends a milder form of unanimity, consensus, is optimal: "Governance by consensus thus promises to result in both superior decisions (because intensities of preference are better taken into account) and higher levels of satisfaction with the decision-making process itself." Ellickson, *Norms of the Household*, *supra* note 115, at 87.

169. Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 *Suffolk U. L. Rev.* 583, 597, 660 (2004).



are relatively meaningless if wives are coerced into consenting. In his brief for polygamy, Richard Posner concedes:

In principle, polygamy with the consent of all of the husband's wives would be the unambiguously best regime for women because it would expand their choice set. But a premodern legal system might be incapable of determining whether consent had been freely given, which may explain . . . why divorce on grounds was preceded by a stage of no divorce. In these circumstances, the second best choice from the woman's perspective might be no polygamy.<sup>170</sup>

Hopefully, in a "modern" legal system such as ours, we have refined principles of discerning consent and duress.<sup>171</sup> To the extent that these are complicated in intimate relationships, it is difficult to contend that plural intimacy is meaningfully different from dyadic.<sup>172</sup>

In addition, fiduciary obligations would allow judges to scrutinize coercion in plural marital associations. As in partnership law, plural spouses would be in fiduciary relationships, which are governed by robust legal doctrines of loyalty, care, and good faith.<sup>173</sup> Spouses are, of course, free to veto adding more intimates. However, administrative gatekeepers for plural unions might choose to make additional inquiries into whether consent was freely given, should the circumstances warrant it. Particularly relevant is the norm that the fiduciary duty remains intact despite strained relations between the partners.<sup>174</sup> (Although some may consider this an overly pragmatic expectation of intimates, in the 1970s, community property doctrine shifted to incorporate this norm.) In sum, fidu-

170. Posner, *supra* note 10, at 257 (footnote omitted).

171. This may require that families present themselves to the licensing authority. In contracts, Judge Posner himself has urged abandoning such doctrines as the preexisting duty rule because of doctrines that now allow judges to police duress directly. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) (holding damage formulation was improper penalty and not acceptable liquidation of damages). Similarly, in trusts and estates, some scholars have urged abolishing or reducing some of the wills formalities because their historic purpose is now served by robust duress and capacity doctrines. See, e.g., John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 *Colum. L. Rev.* 1, 1–2, 52 (1987) (discussing success of probate reform eliminating traditional formalities and rules of strict compliance in Australia).

172. The significant litigation over liability of wives who sign joint tax returns under duress is one example. See, e.g., Melvyn B. Frumkes, *Duress Diverts Dual Tax Liability for Joint Returns*, 19 *J. Am. Acad. Matrimonial L.* 1, 5–11 (2004) (outlining cases in which courts did or did not find duress).

173. "Not unlike spouses, partners have 'the right to know what is going on in the partnership, the right to be involved in conducting the business, the right to commit the partnership to third parties, the right to participate in decision making, and the right to veto certain decisions.'" Starnes, *Pity, Partnership, and Divorce Discourse*, *supra* note 14, at 1536 (quoting Daniel S. Kleinberger, *Agency, Partnerships, and LLC's* § 9.1 (2d ed. 2002)).

174. See Bainbridge, *supra* note 153, at 135 ("[P]artners frequently must subordinate their personal economic interests to those of the firm and their fellow partners.").

ciary obligations supplement other legal norms in policing duress and coercion.<sup>175</sup>

3. *Dissolution Norms.* — Arguably trickier than formation is “exit,” or divorce, and its effects on dissolution of plural marital associations. In the United States, many view intimate connections as deeply definitive of who they are, more so than employment or other market relations.<sup>176</sup> Hence, the inability to convince one’s co-spouses to formalize relations with a new, desperately sought love, or to expel an immiserating one, could make remaining in the association untenable. Others may merely become disenamored with the bargaining and drama of plural marital life, or, as frequently is the case in dyadic marriage, simply want a change. If entrance and expulsion require unanimous agreement, what of the ability to exit plural marital associations, to walk away? For some who currently practice faith-based polygamy, their religion sanctions only expanding the marriage by incorporating new spouses.<sup>177</sup> Like strict Catholicism and other orthodox religions, their faith does not permit divorce. However, no-fault divorce has been a core part of family law in almost every state for close to half a century.<sup>178</sup> When religious intimates

175. There is a robust debate on the scope of fiduciary obligations. Compare Daniel S. Kleinberger, Two Decades of “Alternative Entities”: From Tax Rationalization Through Alphabet Soup to Contract as Deity, 14 *Fordham J. Corp. & Fin. L.* 445, 469–71 (2009) (“[C]ontractual good faith is less powerful than fiduciary duty.”); Ethan J. Leib, Contracts and Friendships, 59 *Emory L.J.* 649, 673–80, 694–97 (2010) (“As friendships get closer to marriages in intimacy and interdependence, they get closer to fiduciary relationships . . . .”); Ethan J. Leib, Friends as Fiduciaries, 86 *Wash. U. L. Rev.* 665, 700–07 (2009) (examining courts’ treatment of friends as fiduciaries); and Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 *Va. L. Rev.* 2401, 2418–30 (1995) (discussing “family law regime premised on a fiduciary framework”), with Ribstein, Partners, *supra* note 152, at 232–37 (“The strong medicine of fiduciary duties is, however, appropriate only for a narrow class of cases.”), and Larry E. Ribstein, Fiduciary Duties and Limited Partnership Agreements, 37 *Suffolk U. L. Rev.* 927, 930 (2004) (arguing “waiver of fiduciary duties should be broadly permitted in limited partnerships”). See also J. Dennis Hynes, Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract, *Law & Contemp. Probs.*, Spring 1995, at 29, 43–46 (outlining arguments in favor of mandatory fiduciary duties for business partners).

176. See, e.g., Robert O. Blood, Jr., Love Match and Arranged Marriage: A Tokyo-Detroit Comparison 3–34 (1967) (comparing and contrasting individuals’ ideas of love and marriage in different societies, including those holding love marriages, individualism, and egalitarianism at premium).

177. For instance, fundamentalist Mormon sects require three wives in order to achieve what they call celestial or eternal marriage, also known as the New and Everlasting Covenant. See, e.g., Scott, Celebrating, *supra* note 37, at 109.

178. The role of fault in ending marriage is actually fairly complex. In some states, as a practical matter, fault continues to be taken into account in divorce proceedings; in others it is relevant only in making property or alimony determinations. See, e.g., Linda D. Elrod & Robert G. Spector, A Review of the Year in Family Law: Looking at Interjurisdictional Recognition, 43 *Family L.Q.* 923, 972 chart 1 (2010) (classifying U.S. jurisdictions on grounds for divorce, consideration of fault for alimony, and spousal support). In New York, one of the last holdouts, the Governor signed legislation that shifted the state toward more of a conventional no-fault jurisdiction in August 2010. See, e.g., J. Herbie DiFonzo & Ruth C. Stern, Addicted to Fault: Why Divorce Reform Has

seek state licensing, they are free to avail themselves of state dissolution rules, or not. There is no compelling reason to treat plural marriage differently, thereby giving religious norms more deference than dyadic marriage in this regard. Hence plural marriage would incorporate the same gender neutral no-fault rules allowing unilateral exit that govern the dyadic form. Bob Ellickson denominates this strong principle of unilateral exit as a “liberal household,” meaning “each of its members . . . individually have the power to exit from the arrangement and collectively have the power to control the entry of new occupants and owners.”<sup>179</sup> Some polygamous families live as a single household; others do not. But given the contemplated legal structure of the plural marital association, the principle underlying voluntary, unilateral exit holds.

Some states, such as Louisiana, recently added a more restrictive form of marriage, covenant marriage, which is more akin to the old fault-based system.<sup>180</sup> It may be the case that more states adopt the covenant form, also making it available to plural intimates. But, following the norms currently in place, a spouse in a plural marriage would be permitted to exit, i.e., divorce, for the same set of reasons as in no-fault dyadic marriage. Moreover, given the other constraints plural marital associations will impose on their members, following Levmore’s love-it-or-leave-it principle—where the remedy is to leave—marital partners can always exit the association.<sup>181</sup>

Barring constraints on divorce may be relatively straightforward, as the voluntary exit norm is so thoroughly entrenched in both commercial partnership and dyadic marriage. However, plural marital unions share another feature with commercial associations that dyadic marriages do not—members may exit, but others may remain who desire to maintain

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Lagged in New York, 27 *Pace L. Rev.* 559, 599–603 (2007); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 *BYU L. Rev.* 79, 79–80 (noting since 1985, all states except for one adopted some form of no-fault divorce); see also Nicholas Confessore, *No-Fault Divorce Finally in Sight for New York*, *N.Y. Times*, June 16, 2010, at A1 (explaining that last remaining jurisdiction without some type of no-fault divorce rule, New York, has passed legislation, pending Governor’s approval, to incorporate such rules into law).

179. Ellickson, *Norms of the Household*, *supra* note 115, at 62. He elaborates: “To enable the self-determination of existing household members, a liberal society must empower a household to reject an unwanted person who seeks to be taken in as either an occupant or owner.” *Id.*

180. Three states currently recognize covenant marriage, and almost twenty others have contemplated or are contemplating it. See *infra* note 188.

181. See Ann Laquer Estin, *Unofficial Family Law*, 94 *Iowa L. Rev.* 449, 463 (2009) (“Once lawmakers enacted no-fault divorce laws, some individuals attempted without success to resist civil divorce actions on religious grounds, arguing that entry of a no-fault divorce decree would violate their rights under the First Amendment.” (footnote omitted)). Partnership rules allow wrongful termination suits when a partner’s dissolution prevents a remaining partner from recouping an expected investment. This may be a point where family law principles of voluntary exit, etc., trump commercial partnership norms.

the association. In other words, does one member's voluntary exit or unanimous expulsion mandate dissolution of the association?

In dyadic marriage, when one spouse leaves, the union is definitionally and unilaterally dissolved. This is not necessarily the case in plural marriage. In fact, it is at least as likely that the remaining spouses will want the marital association to continue. Partnership law again is instructive. As noted, after much debate, the 1997 RUPA clarified that one partner may exit, or be expelled, without dissolving the partnership.<sup>182</sup> As long as at least two parties committed to the form remain, the association can continue. Following these norms, one spouse could leave a plural marriage, voluntarily or not, but the union would remain intact. In other words, no single spouse could unilaterally dissolve a plural marital association, which, in addition to the economic commitments that characterize commercial partnerships, also entails significant emotional and child-rearing attachments. Of course, if dissatisfied with the resulting association, a spouse could follow an exiting spouse at her or his election. But the crucial feature of this default is that the desire by one spouse for a divorce need not dissolve the union of all of the other remaining spouses who desire to remain in the marriage.<sup>183</sup>

The ability to maintain the association leads to another logical question: What would this partnership model mean if the husband is the one to exit? Perhaps counterintuitively, but again, following the commercial partnership model, the remaining wives should have the option to dissolve the family unit or to maintain it intact. For both proponents of polygamy and its opponents, who also oppose gay marriage, the specter of all-women households may be the biggest challenge of legalizing plural marriage. Yet, this Article does not propose this as a "backdoor" to same-sex marriages, group or dyadic, but, as conceptually following commercial partnerships, and also taking to its logical conclusion how many polygamists themselves describe plural marriage—as a union among them all.<sup>184</sup>

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182. The Revised Uniform Partnership Act states:

Under RUPA, unlike the UPA, the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership. Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business. Section 701 provides that in all other situations there is a buyout of the partner's interest in the partnership, rather than a windup of the partnership business. In those other situations, the partnership entity continues, unaffected by the partner's dissociation.

RUPA § 603 (1997). These "other situations" include expulsion. See §§ 601(4)–(5) (describing circumstances and effects of expulsion).

183. Hence, in a plural marital association, "divorce" would take on more subtle nuances and legal meanings. "Divorce" would mean voluntarily exiting the association, although without the typical dissolution that results in dyadic marriages if more than two spouses remained. Expulsion would entail "voting" a spouse out, while others remain in the association.

184. Compare Campbell, *Bountiful Voices*, supra note 22, at 198–99 (describing two co-wives who legally married each other and "the couple's interview suggested a genuine

Departures, whether exit or expulsion, will force a property division, the marital analogy to a buyout. This raises the question, then, of how to define and distribute property in plural marital associations. An analog exists in community property states, which, as noted, already incorporate aspects of commercial partnership law. Earnings during the marriage, and fruits of those earnings, are defined as marital property, with each spouse owning a proportionate share.<sup>185</sup> In addition, spouses can designate assets as marital or separate property through prenuptial or post-nuptial agreements. At dissolution, divorce or death, assets are titled proportionately in the name of each spouse. (As in commercial partnership, unanimity would be required to amend agreements, or to negotiate around defaults, once the association is formed.) In polygamous unions, marital property would mean the entire intimate partnership, not merely each husband/wife dyad. Any spouse seeking exit would take his or her proportionate share of those assets designated as marital. Again, defaults would be crucial, and the extant community property rules can provide a starting point for definitions.

Although partnership law defaults to equal distributions among partners, states could consider implementing a more refined regime, perhaps calibrating property rights to contribution based on length of time in the marital association.<sup>186</sup> Clear property division rules are crucial to ease exit and avoid spouses being held hostage in plural marital associations because of unpredictable property rights, or, as is the current case for all but “first” wives, that is legal wives, no economic rights if they leave.<sup>187</sup>

4. *Defaulting to Dyadic*. — Finally, licensing an additional marital form raises the crucial question of how intimates will choose among marital options and how plural marriage will interact with existing dyadic marriage. Marital “choice” regimes have already been introduced in some states. For instance, the proposed structure might not look substantially different from Louisiana’s marital regime, which offers prospective spouses a choice between conventional and “covenant” marriage.<sup>188</sup> Sim-

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shared domestic existence that bore the conventional elements of marriage”), with Bennion, *supra* note 54, at 72, 74 n.40 (describing how some co-wives develop romantic or sexual bonds). This joins the fascinating debate over what we mean by sexual orientation, that is, whether it is sexual or affective, or both.

