Chains of Love in Law: Revisiting Plural Marriage

By

Mark Goldfeder
J.D., New York University School of Law, 2011
L.L.M., Emory Law School, 2012

Advisor: Professor John Witte, Jr.

An abstract of a dissertation submitted to the Faculty of Emory Law School in partial fulfillment of the requirements for the advanced degree of Doctor of Juridical Science (SJD) 2013

Abstract

This dissertation explores an area at the intersection of family law, religious liberty and criminal law: the issue of plural marriage. As American keeps moving in the direction of favoring consensual adult relationships regardless of their nature, polygamy has been slowly making a comeback in the national consciousness. Arguments include First, Fifth, and Fourteenth Amendment rights to religious liberty, due process, and equality. The first part of this dissertation explores the issue of legalizing plural marriage from a legislative and administrative standpoint, while the second part argues that, regardless of whether or not the technicalities can be worked out on paper, from a public policy perspective, polygamy is a poor choice. It argues from experience, with detailed reference to the Jewish legal system's dramatic move away from the practice of plural marriage.

Chains of Love in Law; Revisiting Plural Marriage

By

Mark Goldfeder
J.D., New York University School of Law, 2011
L.L.M., Emory Law School, 2012

Advisor: Professor John Witte, Jr.

A dissertation submitted to the Faculty of Emory Law School in partial fulfillment of the requirements for the advanced degree of Doctor of Juridical Science (SJD)
2013

Acknowledgments

The author wishes to express the deepest thanks to his committee.

To Professor John Witte, Jr.; your mentorship, guidance, and example have been nothing short of inspirational. Thank you.

To Professor Michael J. Broyde; thank you for taking me under your wing, for always being there, and for believing in me. I am eternally grateful and I am proud to be your talmid.

To Professor Barbara Woodhouse; your class on international and comparative family law inspired me to take a closer look at the broader picture, to see the forest in order to save the trees. That perspective is reflected heavily within this work. Thank you.

To Amy Wheeler, Anita Mann, and everyone else at the Center for the Study of Law and Religion, who have been so incredibly helpful and patient: Thank you so much for all that you always do. I have been fortunate to work with you, and I look forward to continuing to do so.

To my parents; Mom and Dad, thank you for always supporting me in every way. Thank you for believing in me and pushing me to be the best I can be. You taught me by example what a good marriage and family look like.

To my older brother Chanoch, who countless times recovered my work when I forgot to save it; thank you. To my sister-in-law Chani and my niece Reut, thank you for not getting angry when those frantic phone calls came in at 2 a.m.

To my sister Ita, who helped me realize that I was the one sibling who should not go into math or computer science; thank you.

To my brother Tzvi, who was always online for a chat when I needed a break in the middle of the night. Thank you, and I do not envy you as you begin your doctoral studies at Princeton! Good luck and I'll probably be on g-chat when you need it.

To my brother Yehuda, one of the few people who actually seemed genuinely interested in what I was writing, whose support I appreciate and whose own diligence and self-discipline I admire; thank you.

To my grandparents; Bubby, Zaidy, and Marilyn: Thank you for always being proud and for making me feel special.

To my father-in-law, Mr. Emanuel Taitz, Esq.: Thank you for all of your positive energy, encouragement and support. To mommy-dearest-in-law Dr. Josepha Seletz, thank you for all of your help, and for continuing to introduce me as your son-in-law, who does polygamy. To both of you, thank you for your amazing daughter.

And last but definitely not least, to my wonderful wife Michelle, without whom none of this would be possible. This dissertation is dedicated to you. Your unflagging

support, your wonderful insights, and your gracious presence in my life are what make this and all future accomplishments possible. This work may be about polygamy, but you alone are everything I could ever want in a wife. As the verse in *Proverbs* 18:22 states, "one who has found a woman has found good." I have found the best. Thank you for everything.