185. D. Kelly Weisberg & Susan Frelich Appleton, *Modern Family Law* 664 (1998) (“Community property principles, explicitly recognizing marriage as a partnership, give each spouse an undivided one-half interest in property acquired by spousal labor during the marriage. Although most community property states apply a rule or presumption of equal division at dissolution.”); see also Unif. Marriage and Divorce Act § 307 (1974) (recommending “just division” of community property assets).

186. See Unif. Probate Code § 2-202 (2006) (adopting sliding scale accrual method for the elective share).

187. See also Ellickson, *Norms of the Household*, *supra* note 115, at 62 (“An owner can unilaterally withdraw his capital over the objection of others by invoking his legal power to partition jointly owned property.”).

188. In 1997, Louisiana adopted the first statute permitting covenant marriage. La. Rev. Stat. Ann. §§ 9:272–276, 9:307–309 (2008). Covenant marriages limit the grounds

ilarly, there are proposals to allow prospective spouses to elect whether to hold marital property as community or separate property, an option recently adopted in Alaska.<sup>189</sup>

The default becomes crucial in such choice regimes. This is a point at which plural marital associations might diverge from partnership defaults. Unlike commercial partnerships, plural marital associations would not be the default form; instead, there would be a strong default to dyadic marriage, with the aforementioned possible hurdles to electing plural marriage.<sup>190</sup> (Nor would the old common law marital form apply, although equitable remedies might, as described below.)

In addition, because plural marriage can differ so fundamentally from its dyadic counterpart, marriages should be designated as dyadic or plural *ex ante*. To clarify, dyadic marriages could not be converted into polygamous ones simply by marrying other spouses. Rather, the marital multiplicity determination is one that must be made up front and, as will be described below, by all the parties involved. This prohibition on marital conversion is crucial in order to secure the stability of the current marital regime. It is not the position of this Article that most people are

upon which a divorce will be granted, operating in effect as “super marriages.” The Louisiana statute mandates that unless there is adultery, abuse, abandonment, or commission of certain criminal acts, the couple must be separated for at least a year before they can divorce. In addition, the couple must seek marital counseling. Arizona adopted a similar measure in 1998, although the Arizona statute allows for divorce subject to mutual consent. *Ariz. Rev. Stat. Ann.* §§ 25-901 to -906 (2007). The most recent state to pass a covenant marriage statute was Arkansas in 2001. *Ark. Code Ann.* §§ 9-11-801 to -811 (2009). See, e.g., Margaret F. Brinig & Steven L. Nock, *What Does Covenant Marriage Mean for Relationships?*, 18 *Notre Dame J.L. Ethics & Pub. Pol’y* 137, 172–88 (2004) (considering some early empirical evidence on covenant marriages in Louisiana); Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 *U. Ark. Little Rock L. Rev.* 261, 274–88 (2003) (summarizing three covenant marriage state statutes); Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 *Mich. J. Gender & L.* 169, 177–80 (2003) (exploring demographics of couples choosing covenant marriage).

There is one important difference however. Because divorces are governed by the rules of the domicile, a marriage designated as covenant would in fact be governed by rules of no-fault divorce if the spouses have moved to a jurisdiction not recognizing covenant marriage. Plural marital associations, then, would have to rely on comity rules, as do same-sex marriages, but without the additional hurdles imposed by the Defense of Marriage Act. Another analog is to the quasi-community property rules followed in some community property states that give limited community property status to marriages dissolving in their jurisdiction that were formed in non-community property states.

189. Alaska Community Property Act, Alaska Stat. § 34.77.030(a) (2008) (“[P]roperty of spouses is community property under this chapter only to the extent provided in a community property agreement or a community property trust.”). Currently each state designates its marital property regime as community property or separate property, with some comity concessions.

190. “If the parties fail to more formally define and establish their firm, their relationship defaults to partnership status.” Bainbridge, *supra* note 153, at 101. Of course, there could be real debate about the number and nature of hurdles required. But some degree of paternalism could be justified here because of the state investment in ameliorating exploitation and opportunism in the relationships it sanctions.

open to, or even indifferent to, plural marriage. Rather, the underlying premise of the Article is that dyadic and plural marriages require distinct default rules, and that converting dyadic to plural partnership midstream might generate precisely the costs, bargaining disparities, and opportunism that I am trying to ameliorate.<sup>191</sup> People should not end up in plural marriage at the whim of a box they have checked:

The “threat of polygamy”, the possibility that their present or future husband might take another wife, is influencing women’s perception and management of relationships, marriage and family life. In a polygamous society, it may on some level be wrong to call any marriage monogamous because all marriages are potentially polygamous, and both men and women organize their relationships on this assumption.<sup>192</sup>

Nor are prenuptial “monogamy contracts” sufficient to guard against the polygamy threat. As Michèle Alexandre has pointed out, in polygamist societies, without an anti-conversion rule, “a monogamist contract is never guaranteed.”<sup>193</sup> Women who obtain promises of monogamy *ex ante* still report that the threat of polygamy polices their behavior. But polygamy blackmail is less effective in an anti-conversion regime. In sum, anti-conversion rules mean that plural marriage would not be defined by the number of spouses, but by the mutual election of the parties *ex ante*.

Readers familiar with default rules will recognize the set I am positing as an opt-in regime. With a strong default to conventional dyadic marriage, people must express a strong and informed preference for plural marriage. By the same token, people have to seek licensing: Plural marital associations would not be “imposed” on all practicing polygamists. As several commentators have noted, the decision to structure default rules as opt-in or opt-out is a significant one.<sup>194</sup> We need though, a more robust literature on opt-in/opt-out as structures for inti-

191. Of course, this is only a problem for “first wives,” many of whom report shock, confusion, and anxiety when learning that their husband plans to marry a subsequent wife. However, having already started a family, and the economic partnership, it is far more difficult to negotiate or exit. In theory, any “subsequent” wife understands she is entering a plural marriage, unless she is deceived, a documented problem in polygamous cultures. This suggests an interesting opportunity for empirical and anthropological studies of whether there are definable differences between first and subsequent wives.

192. Zeitzen, *supra* note 26, at 8; see also *id.* at 170 (“The knowledge that polygamy is possible and permissible can be a destabilizing factor in marriages, a phenomenon well documented in polygynous societies.” (citation omitted)); *supra* notes 58–59 and accompanying text (arguing polygamy harms society by negatively affecting individual well-being).

193. Alexandre, *Big Love*, *supra* note 23, at 16; see also Posner, *supra* note 10, at 253 (“In most polygamous cultures a woman cannot make an enforceable contract to be a man’s only wife, and this limitation on freedom of contract reduces the advantages of polygamy for women. The option of polygamy is given them, but the option of monogamy is withdrawn.”). One deficit of private law ordering is that it leaves it to *wives* to complain, versus the state asserting independent interest.

194. A recent Comment clarified the three “routes” to voluntarily including or excluding a specific term in a marriage:

mate relationships. For instance, doctrines ranging from old common law marriage to the new ALI proposal for domestic partnership can be viewed as strong opt-out regimes, i.e., they make it difficult to avoid the imposition of legal duties and obligations on intimate relationships.<sup>195</sup> On the other hand, some scholars have made a strong case for structuring intimate partnerships as what we would recognize as opt-in, suggesting that the state should not impose legal obligations on its citizens because of their sexual or reproductive conduct.<sup>196</sup> Instead, these scholars argue that parties should voluntarily seek licensing or other explicit contractual status. This debate is helpful in the plural marriage context. Some might be surprised, given the vulnerabilities and risks described in Section II, that I am styling this as an opt-in regime rather than one that would be imposed on plural intimates. Yet, recall that the goal of this Article is to have plural marriage adhere to conventional dyadic norms, with all their flaws, not to transform marriage—a project I am also sympathetic to by the way. Currently, intimates who do not license their relationships have only limited rights, typically from contract, or perhaps in equity.<sup>197</sup> But I reject an involuntary regime, at least as long as dyadic marriage is not similarly subject to it.<sup>198</sup>

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- (1) Opt-In. The state allows marrying couples to opt-into contractual terms, including a term by checking a box on the marriage license application; (2) Default with Opt-Out. The state makes a term the default, and it is included unless the couple opts-out by checking a box on the marriage license application; (3) Affirmative Choice. The state puts both an opt-in and an opt-out checkboxes on the marriage license application and does not issue the marriage license unless the couple selected one.

Andrew Blair-Stanek, *supra* note 144, at 44.

195. See, e.g., Erin Cleary, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 Rutgers L. Rev. 519, 526–27 (2008) (explaining how scope of ALI proposal goes beyond family dissolution to reshape paradigm of domestic partnerships); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815, 834–36 (2005) (identifying justifications for imposition of marital duties on intimates); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. Chi. Legal F. 353, 368–72 [hereinafter Polikoff, *Making Marriage Matter Less*] (arguing some commentators find imposition of legal and financial obligations paternalistic).

196. See, e.g., Garrison, *supra* note 195, at 854–64 (rejecting “conscriptive” models that impose obligations on intimates); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 88 (1990) [hereinafter Scott, *Rational Decisionmaking*] (suggesting that otherwise state is being paternalistic).

197. Michèle Alexandre proposes a similar equitable remedy for plural unions to avoid unfairness. Alexandre, *Lessons*, *supra* note 10, at 1474–78 (arguing common law marriage doctrine should be used to rectify inequities of *de facto* polygamy).

198. Readers might question whether the opt-in aspect is illusory. Can’t a spouse in a dyadic marriage who wants to take a second wife merely threaten her with divorce if she won’t agree to restructure the marriage as plural? Of course. But this sheds light on a crucial point: How is this threat any different from dissolution threats in the current dyadic regime? Spouses in conventional marriage routinely use divorce, and its accompanying child custody threats, to gain bargaining power, inducing the other spouse to abide by their wishes. Plural intimacy, otherwise known as cheating, infidelity, and



5. *Penalty Defaults.* — The primary goal of these proposed rules is to show that commercial partnership defaults provide guidelines and norms for regulating polygamous unions, consistent with contemporary norms of fairness and egalitarianism in family law. These defaults do implement some key changes from the way polygamy is currently practiced in many communities, and also from the ideals its adherents might desire.

First, consistent with the understanding of plural marriage as a partnership, not a series of dyads, no one person—including the husband—would have sole discretion to marry; instead all spouses would need to give their consent. No one could unilaterally enter into a series of dyadic marriages contemporaneously, thereby transforming and diminishing other spouses' rights, without their knowledge or consent.<sup>199</sup> (As with regular dyadic marriage, nothing prevents infidelity, or the accumulation of multiple families, but the key is the state would not license them. In short, “bigamy” would remain a crime.) This is a radically different proposition from the way many polygamists currently practice plural marriage in the United States, conceiving it in effect as a series of legal dyads, each of which runs through the husband, like spokes around the hub of a wheel.<sup>200</sup> Instead, I propose that plural marriage be conceived as an association, with legal rights and obligations among all parties. As noted repeatedly above, this is necessary to ameliorate the basic vulnerabilities and opportunities for exploitation that polygyny often entails.<sup>201</sup> In short, plural marriage would not be institutionalized bigamy.<sup>202</sup>

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affairs, is not an uncommon desire. The key distinction between the polyamory threat in plural marriage versus dyadic is that what is sought is a second spouse, versus a mistress. In fact, one could make an argument that, in a regime that permitted plural marriage, a dyadic wife would have a choice she does not currently have: divorce or “convert.”

199. After some ambiguity, the 1997 RUPA clarified that the partnership is a legal entity on its own terms, not merely a composite of its members. Unlike partnerships, marital associations would not be a separate legal entity, but rather an aggregation of the individuals. Hence liability rules are not applicable.

200. See, e.g., Bennion, *supra* note 54, at 55, 81–82, 135 (describing hub and spoke model in fundamentalist Mormon communities).

201. For instance, in today's age of sexual hygiene and risk, it is reasonable that people be able to agree to be faithful to the others in their sexual “pool,” particularly in a marital context in which “monogamy” reasonably substitutes for “safety.” See Rachel C. Loftspring, Comment, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda*, 29 U. Pa. J. Int'l L. 243, 258–60 (2007) (discussing polygamy, property rights, and AIDS in Africa).

202. One website of Christian polygamists describes the difference as follows: “Dishonest Bigamists” are “accused of bigamy for turning secret affairs into secret ‘secondary’ would-be ‘legally recognized’ marriages . . . and being *dishonest*, as their other mates do not know of each other.” In contrast, “Honest Polygamists” are “accused of bigamy for obtaining any ‘secondary’ would-be ‘legally recognized’ marriages . . . yet being *honest*, with all the family knowing of each other.” Bigamy, Christian Polygamy INFO, at <http://www.christianpolygamy.info/bigamy> (on file with the *Columbia Law Review*) (last visited Aug. 26, 2010). The term “polyfidelity,” captures this attitude. See *supra* note 24 (defining polyfidelity).

In addition, some practicing polygamists might reject the egalitarian spirit behind these proposed defaults. The unanimity and equality defaults from the partnership model formally reject the various status hierarchies, both of husbands over wives and among co-wives, that characterize many polygynous households and cultures. This is most obviously the case when a husband claims sole or primary authority over all of his wives. In addition, though, “first” or prior wives may claim rights and status over subsequent ones. Or, co-wives may compete with each other for their husband’s favor, which can translate into authority. This is intensely exacerbated when plural families find themselves in regimes that recognize only one “legal” wife, thereby leaving co-wives to compete for that status, which may bring significant immigration and other material benefits.<sup>203</sup> Unanimity rules and formalized equal voting refuse to give force to these rankings, formal or informal. Of course, as is currently the case in dyadic unions, individual households can work out governance norms as they wish. But the crucial intervention is that law will not enforce such arrangements, or even agreements, any more than it would in dyadic prenuptial agreements. This reiterates the midgame norms of dyadic marriage. “In the United States, courts will generally enforce prenuptial agreements regarding the distribution of assets in the event of divorce. They will not, however, enforce agreements regarding the distributions of benefits and burdens in ongoing marriages.”<sup>204</sup> Hence, much as a prenuptial agreement or informal ex post agreement giving a husband power over his wife, or a religious norm in which wives “submit” to their husbands, would have expressive value only and would not be enforceable in court, so too would rankings or other status hierarchies between husbands and wives or between co-wives be unenforceable.

Finally, practicing polygamists might reject the requirement to designate marriages as plural ex ante, the accompanying anti-conversion rule, and the imposition of formal fiduciary duties. Some might find such norms inconsonant with intimate relationships. Others might oppose them as unnecessary government interference.<sup>205</sup>

Hence, at least some of the proposed defaults should be understood as penalty rules rather than majoritarian ones. This might surprise some. If this Article advocates legalizing polygamy, why not suggest a system that would defer to the preferences of its current practitioners? Following

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203. See, e.g., Carolyn Sargent & Dennis Cordell, *Polygamy, Disrupted Reproduction, and the State: Malian Migrants in Paris, France*, 56 *Soc. Sci. & Med.* 1961, 1962, 1967–68 (2003) (explaining restrictions on polygamy in France cause Malian migrant women to strategically approach marital disputes); Carolyn Sargent, Professor, Wash. Univ., Address at the Global and Transnational Feminism Lecture Series, *Sex in the City: How Polygamy Shapes the Lives of West African Women in Paris I* (Dec. 3, 2008) (“[West African migrant wives in polygamous marriages] demonstrate considerable ingenuity and assertiveness in pursuing their own objectives and strategies.”).

204. Lundberg & Pollak, *American Family*, *supra* note 47, at 13–15.

205. See *supra* note 65 (discussing fundamentalist polygamist communities’ distrust of government).

Ayres and Gertner's formulation, this would reduce the costs of forming polygamous relationships and expedite their arrangement. Yet, I conceive of some of these rules as so-called penalty defaults because the goal is not to reflect what the "average polygamist" might seek, but rather to reduce the strategic and opportunistic behavior described in Part II.B. As classically conceived, penalty defaults either increase the costs of an arrangement or force disclosure of information. Parties must incur the costs of negotiating and drafting around penalty defaults, thereby increasing the costs of entering their preferred arrangement. In addition, some of these antimajoritarian defaults also will be information-forcing, in that both personal preferences against fairness and egalitarianism and, if current prenuptial agreement norms are followed, any financial information affecting property rights will need to be disclosed.<sup>206</sup>

It is not clear that the unanimity requirement actually functions as a penalty default, however. While we might assume that many practicing polygamists give the husband authority to add additional wives, the bargaining dynamics between him and potential wives might go in the other direction. Given women's fear of the "polygamy threat" described in Part II, men might promise potential wives control over the selection of subsequent wives as an incentive for marriage.<sup>207</sup> Women presumably would want such a promise. Hence, when we focus on the bargaining process *ex ante*, unanimity may well be functioning as a majoritarian rather than a penalty default. On the other hand, it is certainly information-forcing, to the extent that it forces men (and women) who prefer unilateral power to disclose this preference up front.

Similarly, anti-conversion rules are classic penalties in that they force intimates who prefer plural arrangements to disclose this valuable information up front. Nothing will prevent a spouse from subsequently insisting on pluralism, but they would need then to dyadically divorce and remarry under the plural marital association form—a costly endeavor and, crucially, one that will give the noncompliant spouse the opportunity to distribute his or her property and renegotiate under the plural form. Knowing that a potential spouse has a predilection for plural intimacy is valuable information to have *ex ante*.

Is styling some of these defaults as penalties paternalistic? Probably. However, family law norms generally are not as majoritarian as those in other fields. As already discussed, in the last few decades family law has

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206. See Emens, *supra* note 24, at 371 (explaining that converting some mandatory prohibitions on adultery to default rules will force parties to disclose information about intimate preferences for monogamy and nonmonogamy); Stake, *Mandatory Planning*, *supra* note 14, at 417–18 (arguing mandatory premarital agreements can “reveal[ ], and thus secur[e], the common needs and hopes of the couple” and “may help some couples to avoid unhappy marriages by exposing their incompatibilities”); Blair-Stanek, *supra* note 144, at 34–35 (stating that incorporating more defaults in marital family law can enhance autonomy, reveal information, and circumvent constitutional restrictions).

207. I'd like to thank Scott Baker for bringing this point to my attention.

taken a relatively hard stand against opportunism and in favor of formal fairness and egalitarianism as governing principles.<sup>208</sup> Perhaps people should be free to structure their intimate lives as they see fit, including in inegalitarian, strategic, or opportunistic ways, but, as discussed, the state is invested in promoting fairness and antiexploitation norms in all relationships that it licenses, including intimate ones. Antimajoritarian penalty defaults raise the costs of opting out of arrangements the state presumes to be fair. Practitioners of both dyadic and plural marriage may favor power disparities based on gender and other factors, but there is nothing intrinsic to polygamy that warrants more deference to these wishes than in conventional marriage.

Furthermore, these proposed rules depart from commercial partnership norms in some crucial ways. Commercial partnership rules are truly defaults and notoriously slippery, that is, easy and inexpensive to bargain around. In contrast, some of these proposed rules will almost certainly be construed as stickier. (States contemplating plural marital associations might not even style all these rules as defaults, instead making at least some of them immutable.) For instance, the *ex ante* designation, anti-conversion rules, and imposing additional hurdles to plural marriage would make dyadic marriage the strong and sticky default. States might want to make unanimity rules particularly sticky, imposing real scrutiny before permitting parties to waive their approval rights. In this sense, again, plural marital associations might follow family law norms, in which rules are notably sticky.<sup>209</sup> Hence, my proposed rules follow commercial partnership law in form, but not in flexibility. As with commercial partnerships, or any commercial association, regulation can only do so much to alleviate vulnerability and opportunism. Following the analogy to its logical conclusion, the goal here is simply amelioration, not elimination, of these costs.

As with all sticky defaults, the consequence is reduced autonomy. Yet, as in all such determinations, encroachments on individual autonomy are balanced against enhancing intimacy liberty overall by making plural marital associations available as a marital option.

6. *Other Private Law Models.* — As noted in the Introduction, other legal scholars have conceived of marriage as a partnership, embracing principles of dissolution, buyout, and fiduciary obligation, among others. The RUPA prompted Cynthia Starnes to urge that divorce be reformed in

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208. See *supra* note 123 and accompanying text (describing emergence of fairness and equality norms in family law).

209. Andrew Blair-Stanek encourages states to craft a more robust set of marital default rules, finding that “[s]tates have used their powers to set default terms of the marriage contract in only a very limited way . . . typically dealing solely with disposition of assets upon divorce.” Blair-Stanek, *supra* note 144, at 34 (footnote omitted); see also Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 Fla. St. U. L. Rev. 779, 795–804 (2006) (considering child custody rules through penalty default lens).

accord with partnership principles.<sup>210</sup> Jennifer Drobac and Antony Page took the argument an additional step, contending that conventional marriage is not only unfair but obsolete.<sup>211</sup> They propose that civil marriage be replaced with domestic partnerships modeled on commercial partnership norms.<sup>212</sup> Like Drobac and Page, partnership scholar Larry Ribstein urges developing standard forms that would reflect the heterogeneity of intimate associations, much as business law has generated different forms for various commercial entities.<sup>213</sup> Martha Ertman proffers a typology of business associations and intimate associations that could serve as a map for the variety of intimate arrangements.<sup>214</sup> At the same time, she contends that seeing the similarities between business and intimate relationships could denaturalize the hierarchies fostered by conventional family norms.

These private law approaches differ, of course. Starnes remains committed to marriage, but turns to partnership norms to justify reforming marital dissolution policy.<sup>215</sup> Ribstein rejects the direct analogy between

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210. Starnes, *Divorce and the Displaced Homemaker*, supra note 14, at 119–29 (using commercial partnership law as conceptual basis for postdivorce maintenance); see also Starnes, *Pity, Partnership, and Divorce Discourse*, supra note 14, at 1534–35 (arguing partnership model normalizes wives’ economic claims and avoids “mothers as suckers” rhetoric). Starnes describes RUPA’s principles in detail to combat simplistic applications of imagined partnership norms as a “clean break.” Starnes, *Divorce and the Displaced Homemaker*, supra note 14, at 120–24. “Adherence to this clean-break principle of partnership law, however, without regard to related partnership principles essential to its fair application, made divorce a financial disaster for homemakers.” *Id.* at 108.

211. Drobac & Page, supra note 14, at 356–79 (stating “marriage fails many families”).

212. They envision that marriage would continue within religious or cultural communities, but without legal significance. Their proposed Uniform Domestic Partnership Act proffers four forms: enduring, provisional, filial, and caregiving domestic partnerships. *Id.* at 402–21.

213. Ribstein, *A Standard Form Approach*, supra note 16, at 316–21; cf. Ribstein, *Limited Liability Unlimited*, supra note 16, at 409–10 (proposing contractual entities to “free idiosyncratic contracts from the limitations of existing standard forms”). Ribstein also encourages a choice-of-law approach to resolving the same-sex marriage debate that would privilege contractual elements of intimate relationships. See F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. Ill. L. Rev. 561, 563 (encouraging states to enforce contractual elements of other states’ marriage laws); Erin O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. Chi. L. Rev. 1151, 1165 (2000) (proposing choice of law regime as compromise).

214. Ertman, *Marriage as a Trade*, supra note 15; see also Ertman, *Commercializing Marriage*, supra note 18, at 20, 38–63 (proposing model in which homemakers have an Article 9 type security interest in wage-earning spouse’s postdivorce income).

215. Starnes explains:

Even as language can convey a dispiriting message of incapacity and pity about mothers, it can also convey an affirmative message of empowerment and dignity. A partnership model of marriage conveys the latter message, offering a vocabulary and concept that cast mothers as full stakeholders in marriage, equal in status to fathers, regardless of who brings home the bigger paycheck. Partnership provides an alternative reform discourse, free from the stubborn remnants of old ideologies that sabotage reform efforts long after they are spoken in polite society.

marriage and commercial partnerships. For him, the analogy lies in the generation of standard forms that commercial law has become expert in. Unlike Starnes, Drobac and Page, and especially Ertman, Ribstein disputes that partnership's profit-seeking goals share much in common with families.<sup>216</sup> On the other hand, these proposals share some crucial common features. Drobac and Page's Uniform Domestic Partnership Act, Ribstein's Domestic Entities, and Ertman's typology all embrace business law's flexibility, which takes account of the heterogeneity of modern intimacy. As Ertman puts it, this flexibility "is compatible both with the various ways that people order their intimate lives and the range of legal and institutional responses to those arrangements."<sup>217</sup> They also note that uniform laws and other private law strategies can better achieve certainty for intimates in a mobile society.<sup>218</sup>

On the other hand, even as they seek to meet the needs of increasingly diverse intimate relationships, the proposals all remain firmly locked in a dyadic model. Drobac and Page's imaginative case studies of different intimate arrangements are all dyadic, and their proposed Uniform Domestic Partnership Act explicitly defines a domestic partnership as dyadic.<sup>219</sup> Ribstein's proposals were motivated by the needs of same-sex intimates, and he gives only passing attention to other sexual minorities such as polygamists.<sup>220</sup> Unlike Drobac and Page and Ribstein, Ertman does not propose explicit forms. But she is the only one of this cohort to take explicit account of intimacy multiplicity, suggesting that

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Starnes, *Pity, Partnership, and Divorce Discourse*, *supra* note 14, at 1534.

216. See Ribstein, *A Standard Form Approach*, *supra* note 16, at 319 (crucial feature is whether they are profit-seeking entities). Others join Ribstein in vigorously opposing the analogy between commercial and intimate associations. See, e.g., Martha L. Fineman, *Illusion of Equality: The Rhetoric and Reality of Divorce Reform 174* (1991) [hereinafter *Fineman, Illusion of Equality*] ("Through the application of a business, contractual, partnership model, dependency and need are obscured."); Ira Mark Ellman, *The Theory of Alimony*, 77 *Calif. L. Rev.* 1, 33–40 (1989) (discussing failure of partnership analogy); Scott, *Rational Decisionmaking*, *supra* note 196, at 52 ("[S]imilarities between marriage and commercial contractual relationships should not be exaggerated.").

217. Ertman, *Marriage as a Trade*, *supra* note 15, at 82.

218. Ribstein, *A Standard Form Approach*, *supra* note 16, at 316–21; see also Rasmusen & Stake, *supra* note 14, at 464–65 (relying not on business analogy but on private ordering through contract); Stake, *Mandatory Planning*, *supra* note 14, at 425–29 (proposing state mandate for premarital contracts).

219. "[A]n association of two (2) adult persons . . . form[s] a single economically and emotionally supportive family." Drobac & Page, *supra* note 14, at 427.

220. Ribstein views the turn to private ordering as a "compromise" in the same-sex marriage debates. See Ribstein, *A Standard Form Approach*, *supra* note 16, at 313 (noting "contractual choice of law analogy provides a promising way to compromise seemingly polar positions on same-sex marriage"); Ribstein, *Limited Liability Unlimited*, *supra* note 16, at 449 (noting "many of the same impediments to recognizing new relationships that apply to business relationships also apply to domestic relationships," and suggesting "[a]n open-ended domestic relationship . . . would provide a mechanism for enforcing such contracts that would fill the gaps in the marriage standard form").

“the highly contractual nature of an LLC could address the wide variety of conditions present in polyamorous arrangements.”<sup>221</sup>

My point is not merely that these private law proposals fail to account for polygamy. In other words, this is not a classic “me too” argument. Rather, my point is that, for all of the analogies they draw between intimate and business associations, this cohort of perceptive scholars still misses the crucial implications of analogizing polygamy and partnership. For instance, Martha Ertman derives her intriguing typology based on the role of the state in formation and dissolution. She argues that partnership involves the state only at dissolution, akin to cohabiting couples, whereas, like corporations, marriages involve the state at both formation and dissolution. In contrast, this Article has emphasized not the chronology of state involvement, but rather how different associational forms generate distinct bargaining dynamics. Hence, for my purposes, the relevant feature of both commercial partnership and plural marriage is their shared open-ended multiplicity and the distinct dynamics it generates. Nor is corporate law, with its rules governing majority and minority shareholders, an appropriate analog. While it might be tempting to conclude that in plural marriages husbands are always the ones with power, akin to a majority shareholder, as described above, co-wives too jockey for power and resources.<sup>222</sup>

Put slightly differently, to the extent that at least some of the concerns we fairly have about polygamy stem from its opportunism and exploitation, I suggest these are not endemic to polygamy, but rather are expedited by its structure. The open-ended multiplicity of partnerships, too, can engender vulnerabilities, but legal norms ameliorate those. While patriarchy certainly characterizes a substantial portion of polygamous relationships, I would contend a very similar deployment of gendered power was at work in heterodyadic marriage for most of its history. Male supremacy’s grip on dyadic marriage did not lead to its abolition, though, as some radical women’s groups urged in the nineteenth century. Instead, a series of legal reforms were put in place that, in tandem with shifts in cultural and religious norms, transformed the institution. Similarly, legal reform might very likely ameliorate conditions within polygamous marriages. Partnership is helpful then as a model to better perceive and deexceptionalize plural marriage and to consider how we might reform plural intimacy.

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221. Ertman, *Marriage as a Trade*, *supra* note 15, at 101. Laura Rosenbury makes this point outside the sexual context in her article on friendship. Rosenbury, *Friends with Benefits?*, *supra* note 109, at 229–33, 240–41 (stating conferral of status on friends will also promote nonexclusivity and fluidity as norms among intimates). Others who embrace private law ordering of intimate associations take a more contractual approach. See *supra* notes 14, 16, and accompanying text (discussing scholars viewing marriage and intimate relationships through contractual lens).

222. See *supra* notes 120–122 and accompanying text (describing competition among co-wives).

Ertman's characterization of state involvement—at dissolution for cohabitants, and at formation and dissolution for corporations—in some ways also privileges the existing love-it-or-leave-it dynamics in which the state does not intervene “midgame.”<sup>223</sup> There is an intriguing possibility though. Saul Levmore notes that the norm of exclusivity of remedies, that “withdrawal from a partnership must precede or accompany legal actions against one's partners,” is in transition in commercial law.<sup>224</sup> RUPA tries to “bury” the love-it-or-leave-it regime “by allowing almost any cause of action by a partner against the partnership or against other partners without a final accounting or dissolution.”<sup>225</sup> Plural marital associations might veer from traditional family law and instead adopt this “evolved norm,” thereby deprivileging the strong dichotomy between midgame and endgame in intimate, as well as commercial interactions. As Levmore notes, “under the traditional partnership rule, the very point of bringing a claim for one's ‘property right’ of final accounting and dissolution may be to get a hearing on a liability matter that the complaining party would in fact have preferred to bring without severing the relationship.”<sup>226</sup> Given our professed commitment to families, such an evolved norm might very well make sense.<sup>227</sup>

Some might continue to resist the analogy. Of course, partnership rules are designed for particular kinds of relationships between profit-seeking entities. Still, as Cynthia Starnes observes: “It would be foolish, of course, to insist that partnership perfectly describes marriage. The question, however, is not whether anyone would mistake a business partnership for a marriage, but rather whether any gain can flow from an analogy to partnership.”<sup>228</sup>

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223. Ertman's typology “focuses on two important points of state intervention in the relationship—formation and dissolution.” She concedes that “[m]arkedly absent from this discussion are the myriad ways in which state nonintervention in business and family life determines the course of events during the relationship.” Yet she concludes, “[t]he law is most involved in a business or intimate affiliation at entry and exit, however, and these moments determine which law governs. Accordingly, it makes sense to focus on parallels in formation and dissolution.” Ertman, *Marriage as a Trade*, *supra* note 15, at 100.

224. Levmore, *Love It or Leave It*, *supra* note 125, at 221.

225. *Id.* at 223 (footnote omitted). Levmore notes:

The Official Comment to the new (model) statute notes that the abolition of the exclusivity rule “reflects a new policy choice that partners should have access to the courts during the term of the partnership to resolve claims against the partnership and other partners, leaving broad judicial discretion to fashion appropriate remedies.”

*Id.* at 223 n.10 (quoting RUPA § 405(b) cmt. 2 (1997)).

226. *Id.* at 242.

227. See Rasmusen & Stake, *supra* note 14, at 481–89 (contemplating prenuptial agreements that would be enforceable during marriage).

228. Starnes, *Pity, Partnership, and Divorce Discourse*, *supra* note 14, at 1537.



D. *Children and Other “Externalities,” or, “Polygamy on the Installment Plan”*

Much noted are polygamy's effects on third parties, that is, those who did not choose to enter the plural marriage. These might be thought of as polygamy's “spill-over effects,” or its externalities. One charge against polygamy in the United States is that it entails social costs in terms of corruption and fraud.<sup>229</sup> An even greater and more common concern, however, is polygamy's effects on the children raised in these households and communities. People point to child brides and “lost boys” as emblematic of the abuses polygamy perpetuates against children.<sup>230</sup> Part of me wants to radically resist the notion that intimacy cannot be theorized without attention to children. The assumption of women as mothers falls prey both to repro-normativity and to heteronormativity.<sup>231</sup> Yet, the strong reality is that a paper on bargaining dilemmas and vulnerabilities in plural families must address the role of children, child custody determinations, and what Martha Fineman calls the dependency critique, to assert that it is taking vulnerability seriously and as a central concern of family law.

In fact, children raise two distinct questions for polygamy. The first is that polygamy is intrinsically “bad” for children. In a sense, this allegation is not materially different from accusations about gays and lesbians

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229. In the United States, polygamy has served as a cover for social corruption, most notably, welfare and tax fraud. Under our current dyadic marital regime only one woman can be legally recognized as a man's spouse. This means that all subsequent “wives” have the technical legal status of single heads of (often quite large) households, and, as such, are entitled to federal and state benefits. Investigations have shown that these monies are often claimed by husbands or sect leaders, comprising a substantial source of institutional wealth and funding. At the same time these communities report high levels of child poverty and neglect. Similarly, some polygamist communities have politicized not filing tax returns. Sect leaders call this fraud against the government “bleeding the beast.” See Strassberg, *The Crime of Polygamy*, supra note 24, at 405–12 (describing fundamentalist community's illegal evasion of civic and family obligations). Yet legalizing plural marriage will diminish the opportunity for both welfare fraud and tax abuse and also shine some much-needed sunlight on polygamous communities, allowing them to live their lives openly and hopefully reducing the sway of underground sects and cult leaders. See Sigman, supra note 7, at 184–85 (“[T]he historical criminalization of polygamy has created barriers to legal enforcement of other criminal provisions concerning abuse, sexual assault, and neglect within some polygamous communities.”); see also Bennion, supra note 54, at 120 n.57 (“According to the Utah Department of Workforce Services, in 2002, 66% of Hildale FLDS residents received federal assistance and according to the Arizona Department of Economic Security, 78% of Colorado City residents received food stamps.”); Duncan, supra note 10, at 329–31 (describing various forms of entitlement and tax fraud).

230. See supra note 61 and accompanying text (discussing how some polygamous communities coerce girls into early marriages and expel boys, leaving them on their own with no resources or family; in this sense, girls are forced into new families and boys are deprived of theirs).

231. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *Colum. L. Rev.* 181, 197 (2001) (contending feminism has launched rigorous critique of women's socialization into being heteronormative, but not of women's socialization as mothers).

as parents. For both, the claim is that the nature of the adult intimacy disadvantages, or in the stronger form, injures, children in some meaningful way.<sup>232</sup> Charges of child abuse and neglect are what prompted Texas officials to raid the Fundamentalist Church of Jesus Christ of Latter Day Saints and seize hundreds of children from its members.<sup>233</sup> Concerns over child welfare also sparked other large-scale polygamy prosecutions in the twentieth century. However, as Martin Guggenheim, a scholar of children's welfare, contends, the state should not be permitted to use child abuse prosecutions to "[r]egulat[e] the behavior of adults who are not directly harming their children."<sup>234</sup> In addition, the abuse concern may well confuse polygamy as a form of intimate association with the unregulated communities and "compound effect" that Strassberg and Sigman attribute to fundamentalist polygamous communities in the United States.<sup>235</sup> If this is the case, then Sigman is almost certainly correct that decriminalization, or the additional step of recognition and regulation called for by this Article, is the key to assimilating these families and bringing them within our moral scrutiny.<sup>236</sup> Finally, some worry that

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232. Abuse concerns include child brides, incest, lost boys, violence, and the difficulty of even proving paternity given the lack of record keeping in some underground polygamous communities. Shayna Sigman elaborates why people may fear abuse from polygamy:

Reasons that polygamy might be more likely to be abusive or neglectful than other relationships are that: (1) polygamy invites secrecy, undermining women's ability to get help if needed; (2) the structure of polygamy suggests that the husband will not have sufficient time to devote to each wife or their children; (3) the treatment by other wives may be abusive; and (4) the types of people who voluntarily choose polygamy may be attracted to the uneven power dynamic.

Sigman, *supra* note 7, at 172–73. Janet Bennion's empathetic interviews of fundamentalist Mormon women led her to identify the following as risk factors for abuse within families: physical and social isolation/circumscription; father absence; lack of female network; overcrowding; economic deprivation; and male supremacy/patriarchy. Bennion, *supra* note 54, at 10. But see Guggenheim, *supra* note 100, at 776 (agreeing state uses child welfare as excuse to intervene in nontraditional families but suggesting families headed by same-sex couples may receive more deference from state than polygamous families).

233. See, e.g., Guggenheim, *supra* note 100, at 800 (detailing charges of abuse and neglect); Jessica Dixon Weaver, *The Texas Mis-Step: Why the Largest Child Removal in Modern U.S. History Failed*, 16 *Wm. & Mary J. Women & L.* 449, 458–81 (2010) (describing allegations that precipitated raid and subsequent legal proceedings).

234. Guggenheim, *supra* note 100, at 814. Guggenheim, however, ends up endorsing criminal prosecutions of polygamists because criminal law better protects civil liberties. *Id.*

235. Sigman, *supra* note 7, at 169–74 (discussing potential for abuse or neglect in polygamous relationships); Strassberg, *The Crime of Polygamy*, *supra* note 24, at 357 (contending "modern Mormon fundamentalist polygyny is . . . instrumental in the development of small theocratically governed communities that largely evade both regulation by the secular government and economic contribution to that government").

236. While child abuse has certainly figured in several of the highly publicized polygamy prosecutions, we may conflate correlation with causation. All of these acts are already criminalized. However, they are difficult to prosecute in *underground* polygamous communities. Shayna Sigman observes "[c]hildren and women in polygynous families may be at greater risk to suffer abuse precisely because of the premium placed on silence and privacy. These are the greatest weapons an abuser has." Sigman, *supra* note 7, at 181; see

growing up in polygamous families will reinforce conventional gender roles in children, inhibiting their development in a liberal society nominally committed to gender equality.<sup>237</sup> For instance, the report from the Texas Department of Family and Protective Services concluded the following after the FLDS raid: “DFPS also presented evidence that . . . the community functioned as a single household with a pervasive belief system that groomed girls to become future victims of sexual abuse and boys to become future sexual abuse perpetrators.”<sup>238</sup> Social reproduction and the socialization of children into gender roles is something that concerns me greatly. And yet, I suspect there are deeper threats to gender socialization than plural marriage: television; the Internet; video games; movies; advertising; toys (from Barbie to Bratz); and even the organization of sports and Scouting. Nor is illiberal socialization limited to polygamists. Orthodox religions, traditionalist families, conservative states, and some ethnic enclaves oppose liberalism in various ways. Yet, there are long-standing constitutional norms protecting parents’ rights to raise their children as they see fit, short of abuse or neglect. We should be attentive to how children learn to gender identify, but it is unclear that plural marriage threatens social reproduction more than a variety of other social things, which are tolerated and even subsidized.<sup>239</sup>

The second concern is more directly related to the topic of this Article—whether polygamous families can be effectively regulated consistent with extant norms in family law. Apart from concerns about abuse or illiberal socialization, critics of polygamy contend that it generates other harms for children in our society, which is nominally organized around a nuclear family model. Some contend that polygamy is bad for children

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also Duncan, *supra* note 10, at 316 (contending decriminalization will help to ameliorate abuse).

237. Importantly, here is where the gay analogy might actually be helpful. Similar allegations about childrearing and gender roles are made as a primary reason to deny same-sex marriage. Moreover, we may again conflate fundamentalist underground polygamy with other forms of polygamy, including those who practice its crisis, charitable, or immigration iterations.

238. Tex. Dep’t of Family and Protective Servs., Eldorado Investigation 7 (Dec. 22, 2008), available at <http://texasflds.files.wordpress.com/2009/02/eldorado-investigation-report.pdf> (on file with the *Columbia Law Review*); see also Amanda Townsend & Agnes Pawlowski, Girl, 14, Fled Abuse, “Mind Control” of Polygamy, CNN (Sept. 14, 2007), at <http://edition.cnn.com/2007/US/law/09/11/fleeing.polygamy.hammon/index.html> (on file with the *Columbia Law Review*) (“Probably the worst part of the whole theology . . . is the treatment of women and teaching women that they are not equal to men.” (internal quotation marks omitted)).

239. Maxine Eichner and Linda McClain have both made strong cases for the role of an active state in supporting liberal ideals within families. See, e.g., Maxine Eichner, The Supportive State: Families, Government, and America’s Political Ideals 5 (2010) (“Because of . . . the critical role that sound families play in . . . a flourishing society, the family-state relationship must occupy a central position in liberal democratic theory.”); McClain, The Place of Families, *supra* note 46, at 4 (stating “government has an important responsibility” to carry out “the task of producing persons capable of responsible personal and democratic self-government”).

because multiple families with a single father will necessarily decrease the emotional and financial support he gives to any child. This is one of the major criticisms of polygamy as practiced currently in some underground communities and has been alleged in some high-profile prosecutions.<sup>240</sup> In addition, some question whether child custody disputes would be unworkable with polygamy's multiplicity. Let me take these in turn.

With regard to how marital multiplicity affects economic and emotional child support, it is unclear that polygamy generates more costs for children than the standard alternatives. In 2006, the Centers for Disease Control & Prevention reported that 38.5% of children were born to unmarried women.<sup>241</sup> While some of these mothers will subsequently marry, others, particularly poor women, will not. Instead, the fathers of their children will subsequently father children with other women, leading to multiple nonmarital families, or *de facto* polygamy.<sup>242</sup> In addition, a substantial percentage of married couples divorce and remarry, starting new families.<sup>243</sup> These successive divorces and remarriages have led to what some have called serial polygamy, or what nineteenth-century activists derided as "polygamy on the installment plan."<sup>244</sup> This cultural dynamic leaves children from prior families economically and emotionally disadvantaged in favor of subsequent ones, and, because men tend to procreate with each new marriage more so than women, serial polygamy has generated dynamics not unlike those feared from its contemporaneous variation. In fact, the child welfare arguments currently made against

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240. See, e.g., Strassberg, *The Crime of Polygamy*, *supra* note 24, at 408 ("Of more legitimate state concern than simply the population effects of polygyny relative to monogamy is the much smaller ratio of adults to children present in polygyny for support purposes."); Jason D. Berkowitz, Comment, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 *U. Miami Inter-Am. L. Rev.* 615, 639 (2007) (stating children "are deprived of monetary support because the fathers are unable to provide for all their children"); see also Guggenheim, *supra* note 100, at 791–94 (discussing more generally purported state interests in protecting children from living in polygamous households); Weaver, *supra* note 233, at 486 (describing this concern at work in FLDS raid).

241. Joyce A. Martin et al., *Ctrs. for Disease Control & Prevention, Births: Final Data for 2006*, 57 *Nat'l Vital Stat. Rep.* 2 (2009), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57\\_07.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf) (on file with the *Columbia Law Review*).

242. In the African context, anthropologist Zeitzen notes that some men have replaced multiple wives with girlfriends. In these contexts, the "move away from polygyny is more an economic adaptation to urban conditions than a normative commitment to monogamy as such, a process seen in all of urban Africa." Zeitzen, *supra* note 26, at 163–64.

243. In addition, forty percent of children born into two-parent households experience a parental breakup by age fifteen. Pat Wingert, *Americans Marry Too Much*, *Newsweek*, Aug. 15, 2009, available at <http://www.newsweek.com/2009/08/14/americans-marry-too-much.html> (on file with the *Columbia Law Review*); see also Hendrik Hartog, *Man and Wife in America: A History* 286 (2000) ("[T]he men and women who lived behind the developing law of divorce . . . made it . . . serve their limited and concrete goals: to live as husband and wife, to be married.").

244. Gordon, *Mormon Question*, *supra* note 6, at 173.

polygamy were also made against no-fault divorce half a century ago.<sup>245</sup> In other words, competition among families for emotional and economic resources is not unique to what we might think of as contemporaneous polygamy, but has long been found in both the de facto and serial versions as well.<sup>246</sup>

In fact, despite their emotional and economic costs to children, de facto and serial polygamy both enjoy strong legal protection. Individuals have a constitutional right to divorce and remarry as many times as they desire, regardless of whether they are supporting prior families.<sup>247</sup> Nor can the state limit men's right to reproduce outside of marriage, based on burdens to the welfare system.<sup>248</sup> Hence, apart from the fact that the question of "affordability" has already been declared constitutionally irrelevant, practically speaking, both serial polygamy and de facto polygamy have already undermined it. In this sense, the question of child support is a bit of a red herring. This is not to say that these dynamics are

245. Nancy Rosenblum, *Democratic Sex: Reynolds v. U.S., Sexual Relations, and Community*, in *Sex, Preference, and Family: Essays on Law and Nature* 63, 78 (David M. Estlund & Martha C. Nussbaum eds., 1997).

246. In her comparative survey, Michèle Alexandre finds:

Vulnerable individuals often enter into these de facto unions with little bargaining power and find themselves without any recourse when the de facto polygamous union terminates either by the death of a de facto spouse or by the unilateral termination by one of the parties. De facto spouses with the greatest bargaining power are able to enter into as many of these de facto unions as they want without shouldering any of the statutory marital responsibilities imposed by their particular jurisdiction on de jure spouses.

Alexandre, *Lessons*, supra note 10, at 1476–77. While this focuses on particular postdivorce dynamics, even when mutually sought or initiated by the wife, one can find such dynamics in intact dyadic marriages as well. While intact, dyadic marriages do not share the particular heightened opportunities. And yet, economists of the household have identified how, under the no-fault regimes that now dominate Western family law, the divorce threat is prevalent. See, e.g., Lundberg & Pollak, *Efficiency*, supra note 112, at 164 ("[T]he equilibrium allocation typically depends upon the spouses' alternatives outside marriage (e.g., 'the divorce threat') . . ."). Of course, things used to be much worse in dyadic marriage.

247. Compare *Zablocki v. Redhail*, 434 U.S. 375, 375–77 (1978) (holding unconstitutional statute forbidding individuals with child custody obligations from marrying without court approval), and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding constitutional right to procreate), with *State v. Oakley*, 629 N.W.2d 200, 201 (Wis. 2001) (holding where father is not supporting existing children, state may bar him from having more children as condition of his probation). Kenneth Karst's classic article, *The Freedom of Intimate Association*, 89 *Yale L.J.* 624, 667 (1980), found there is a constitutional right to remarry implied in *Zablocki*. Similarly, children may have expectations of being only children, but the law doesn't protect these either. See, e.g., Martha Minow, *How Should We Think About Child Support Obligations?*, in *Fathers Under Fire: The Revolution in Child Support Enforcement* 302, 313–18 (Irwin Garfinkel et al. eds., 1998) (examining conflicting intuitions on support priorities for successive families).

248. See *Zablocki*, 434 U.S. at 375–77 (holding unconstitutional a statute restricting marriage for people with children likely to become public charges).

not worth taking into account, only that polygamy is not necessarily *distinct* in this regard.

Another related concern about children is how custody would be determined upon divorce. As difficult as custody disputes are, how can the law possibly manage multiple adults seeking custody? But in fact, family law is already grappling with parental multiplicity. Dyadic parenthood, along with what Katherine Baker has called “bionormativity,” is splintering along several axes.<sup>249</sup> First, no-fault divorce and changing cultural norms have combined to drastically increase the number of remarriages and hence blended families. The following is a common scenario: A dyadic couple may have a child and then divorce. The custodial parent may then remarry, and the child may form strong ties to the new stepparent. A third marriage and second stepparent may even follow. Hence, in serial polygamy, several adults may “parent” a child who does not share a biological relationship, any of whom may seek custody or visitation rights at dissolution. A second fact pattern stems from the rise in assisted reproduction among both gay and heterosexual couples. Contributors of genetic material, i.e., sperm and egg donors, are seeking parental rights, as are surrogate mothers. Such claims have been an issue for heterosexual consumers of “reprotech” resources for some time, and gay couples increasingly are confronting them, i.e., lesbian couples and sperm donors; gay men and surrogates or egg donors. Grandparents and other extended family members have also made claims for visitation, if not outright parenthood. Finally, adoption too has generated parental complexity, particularly in states that have implemented open adoption.<sup>250</sup> Thus, a variety of contemporary scenarios have introduced the question of parental multiplicity into the law. Child custody and welfare issues upon dissolution of plural marital associations are not meaningfully different from ones that arise in *de facto* polygamy or the variety of scenarios that

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249. “There is much talk about how the diminished importance of marriage harms children by destabilizing homes and breeding competing loyalties, but the diminished importance of marriage affects children in a more fundamental way. Without the law of marriage, we do not know who parents are.” Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649, 651 (2008) [hereinafter Baker, *Bionormativity*] (footnote omitted); cf. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 Wis. J.L. Gender & Soc’y 73, 78 (2010) (discussing persistence of biological connections in adoptive, reprotech, and stepfamilies and suggesting law take lessons from contact norms utilized in adoption law).

250. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 60, 67 (2000) (denying grandparents’ petition for visitation); *Michael H. v. Gerald D.*, 491 U.S. 110, 114, 131 (1989) (rejecting sole or dual paternity claim by biological father not married to child’s mother); *Carter v. Brodrick*, 644 P.2d 850, 853–56 (Alaska 1983) (construing statute broadly to enable stepparent visitation rights); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985) (using equitable estoppel to enforce state claim for child support against transgender partner of child’s mother, where child was product of artificial insemination with third party); Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. Rev. 997, 1012 n.77 (1995) (citing cases in which courts gave visitation rights to birth parents after adoption).

generate “third party” parental claims—serial polygamy, the increasing number and variety of reprotch families, grandparents, and adoption. Family law itself is in transition, and courts are already developing norms to allocate parental rights among multiple claimants.<sup>251</sup>

In sum, family law already has disaggregated marriage from parenting. We have a separate law of parenthood, and it is generating norms to grapple with parental multiplicity. As the existing law shows, permitting polygamy is a conceptually distinct question from permitting multiple parenthood. To the extent that children of polygamy are raised in households with more than one parental *figure*, this does not mean that they are being raised in a household with multiple parents.<sup>252</sup>

Concerns about children and child welfare should be taken seriously, and one might be inclined to conclude that polygamy’s critics are correct: It should be a banned form of intimate association. And yet, open-ended intimate multiplicity already exists. We might fairly be concerned about its harms, costs, and regulatory challenges, but plural marriage is not a necessary condition for these concerns. Formal, contemporaneous polygamy, serial polygamy, and de facto polygamy all share some of the vulnerabilities and uncertainties with regard to struggles for financial, and particularly emotional, resources among families. Despite ongoing controversy, we don’t ban de facto polygamy. And, with the advent of no-fault divorce, serial polygamy is the norm. Family law has developed robust norms to grapple with the implications and effects of “serial” open-ended multiplicity with regard to children. The next step, which this section has addressed, would be to contemplate how to best address legal questions of multiple adults as contemporaneous intimates.

#### E. *Summary*

This set of proposed default rules is both tentative and incomplete. Marital law comprises volumes in state codes, and this Article could not possibly address, or even anticipate, all of the issues that a regime permitting plural marriage would confront. Yet, this is a first step, an effort to

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251. Family law has yet to generate universal norms to address parental multiplicity. Determinations of “third party” legal parenthood, custody, and visitation rights vary from jurisdiction to jurisdiction, as does much of family law. See generally Susan Frelich Appleton, *Parents by the Numbers*, 37 Hofstra L. Rev. 11 (2008) (distinguishing biological, functional, and estoppel approaches to parental multiplicity); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 Buff. L. Rev. 341 (2002) (describing courts’ use of equitable doctrines to determine legal relationship of lesbian coparents and children); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & Fam. Stud. 309, 310 (2007) (“[D]octrines such as intentional and functional parenthood have been applied by courts to legalize the coparentage of a child by a nonbiological gay or lesbian partner . . .”).

252. See, e.g., Baker, *Bionormativity*, supra note 249, at 655–56 (noting differing degrees of parenthood may be “inevitable by-product of a system that rejects bionormativity”).

consider whether the challenges polygamy poses for legal regulation could be met, and how they should be met.

Taken together, an opt-in regime with a strong anti-conversion principle, combined with unanimity rules barring unilateral actions, voluntary exit, i.e., divorce, and buyout norms should alleviate some of the worst harms we might fear from plural marriage. Of course, there are some real and meaningful distinctions between regulating the bargaining concerns in polygamy's intimate sphere versus partnership's commercial one. In particular, some of the rules I posit might be styled explicitly as more expensive or information-forcing penalty defaults rather than majoritarian ones, and some of the rules will be "stickier" than commercial partnership's notoriously slippery ones.

In the end, the claim here is not that these defaults will eliminate vulnerability or exploitation, but rather, that they will ameliorate them. People might still fear that these rules, particularly unanimity, will not be sufficient, however sticky, because of coercion or deceptive behavior. In addition, the fact that it is a voluntary opt-in regime will leave many plural households unregulated and its members without protection. Finally, some will complain I have fallen into an autonomy paradox, that intimates gain substantial rights, but concede significant liberties. All of these concerns are true of course. But none of them are meaningfully different from the current dyadic regime.

#### IV. INTIMACY EXCEPTIONALISM

Only an ostrich could fail to have noticed that the institution of marriage as we know it, i.e., heterosexual and dyadic, has been subjected to increasing scrutiny by policymakers, scholars, and layfolk alike. Conservatives, liberals, feminists, economists, and multitudes of others of all political and methodological stripes have debated the effects of our marital regime on the men and women who participate in it and on the same-sex couples and other sexual minorities it excludes. Resolutions have been in short supply; proclamations and diagnoses, though, proliferate. We have thoroughly theorized and debated the heterosexual aspects of contemporary marriage. Now, perhaps, it is time to theorize and debate the dyadic part.

This Article has focused on plural marriage through a regulatory lens. It has contemplated polygamy as a bargaining paradox, a potentially fruitful analog to commercial partnerships, and possibly a new marital form. The primary goal thus far has been to shed some much-needed light on polygamy itself. However, theorizing marital multiplicity has broader implications for the intimacy debates. As this Part will show, moving beyond marital dyadicism to contemplate multiplicity suggests three things for conversations about recognition and regulation of intimacy. First, it explains why this Article encourages marital licensing and state-supplied defaults, or, in other words, why the purely private ordering urged by many for same-sex couples is not sufficient for committed



intimates, regardless of the number. Second, it plunges headfirst into the recognition debates, using polygamy to show how they frequently fall prey to what we might think of as intimacy exceptionalism and intimacy essentialism. Finally, it returns to the bargaining focus of the last two Parts, using a materialist and consequentialist approach to offer some final thoughts about intimate associations.

#### A. *The Limits of Private Ordering*

Several arguments can be made against recognizing polygamy. In addition to specific objections to the practice rehearsed in Part I.B, there is the more general argument that state recognition is unnecessary because committed intimates can achieve the same status-outcomes through private ordering. Both those seeking the continued exclusion of sexual minorities from heterodyadic marriage and “abolitionists” who urge the state to get out of the intimacy recognition business altogether embrace this view:

[T]he deregulation of marriage will stimulate the democratization of the antenuptial agreement. Besides the standard form agreements promulgated by religious and secular institutions sponsoring marriage, standard form antenuptial contracts will be developed and promoted by bar associations, legal publishers, independent websites—anyone with an ideological or economic interest in servicing the deregulated marriage market.<sup>253</sup>

Yet a brief look at inheritance rules and norms suggests the limits, and insufficiency, of private ordering for intimate associations.

Private ordering would suggest that intimates name each other as beneficiaries in their wills. Indeed, a veritable cottage industry of estate planning for same-sex couples has sprung up in the last several years.<sup>254</sup> Yet such crude optimism ignores the stickiness of default rules in the inheritance context. Most people in the United States die intestate, that is, without a will.<sup>255</sup> In the absence of wills, state statutes direct distribution of the estate to a designated set of family relations, preferred in varying orders. Currently, in every state, spouses inherit, either to the exclusion of blood relations or in tandem with them.<sup>256</sup> If there is no spouse, then

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253. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Deregulating Marriage*, 27 *Cardozo L. Rev.* 1161, 1183 (2006). For others who urge abolition, see *infra* notes 277–284 and accompanying text.

254. See generally Patricia A. Cain, *A Review Essay: Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 *Law & Sexuality* 613 (1998) (reviewing numerous treaties and books pertaining to estate planning for same-sex couples); Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 *Seattle U. L. Rev.* 75 (2003) (focusing on estate planning for nontraditional couples, including same-sex ones).

255. See Joel C. Dobris et al., *Estates and Trusts* 62 (2d ed. 2003) (“Most Americans die without wills.”).

256. In states that have adopted the Uniform Probate Code, the surviving spouse inherits the entire estate in many contexts. *Unif. Probate Code* § 2-102. Non-UPC states

blood relatives inherit in order of proximity to the decedent. Without state recognition of intimate relations, intestacy would become the exclusive province of blood relatives. The only way for nonmarital intimates to inherit would be if the decedent managed to avoid intestacy. Destabilized estate plans fly in the face of longstanding American cultural norms and expectations, increasing the costs and uncertainty of post-mortem wealth transfers.

In addition, wills have their own well-documented perils.<sup>257</sup> Inheritance case law is filled with challenges by third parties to privately ordered distributions between intimates. Particularly at risk are estate plans that do not conform to social intimacy norms, including, of course, ones drafted by sexual minorities. Most recently is the 2009 case of an elderly gay couple of twenty years, Clay Greene and Harold Scull, who had executed reciprocal wills and power of attorney documents. After Scull fell and injured himself, officials in Sonoma County, California ignored the medical and other decisionmaking provisions in the power of attorney, separated the couple, terminated their lease, auctioned their possessions, forced Greene into a nursing home, and refused to allow Greene to make medical decisions for Scull or even see him.<sup>258</sup> This is only the most recent in a long list of examples of how poorly non-recognized intimates fare in the probate system.<sup>259</sup> Spouses do not always fare well in probate

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divide a decedent's assets between the surviving spouse and other family members of the decedent. See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Exclusion*, 41 *Ariz. L. Rev.* 1063, 1064–66 (1999) [hereinafter Spitko, *Expressive Function*] (recounting UPC's innovations regarding surviving spouses and exclusionary effects on gays and lesbians).

257. See, e.g., John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 *Harv. L. Rev.* 1108, 1116–17 (1984) (describing pitfalls of probate process); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 *Harv. L. Rev.* 489, 489, 498–501 (1975) (contending excessive formalism in probate process undermines testamentary intent); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 *Ariz. L. Rev.* 235, 236–38, 243–58 (1996) (describing how undue influence and incapacity doctrine undermines security of wills); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 *U. Pa. L. Rev.* 1033, 1036 (1994) (arguing “[t]he problem lies . . . with judicial insistence on literal compliance” with formalities); Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 *Duke J. Comp. & Int'l L.* 41 (2008) (providing historical and comparative survey of how undue influence doctrine affects will-making).

258. Complaint at 8–20, *Greene v. Cnty. of Sonoma*, No. SPR-81815 (Cal. Super. Ct. Mar. 22, 2010). The court granted only part of the County's requests for control of Scull's affairs, permitting access to a bank account. After Greene sued, the County settled, agreeing to pay \$600,000 in damages to Scull's estate. Case Docket: *Greene v. County of Sonoma et al.*, Nat'l Ctr. for Lesbian Rights, available at [http://www.nclrights.org/site/PageServer?pagename=issue\\_caseDocket\\_Greene\\_v\\_County\\_of\\_Sonoma\\_et\\_al](http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_Greene_v_County_of_Sonoma_et_al) (on file with the *Columbia Law Review*) (last visited Aug. 26, 2010).

259. See, e.g., Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq.* 1, 15–17 (1998) (discussing how gay and lesbian partners are disadvantaged with respect to inheritance); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 *Tulsa L. Rev.* 55, 60 (2004) (describing how current American inheritance law provides little protection for surviving domestic partners); E. Gary Spitko,

challenges, but they certainly do better than most non-recognized intimates.<sup>260</sup> “Spouse,” or some statutorily recognized affiliation, is an important legal designation, necessary to overcome the stickiness of rules favoring other legally defined “heirs.” Against the very sticky backdrop of intestacy, the only way to compete is to become part of the state-recognized scheme of greedy heirs. That is, intimates compete with the decedent’s other family members for recognition and rights to post-mortem wealth.<sup>261</sup> Nor do non-recognized intimates enjoy rights such as the elective share or community property, both devices designed to protect surviving spouses from disinheritance.<sup>262</sup> Ironically, while the turn to “private ordering” might suggest the relevance and application of partnership principles, the lack of marital recognition and status bars non-married intimates from accessing the *actual* partnership principles now embedded in much of family and inheritance law.<sup>263</sup>

Finally, as long as polygamy remains criminalized, wills risk exposing the entire family to state interference. Wills are public documents and as such provide a public record of how a decedent’s estate is distributed. Wills leaving money to multiple spouses will inevitably raise questions as to whether the decedent practiced polygamy, providing evidence to prosecutors and immigration officials alike. Private ordering alone is not sufficient. As the inheritance context demonstrates, privately ordered intimate relationships would require an entirely different set of intestacy categories, as well as substantial changes to both probate statutes and also current probate norms involving judges and juries. Inheritance then provides one example of the fragility and instability of purely private ordering among intimates.

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An Accrual/Multifactor Approach to Intestate Succession for Unmarried Committed Partners, 81 Or. L. Rev. 255, 255–58 (2002) [hereinafter Spitko, Accrual] (describing why domestic partners do not usually inherit); Spitko, Expressive Function, *supra* note 256, at 1064–66 (noting existing inheritance law disadvantages same-sex couples); see also Leeford Tritt, Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code, 61 Ala. L. Rev. 273, 276, 315–16, 328–29 (2010) (stating 2008 UPC amendments on parent-child inheritance only nominally help nontraditional families).

260. See *supra* note 259 (describing role of marriage in determining post-mortem distribution of wealth).

261. See, e.g., Leslie, *supra* note 257, at 243–58 (describing how courts use undue influence doctrine to grant inheritances to blood relations over domestic partners); Spitko, Expressive Function, *supra* note 256, at 1075 (describing intestacy law as favoring blood relations over domestic partners).

262. See, e.g., Gallanis, *supra* note 259, at 60 (stating benefits do not typically extend to non-spouses); Spitko, Accrual, *supra* note 259, at 293 (arguing committed partners should partake in “elective share”).

263. See Starnes, Divorce and the Displaced Homemaker, *supra* note 14, at 108–24 (noting people wrongly conceive partnership law as entailing a “clean break”).

### B. *Intimacy Exceptionalism*

In addition to the private ordering alternative, arguments in favor of recognizing polygamy confront two additional obstacles: intimacy essentialism and intimacy exceptionalism. Some people, including those who support intimacy autonomy and heterogeneity in principle, balk at polygamy. They conclude that polygamy's injuries—characterized variously as patriarchy, barbarism, despotism, or more generally, just plain old deviance—warrant and justify its exclusion from recognition as a legitimate intimate relationship. Polygamy as practiced in its dominant historic and contemporary forms might fairly give policy makers pause. As Part II suggested, it is often associated with inequality, exploitation, and dissatisfaction. Yet, this Article has taken a first step toward suggesting that this is a result not of polygamy per se—that is, of an essential defect with this form of intimacy—but of regulatory failure. There is no good reason why we could not recognize and regulate polygamy to ameliorate many of its illiberal aspects. Many assume the intrinsic harms of polygamy—while at the same time assuming the intrinsic goods of dyadic marriage. Heterodyadic marriage becomes the standard-bearer, the unspoken intimacy norm, according to which all other intimacy forms are measured and evaluated.<sup>264</sup>

Yet, opportunism and injury are present and operationalized in dyadic relationships as well. In fact, the patriarchal nature of marriage was a large part of nineteenth-century calls to abolish the institution.<sup>265</sup> Wives suffered from domestic violence, marital rape, and civil subordination of their property rights and contract capabilities.<sup>266</sup> Yet, despite calls

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264. See generally Diana Fuss, *Essentially Speaking: Feminism, Nature, and Difference* 1–2 (1989) (contending “essentialism is *essential* to social constructionism, a point that powerfully throws into question the stability and impermeability of the essentialist/constructionist binarism”); Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, at ix (1988) (discussing how “notion of a generic ‘woman’ functions in feminist thought much the way the notion of generic ‘man’ has functioned in Western philosophy: it obscures the heterogeneity of women and cuts off examination of the significance of such heterogeneity for feminist theory and political activity”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 585 (1990) (stating feminist theory at times relies on “notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”).

265. See, e.g., Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 63–72 (2000) (discussing abolitionist and early women’s rights, and analogizing marriage’s gender order to slavery’s racial order to indict marriage’s subordinating effects on women).

266. *Id.* at 11–12 (describing how feme covert principle legally subordinated wives to husbands, diminishing women as citizens); Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *Yale L.J.* 1073, 1082 (1994) (“The common law charged a husband with responsibility to represent and support his wife, giving him in return the use of her real property and absolute rights in her personality and ‘services’—all products of her labor.”); see also Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 *Geo. L.J.* 1359 (1983) (tracing evolution of women’s property rights in first half of nineteenth century).

to do so, we neither abolished nor criminalized dyadic marriage. Instead, proto-feminists and their allies undertook a vast reform project, still in progress, which has now been joined by large numbers of those committed to gender equality as a core principle of liberalism and democracy.<sup>267</sup> Regulation was the solution, not abolition. And while feminist scholars continue to criticize marriage's gender inequities, no one denies that formal equality has changed women's lives.<sup>268</sup> Indeed, legal reform of marriage is arguably one of the central forces that has revolutionized gender roles today. Essentialist claims that dyadicism is "good" and polyfidelity is "bad" naturalizes dyadic marriage as a static institution with an intrinsic set of "idealized" traits, obscuring it as a product of political and legal struggle and reform.

Of course, many will dismiss this as ancient history, contending that current heterodyadic marriage bears no relationship to modern-day polygamy. However, this willfully ignores the fact that many contemporary marriages steadfastly continue to adhere to patriarchal principles.<sup>269</sup> Sometimes these are imposed and sometimes they are embraced. Yet, few contend the state cannot or should not recognize all heterodyadic marriages between consenting adults.<sup>270</sup> Instead, most believe the solution to the injuries of intimacy lies in encouraging women to perceive them as such, i.e., as injuries, and to then avail themselves of their formal rights, not prohibiting women from entering these relationships, let alone criminalizing them.<sup>271</sup> If the state is willing to recognize the vast

267. See generally Eichner, *supra* note 239 (exploring state involvement in marriage); McClain, *The Place of Families*, *supra* note 46 (discussing state involvement in enforcing liberal ideals within families).

268. See, e.g., Fineman, *Illusion of Equality*, *supra* note 216, at 1–17 (stating marriage continues to be an inequitable institution); Williams, *supra* note 18, at 1–141 (describing how legal norms of marital property interact with cultural and workplace norms to structurally disadvantage women); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 *UCLA L. Rev.* 1199, 1227–33 (2010) (contending straight women have stake in same-sex marriage debate and whether it is framed as matter of sex equality); Ertman, *Marriage as a Trade*, *supra* note 15, at 79–85 (urging turn to private law norms to govern intimacy to jettison some of marriage's historical gendered baggage). Case and Fineman now do support abolishing contemporary marriage.

269. See, e.g., Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 *Utah L. Rev.* 381, 396–401 (describing cases involving explicitly patriarchal norms in contemporary marriages).

270. But see *supra* notes 265–266 and accompanying text (urging abolition of marriage because of its intrinsic association with institutionalized gender subordination).

271. This is certainly a major point of contention in the literature on domestic violence. Compare Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 *Harv. L. Rev.* 1849, 1857 (1996) (concluding "prosecutors can no longer avoid mandated participation if they are serious about improving the criminal justice system's response to domestic violence"), and Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 *Wis. L. Rev.* 1657, 1677–78 (defending mandatory arrest rules in domestic violence cases), with Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 *St. Louis U. Pub. L. Rev.* 7, 37–38 (2004) ("While implementing mandatory arrest policies seemed to benefit

number of patriarchal dyadic marriages, then it seems odd not to recognize polygamous ones that share the same characteristics. This, again, suggests the solution is to be found in regulatory amelioration, changing the structure of marriages, whether dyadic or plural, to create a baseline of formal equality. Contra essentialist claims about the inherent good or evil of intimate relations based on a numbers game, this Article has embraced a consequentialist analysis focusing on effects and whether they can be ameliorated.

Intimacy essentialism is at work in a second way as well. Opposition to polygamy as intrinsically bad for women exposes a feminist longing for a universal, idealized feminist gender subject.<sup>272</sup> This imagined subject would welcome, participate in, and even embrace mutual, reciprocal social and political relations with men.<sup>273</sup> Yet polygamy is one of several disputed sets of relations that complicates the quest for an idealized gender equality. Penny Andrews's work shows that, in countries such as South Africa, debates over polygamy often occur in the context of "several decades of global human rights debates centering on a woman's right to equality, on the one hand, and the respect for cultural values and traditions on the other."<sup>274</sup> Andrews points out that South Africa's Recognition of Customary Marriages Act, which brought plural marriages within the jurisdiction of the formal courts, carefully negotiated new and "competing" constitutional imperatives of gender equality and cultural autonomy.<sup>275</sup> An international lens exposes the ways that polygamy is part of the pantheon of feminist conflicts over women as volitional sub-

white women . . . that deterrence came at a high cost for African-American women . . ."), and G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 *Hous. L. Rev.* 237, 243 (2005) ("[D]ecision to sacrifice autonomy was based on flawed conceptions of will and resistance, as well as faulty ideas concerning the curative power of state intervention.").

272. See Spelman, *supra* note 264, at 2 ("[M]uch of Western feminist theory has been written . . . as if not just the manyness of women but also all the differences among us are disturbing, threatening to the sweet intelligibility of the tidy and irrefutable fact that all women are women.").

273. On the "sex/violence" axis of feminist legal theory, see, e.g., Adrienne D. Davis & Joan C. Williams, *Foreword to Symposium: Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 *Am. U. J. Gender Soc. Pol'y & L.* 1, 2-3 (2000) ("For the past two decades . . . feminist jurisprudence has conducted a rigorous and sustained inquiry into how rape, sexual harassment, domestic violence, and pornography subordinate women.").

274. Penelope E. Andrews, "Big Love"? The Recognition of Customary Marriages in South Africa, 64 *Wash. & Lee L. Rev.* 1483, 1485 (2007).

275. Andrews observes:

[T]he "Africanization" of the new constitutional state was a precondition for democracy, and a clear signal that South Africa would shed its colonial and apartheid past. But such derogation from the country's ignominious past generated a challenge with respect to the embedding of equality as the signature constitutional principle. Simply put, how was the Constitution to balance, on the one hand, the constitutional commitment to equality, while on the other finally providing formal recognition to indigenous laws and institutions?

jects. Postcolonial and other feminists have called for more complex accounts of women's subjectivity, as beings who make "choices" under cultural, economic, and other constraints.<sup>276</sup> An ongoing question for feminism is whether it leaves room for women who are committed to religious faith, cultural autonomy, antiracism, class solidarity, etc.

A second hurdle for polygamy to overcome is the increasing scholarly resistance to state recognition of intimacy in any form. Legal academic debates over intimacy recognition are robust and complex. Some urge that the state's recognition of intimates should be limited to conventional marriage.<sup>277</sup> Others favor keeping marriage, but contend it should not be privileged over other status-based regimes.<sup>278</sup> At the other end of the spectrum, scholars urge the state to get out of the marriage business and argue that state-sponsored marriage should be abolished.<sup>279</sup> Within

Andrews, *Who's Afraid of Polygamy?*, supra note 96, at 356 (footnote omitted); see also Bunting, supra note 162 (complicating contention that early marriage is always human rights violation).

276. See generally Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (2005) (analyzing constraints on Egyptian women involved in urban women's mosque movement in Cairo from 1995–1997 and impact movement had on Egyptian society); Uma Narayan, "Westernization," *Respect for Cultures, and Third-World Feminists*, in *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* 1, 1–13 (1997) ("Those in Third-World contexts who dismiss the politics of feminists in their midst as symptoms of 'Westernization' . . . fail to consider how these feminists' experiences within their Third-World contexts have shaped and informed politics . . .").

The National Geographic story on an FLDS community noted, "[t]oday FLDS women in the Hildale-Colorado City area have ample opportunity to 'escape'—they have cell phones, they drive cars, there are no armed guards keeping them in—yet they don't." Anderson, supra note 37, at 57. Critics, however, note that, being completely isolated and without skills, the women have nowhere to go and no means of supporting themselves. *Id.*

277. Within this group some would limit marriage to heterodyadic intimates. See, e.g., Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. Rev.* 1, 26–94 (arguing there is no constitutional right to same-sex marriage). Others, though, would maintain the elevated and privileged status of marriage but open it to sexual minorities. See, e.g., William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *McGeorge L. Rev.* 641, 647–59 (2000) ("The path [to legal recognition of same-sex marriage] is step-by-step and incremental, inevitable in some jurisdictions, impossible elsewhere in the short term, and sedimentary in the sense that new institutions are being piled on top of old ones."). Collectively, this camp opposes creating an inferior regime of other state-recognition proposals, such as the proposed American Law Institute's Principles of the Law of Family Dissolution, as well as the domestic partnership and civil union statutes and ordinances that have been enacted in many jurisdictions.

278. See, e.g., Jeffrey A. Redding, *Queer/Religious Friendship in the Obama Era*, 33 *Wash U. J.L. & Pol'y* 211 (forthcoming 2010) (unpublished manuscript) (on file with the *Columbia Law Review*) (urging gay community to embrace liberatory potential of parallel recognition regimes). Although Nancy Polikoff is one of the most adamant abolitionists, in commenting on the American Law Institute Principles for Dissolution she expressed openness to a dual regime. See Polikoff, *Making Marriage Matter Less*, supra note 195, at 366–68 ("I am also willing to acknowledge that legal recognition of nonmarital relationships expresses acceptance of such relationships, and that this is a good thing.").

279. This group ranges from agnosticism about marriage to active opposition, often based on feminist first principles. See, e.g., Fineman, *Masking Dependency*, supra note 20,

this camp, some encourage private ordering—that intimates should negotiate their own intimacy arrangements—against a backdrop of supplied defaults.<sup>280</sup> Others, though, believe that subsidizing the increased privatization of marriage is the wrong move. Instead, the state should direct its energies towards subsidizing economic vulnerability.<sup>281</sup> Finally, some who endorse status-based regimes fervently believe that recognition must rest on voluntary consent and oppose the state *imposing* recognition on intimates.<sup>282</sup> Others embrace this intimate “ascription,” believing that in order to protect vulnerable intimates the state should impose the obligations based on status or behavior.<sup>283</sup>

Of course, some scholars have urged that polygamy should be recognized, typically based on principles of political or constitutional liberalism or concern for the vulnerable populations that practice plural mar-

at 2214–15 (“It is essential for feminists to point out consistently that without substantial rethinking of the concepts underlying patriarchy—such as that of the private-natural family—the condition of women is unlikely to improve significantly.”); Nancy Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 *Am. U. J. Gender Soc. Pol’y & L.* 167, 176 (2000) (“Supporters of legalizing same-sex marriage are . . . wrong when they see equal access to marriage as the only way out of this inequality. Abolish marriage as a legal category for everyone.”); Polikoff, *Making Marriage Matter Less*, *supra* note 195, at 354 (calling idea of treating separating domestic partners like divorcing spouses “an important step in the right direction of making marriage matter less”); Zelinsky, *supra* note 253, at 1163 (“The law should not define, regulate, or recognize marriage.”); see also Ertman, *Marriage as a Trade*, *supra* note 15, at 80 (outlining typology of intimate and commercial associations in some large part to combat “the naturalized model of family [that] contributes to inequalities both within relationships and among various types of relationships” (footnote omitted)).

280. Several endorse a standard form approach. See, e.g., Drobac & Page, *supra* note 14, at 401–20 (proposing “Uniform Domestic Partnership Act” to treat all partnerships the same); Ribstein, *Limited Liability Unlimited*, *supra* note 16, at 449 (proposing “Domestic Entity” as mechanism to fill gaps in marriage standard form); Ribstein, *A Standard Form Approach*, *supra* note 16, at 310 (highlighting “potential of allowing couples to select not only from among the standard forms in a particular state, but also from the menus of standard forms offered by various states”). Others emphasize personalization. See, e.g., Rasmusen & Stake, *supra* note 14, at 464–65 (“Within limits, couples should be authorized to legally define their own marriages.”); Stake, *Mandatory Planning*, *supra* note 14, at 399 (“Allowing people to write their own enforceable marriage terms . . . is an essential and important step in the right direction.”); see also Ertman, *Marriage as a Trade*, *supra* note 15, at 82 (“[B]usiness models offer a repertoire of tools to address both extant and future problems in private relationships.”).

281. This argument is made in its strongest form by influential feminist theorist Martha Fineman. Fineman makes a persuasive argument that state support for families should be designed to support relations of dependency, not to subsidize horizontal, conjugal relations. In Fineman’s vision, the state plays a robust role in subsidizing families, but through supporting dependency, not conjugality. Fineman, *Inevitability of Dependency*, *supra* note 20, at 96; see also Martha Albertson Fineman, *Why Marriage?*, 9 *Va. J. Soc. Pol’y & L.* 239, 271 (2001) (“It is [the caretaker and dependent] relationship that should be subsidized and protected.”).

282. See *supra* note 196 (citing references).

283. See, e.g., Ellman, *supra* note 216, at 55–56 (arguing “[t]he theory developed here . . . focus[es] . . . on the parties’ situation when the marriage ends” in order “to avoid an unequal distribution of the dissolution’s financial burdens”).



riage. Others, though, urge the solution to polygamy is to be found in the state withdrawing altogether from the business of recognizing intimate relationships. Polygamists, then, would have no more, or less, standing before the state than any other intimates. For these abolitionists, the long-term economic relationships and vulnerabilities that can emerge in intimate relationships are substantively different from those that emerge in arms-length ones. Law continues to erect ever more refined and innovative frameworks for commercial associates that allows them to determine the optimal form to serve their interests. In addition to the variety of associational forms, licensing structures, and state-supplied defaults, commercial associates are also protected by implied partnership rules, consumer regulation, and some parts of contract law. At the same time, some of intimacy's best advocates are exceptionalizing it as monolithic, inhabited by intimates who connect sexually but not economically, and, ideally, beyond regulation. They urge horizontal intimacy is irrelevant to the state's task of managing and supporting families, or, alternatively, optimized when left to its own devices.<sup>284</sup> Underlying all of these visions is a liberal account of intimacy as populated by autonomous individuals who do not become interdependent.

Marriage is not only a licensing but also a distributive justice scheme. As currently structured, it discriminates between intimates, channeling resources, preferences, and subsidies to those it recognizes and not others. Importantly, marriage also allocates resources between intimates. During marriage and after, at death or divorce, rules establish baseline entitlements, determining rights and duties, many of them economic. It is important to note that getting rid of marriage will eliminate disparities in subsidies and resources between different kinds of intimates, but will not eliminate the distributive justice concerns between intimates themselves.<sup>285</sup>

We are still in search of a framework to theorize polygamy in the United States. This Article has rejected the now popular gay analogy as inapt, that is un-descriptive and unhelpful. In addition, it is skeptical of both essentialist and exceptionalist rejections of polygamy. The former assumes the inherent harms of polygamy (while also assuming the inherent good of dyadic marriage), condemning it out of hand. It also trafficks in monolithic visions of all women as idealized feminist subjects. The latter rolls polygamy into its broader conclusion that, unlike other economic relationships, the state has no business recognizing intimate ones.

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284. See *supra* note 279 (exemplifying calls for state noninterference); see also Halley et al., *supra* note 97, at 420–21 (urging feminist regulations of sexuality have created costs and harms).

285. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 *Mich. L. Rev.* 129, 142 (2003) (reviewing costs of marriage to state, individuals, and women as a group, but concluding “as an institution that imposes social control, marriage, though flawed and unjust, is better than its competitors”: the state and the market).

In focusing on polygamy through a bargaining and regulatory lens, this Article embraces what we might think of as a consequentialist approach, one that focuses on functions and effects. Consequentialism poses two questions. First, it focuses on how different intimacy forms generate distinct effects and dynamics. Second, it questions whether any negative effects can be ameliorated through appropriate regulation. In proposing a regulatory model for contemplating polygamy, this Article also embraces a different framework for the intimacy recognition debates more broadly. For instance, a consequentialist approach to licensing different intimacy forms not only normalizes intimate associations, but also normalizes a baseline of equality within them, which abolition does not.

A consequentialist approach also suggests why plural marriage might be attractive to some intimates. Arguments for gay marriage often rest on sexual orientation—that object desire is innate. The argument concludes that people should not be excluded from marriage because of their orientation. In contrast, few claim that polygamy rests on an analogous sexual orientation.<sup>286</sup> Of course, for some their religious faith or cultural norms dictate, or at least sanction, polygamy. But beyond religious and cultural mores, why might moving beyond intimate dyadicism be attractive to intimates? Parts II and III of this Article focused on the disadvantages polygamy engenders and how regulation might rectify them. However, marital multiplicity could generate positives as well.

As noted earlier, some commentators have questioned the viability of plural marriage from an efficiency perspective. Mary Anne Case characterizes this as a “collective action problem” that complicates dyadicism’s model of easy and efficient reciprocity.<sup>287</sup> Yet, we can also imagine that spouses might find these heightened collective action costs to be vastly outweighed by the benefits of a “portfolio of spouses,” not unlike the decision to expand a partnership.<sup>288</sup> There is a vast literature on specialization within the household and how it breaks down along gender lines. A portfolio of spouses might enable an even more efficient specialization while also diffusing conventional gender dynamics associating men with paid work outside the household and women with unpaid care work

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286. See, e.g., Emens, *supra* note 24, at 350 (noting those who treat “polyamory as if it is hardwired” stand “[i]n contrast to the universalizing quality of mainstream discourse”); see also Ruth Colker, *Hybrid: Bisexuals, Multiracials, and Other Misfits Under American Law* 1–8 (1996) (discussing hybrid identities); Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 651, 653–54, 664 (2009) (criticizing anti-discrimination law for failing to capture how transitional identities can remain inchoate).

287. Case, *Marriage Licenses*, *supra* note 18, at 1783–84 (identifying efficiency as “perhaps the best justification both for the state’s continuing involvement in licensing marriage and the state’s ability, if it wishes, to stop at two in setting the number of partners for a marriage”).

288. In fact, there are some fascinating potential analogs. See, e.g., Zeitzen, *supra* note 26, at 44 (discussing how in Inuit polygyny when first wife is barren or only has female children, she encourages polygamy); Jacoby, *supra* note 30, at 965 (“[W]ives are attracted to husbands on whose farms their labor is more productive.”).

within it.<sup>289</sup> Poly wives could negotiate among each other to accommodate a variety of interests arguably much more easily than mono wives can negotiate with individual husbands. Hence, plural marriage might allow a family to better maximize their social insurance, defined narrowly as benefits, earnings, and entitlements, and more broadly as the variety of intimate care and support one could find in an extended family.

Polygamy's numbers game can alter the dynamics within marriage in another way as well. In addition to allowing spouses to develop "spheres of influence" or expertise, polygamy alters bargaining dynamics. Much noted are the effects of heterodyadic marriage and child-rearing on women—husbands do less and wives do more household labor, which engenders the much studied and documented "leisure gap." Polygamy allows some women to evade these dynamics. More bodies means the ability to negotiate collectively for fair divisions of labor and responsibilities. Of course, anthropologists also have documented competition among wives, as described in Part II. Still, "cooperation" is the corollary to "competition." In short, polygamy provides more bodies, both to support the household and to police shirking within it.

Finally, some wives in polygamous unions report the development of genuine friendships. Our culture embraces a dyadic model of romantic intimacy. Polygamy offers a different model of companionate marriage, one in which spousal bonds do not necessarily rest on sexual attraction. Fundamentalist Mormons might not be the only ones who disdain classic companionate marriage with its (some might say disastrous) emphasis on eternal, heterodyadic soulmates. As noted in Part II, many radical feminists envision communities and households of women. This is not to say that feminists with this political view would embrace polygamy. It is to say that there are alternative visions of intimacy, affection, and family, intentional or incidental, that marital multiplicity might facilitate. They need not be normative to be real. Hence polygamy provides a different vision of the companionate model of marriage—a more expansive one that does not limit itself to sexual intimacy with a single individual of the opposite sex. In this sense, polygamy may indeed be a species of polyamory.<sup>290</sup>

In sum, marital multiplicity could provide women with a variety of benefits including friendship, a chance to develop their own capabilities, and increased bargaining power to insist upon, among other things, a fair division of labor.

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289. A National Geographic profile of an FLDS community found that wives "tend[ed] to carve out spheres of influence according to preference or aptitude. Although each has primary responsibility for her own children, one wife might manage the kitchen, a second act as schoolteacher . . . and a third see to the sewing." Anderson, *supra* note 37, at 50.

290. See Emens, *supra* note 24, at 282 ("[W]hen Americans hear the term 'polygamy' . . . they typically think of traditional polygyny . . . . But there is another model—called 'polyamory' by its increasingly vocal practitioners.").

Put differently, while on its face polygamy might seem to perpetuate what Gayle Rubin called the “traffic in women,” in fact, plural marital associations with the legal norms described in Section III might offer women the opportunity to convert their status from that as “exchanged” to “exchangers” in intimate marketplaces.<sup>291</sup> Plural marital associations might very well offer women the ability to fulfill their intimate desires, which are undoubtedly more complex than the current dyadic regime can possibly capture or accommodate.

#### CONCLUSION: HOW BIG IS OUR LOVE?

Is it better to channel legal energy into continuing to root out, repress, and punish polygamy, or into admitting polygamy into the marriage pantheon? This Article concludes that the answer may hinge on whether polygamy could be effectively regulated. It has confronted polygamy not as an abstract question of religious or intimacy liberty, but rather as a set of actual relationships that, if licensed as a state-recognized regime, would require regulation. In considering what such a regulatory scheme might look like, this Article has rejected the analogy between gay and plural marriage as a red herring, a distraction from the fact that what is truly distinctive (in the sense of being legally, as opposed to morally or religiously distinctive) about polygamy is its multiplicity and its implications for how power is bargained for and distributed in marriage. In contrast, same-sex marriage adheres to the two-person marital model (or at least the vast majority of gay marriage advocates limit their support to dyadic marriage). Hence, this Article has hopefully put some brakes on the slippery slope invocation and also contended that, if polygamy is legalized, it will warrant a distinct regulatory structure.

However, the Article also suggests that we could readily and easily adapt norms from commercial partnership law to conceive of polygamy as plural marital associations, ameliorating some of the costs and dilemmas that open-ended multiplicity can generate while enabling its potential upsides. Of course, a real and functioning marital regime would require far more detail than an Article such as this one could possibly either anticipate or propose. Still, merely grappling with how these proposed defaults would alter plural marriage as currently practiced, and possibly affect dyadic marriage as well, is hopefully a worthy thought experiment. Anticipating concerns, the Article contends that at least some of the harms and costs of polygamy, particularly its effects on children, are not limited to formal plural marriages, but rather are seen in what the Article has called

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291. Rubin notes, “[i]f it is women who are being transacted, then it is the men who give and take them who are linked, the woman being a conduit of a relationship rather than a partner to it.” She continues, this “exchange of women” implies “a distinction between gift and giver. If women are the gifts, then it is men who are the exchange partners.” Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *Toward an Anthropology of Women* 157, 174 (Rayna R. Reiter ed., 1975) (footnote omitted).

serial and de facto polygamy as well. These other forms of open-ended intimate multiplicity are not only tolerated but legally protected, which should raise some real questions for those who oppose legalizing polygamy.

Moreover, these proposed defaults may very well resolve what the Article described as the polygamy paradox. At bottom, one of the biggest concerns about polygamy is its effects on women's well-being. Economics and bargaining scholars such as Becker and Posner have endorsed polygamy as "good for women," while many whose first principles are sex equality remain skeptical. Indeed, when viewed *ex ante*, from a "courtship" perspective, women may well be advantaged as a group as men compete for multiple wives. On the other hand, the bargaining dynamics *ex post*, during the long life of the marriage itself, may very well disadvantage plural spouses, particularly wives. Neither those who advocate nor those who oppose polygamy on gender grounds have grappled with how regulatory norms might shape bargaining power in marital multiplicity. If we vest plural intimates with rights, it then will be a (very tough) open question as to whether they will exercise them in favor of their own self-interest, or, rather, whether cultural and social norms will prevail. If the latter, is plural intimacy markedly different from dyadic?

Undoubtedly, some readers will remain skeptical that partnership principles, designed to govern arms-length commercial formations, can have anything meaningful to say about the bargaining uncertainties and vulnerabilities generated in plural marriage. Or that commercial norms more generally are relevant to how we think about intimacy. Others may adhere to a prior reticence that the state should not license intimacy at all. I have real empathy with both of these concerns. After all, the goals of commercial partnerships, profit-making, and marriage, nurturing companionship and building a family, are different. In addition, as Martha Fineman and others have pointed out, family law may best achieve its goals by supporting vertical relations of dependency, not intervening in the lives of consensual "horizontal" intimates.<sup>292</sup> What all of these positions share is an underlying skepticism about what we might think of as the economics of intimacy. Although the literature on household bargaining is robust, many legal scholars still resist the notion that private law could have much to say about distributive justice within the household. Perhaps unthinkingly, many legal scholars continue to embrace the public/private distinction, concluding that law should not view intimate relations as economic ones. This Article has challenged this segregation of market and intimate norms, suggesting that the bargaining dynamics and justice concerns are similar.

U.S. legal feminism is coming late to debates about polygamy. The current president of South Africa, a polygamist, urges it as a weapon in

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292. See *supra* notes 20, 108, and 279 (describing Fineman's theory of inevitable dependency and how to best support it).

the country's battle against AIDS, and the First Lady of France, Carla Bruni-Sarkozy, has declared it preferable to monogamy.<sup>293</sup> South Africa's recent recognition of customary marriages included polygamy. The Canadian government has commissioned studies on whether it should be legalized. Even in places as unexpected as rural Russia, people have also begun to lobby for recognition of the practice.<sup>294</sup> My intention here is not to advocate for polygamy, but to show it as a serious topic of legal and policy debates, not just fun television. As one practitioner of plural marriage stressed to me, polygamy is not for everyone, and probably not for most. But then, marriage is not for some at all. The question is not whether any of us would enter plural marriage, but whether we should prohibit others from doing so.<sup>295</sup> And, I argue, this boils down to a question of whether we can effectively regulate it consistent with social goals of egalitarianism and fairness in intimate relationships. Can we even consider it? The answers lie in our response to the question, how big is our love?

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293. Ms. Bruni "has said that 'love lasts a long time, but burning desire, two or three weeks.' She is monogamous from time to time, as she remarked to the magazine *Le Figaro Madame*. 'But I prefer polygamy and polyandry,' she said." Guy Trebay, *The French President's Lover*, N.Y. Times, Jan. 13, 2008, at ST1. The new president of South Africa, Jacob Zuma, is a polygamist, with three wives and a fiancée at the time of his election. In a recent interview, endorsing his new and aggressive campaign against AIDS, President Zuma made the controversial point that "a polygamous marriage in which H.I.V. is openly discussed is safer than a monogamous union in which a man has hidden mistresses." Celia W. Dugger, *In South Africa, an Unlikely Leader on AIDS*, N.Y. Times, May 15, 2010, at A1; see also Michael Allen, *Altared State: Who's the First Lady When the President's a Polygamist?*, Wall St. J., Apr. 30, 2009, at A1. As the *Wall Street Journal* said, "It's 'Big Love,' South African style." The *Journal* quoted Zuma as saying "There are plenty of politicians who have mistresses and children that they hide so as to pretend that they're monogamous. . . . I prefer to be open. I love my wives and I'm proud of my children." *Id.*

294. Recognition of Customary Marriages Act 120 of 1998 (S. Afr.). See generally *Gumede v. President of the Republic of S. Afr.* 2009 (3) BCLR 243 (CC) (S. Afr.) (holding customary marriages entered into prior to Customary Marriages Act are still subject to equal division of assets); *BHE v. Magistrate* 2004 (1) SA 580 (CC) at 593 (S. Afr.) (declaring unconstitutional provisions of Black Administration Act that did not recognize inheritance rights of widows in customary marriages and extra-marital children). In Russia, where there is "[a]n insufficiency of men, educated women who want to realise themselves, rural women who want to protect themselves, all these things are going to give rise to arrangements like polygyny, whether it's called that or not." Mira Katbamna, *Half a Good Man Is Better Than None at All*, *The Guardian*, Oct. 27, 2009, at 13 (quoting Caroline Humphrey, Professor of Anthropology at Cambridge University).

295. Columnist John Tierney said of *Big Love's* depiction of polygamy, "It looks more like what it really is: an arrangement that can make sense for some people in some circumstances." Tierney, *supra* note 63.