TABLE OF CONTENTS

INTRODUCTION **1**

PART I **7**

CHAPTER 1: WHAT IS MARRIAGE? PRIVILEGING FUNCTION OVER FORM 8

A. Introduction *8*

B. The Value of Marriage as an Institution; Personal and Societal Benefits *13*

C. Formulating the Marriage Question Properly *18*

D. Why Get Married? *22*

E. Legal and Social Recgonition of the Marital Entity *34*

F. It, and Nothing But It *42*

CHAPTER 2: UNBUNDLING MARRIAGE 61

A. Modern Marriage; The More Things Change, The More They Stay The Same *61*

B. Unbundling Marriage *68*

C. The Term "Marriage" as an Essential Branch *79*

D. Unbundling Continued *90*

E. Framing Plural Marriage *98*

CHAPTER 3: THE REALITIES OF MONOGAMY AND THE PUSH FOR PLURAL MARRIAGE 109

A. The Ideal Versus The Reality of Monogamy *112*

B. Plural Marriage as a Family System *125*

C. Feminism and Plural Marriage: A Fuller Picture *133*

CHAPTER 4: CHILDREN OF PLURAL MARRIAGES; A FIRST EMPIRICAL LOOK 142

A. Background Information *143*

B. Assumptions and Responses *152*

C. The Polyamorous Families Study *166*

D. Children's Perceptions *170*

E. Conclusions *180*

CHAPTER 5: LEGALIZING PLURAL MARRIAGE 186

A. Decriminalizing, Defining, and Structuring Plural Marriage *187*

B. The Solution to the Plural Marriage Problem: The Plural Prenup *194*

C. Common Polygamy Concerns and Their Solutions *208*

CHAPTER 6: PLURAL MARRIAGE, REVISITED 216

A. Potential Plural Marriage Fraud *216*

B. Private Ordering in Family Law and the Benefits of Choice *222*

C. Other Benefits of Legalization; Safety and Security *225*

D. Plural Marriage, Revisited *228*

PART II **235**

POLYGAMY AND RELIGION IN PUBLIC DISCOURSE 236

THE LIFE OF THE LAW HAS NOT BEEN LOGIC; IT HAS BEEN EXPERIENCE. 236

INTRODUCTION 236

CHAPTER 1: POLYGAMY IN JEWISH LAW 244

A. Background Information *244*

B. A Jewish Law Primer *245*

CHAPTER 2: THE OLD TESTAMENT 256

A. Biblical Instances and Precedents *256*

B. Polygamy as a Religious Obligation *258*
C. Polygamy's Benefits *261*
D. Polygamy as a Tolerated Practice *262*
CHAPTER 3: POLYGAMY IN THE POST-BIBLICAL ANCIENT NEAR EAST 269
A. The Second Temple Period *269*
B. The Tannaitic Period *275*
C. Polygamy in Early Christian Sources *283*
CHAPTER 4: THE AMORAIC AND GAONIC ERAS 288
A. The Jerusalem Tradition *292*
B. The Babylonian Tradition *296*
C. The Gaonim and Early Rishonim *310*
CHAPTER 5: THE BAN OF RABBEINU GERSHOM 317
A. A Summary of Judaism's Approach to Marriage *319*
B. Rabbeinu Gershom's Inspirations and Influence *327*
CHAPTER 6: THE LIMITS AND CONTOURS OF THE BAN 340
A. Issues of Authority, Authorship, and Scope *340*
B. Polygamy in Non-Christian Lands *347*
C. Revisiting the Concubine *352*
D. The Story Behind the Story *353*
CHAPTER 7: CONCLUSION AND SUMMARY OF FINDINGS 356
TABLE OF STATUTES 363
TABLE OF CASES 371
BIBLIOGRAPHY 377

Chains of Love in Law: Revisiting Plural Marriage

INTRODUCTION

On June 26, 2013, in United States v. Windsor,[1] the United States Supreme Court struck down the federal Defense of Marriage Act and with it the ability of a legislature to uphold morals-based legislation regulating personal relationships. While the gay rights movement celebrates its landmark victory, the ruling may also have some unintended side effects for other groups.

The problem is that, while the ruling finally settled the question of gay marriage on a federal level, according to current court doctrine, morals-based legislation is also the justification for why plural marriage remains illegal.

Plural marriage, or polygamy, is the practice of having more than one husband, wife, or both at the same time.

In 1878, the Church of Jesus Christ of Latter Day Saints brought a test case challenging the federal government's attempt to outlaw polygamy.[2] The United States Supreme Court, in a unanimous decision, upheld the statute making polygamy criminally punishable. In his opinion for the Court, Chief Justice Waite noted and noted that plural marriage is "odious," and an "offence against society," comparable to human sacrifice.

---

[1] 133 S. Ct. 2675 (2013).

[2] Reynolds v. United States, 98 U.S. 145 (1878).

After *Windsor*, however, these arguments are no longer valid.

In the two modern cases which set the stage for *Windsor*—1996's *Romer v. Evans*, expanding protection against discrimination based on sexual orientation, and 2003's *Lawrence v. Texas*, holding that intimate relationships between consenting adults are protected by the Fourteenth Amendment's Due Process Clause—Justice Antonin Scalia, who, until now, has been prescient in his predictions, noted that once gay marriage is legalized, the ban against plural marriage would have to be the next thing to go. This disseration focuses on the question of whether his prediction will become a reality.

The dissertation is divided into two sections. The first is forward-looking and, in some sense, prescriptive. It is a thought experiment that begins with detailing how advocates might argue that plural marriage should be legalized. It then provides a roadmap describing how—if it is to be legalized—its legalization should be handled. Overall, it is an exploration of legislative and administrative arguments demonstrating that plural marriage is: a) not so farfetched or far off; b) in keeping with the legislative values and freedoms of the United States; c) on a practical level, not particularly difficult to manage; and d) on a technical level, not hard to adminstrate or accommodate within the legal system.

This first section is divided into six chapters. The first chapter lays out the issues behind the current push for plural marriage in the United States, from both a sociological and a legal perspective. It also provides a defense for the institution of marriage, arguing that marriage, and marriage alone—as opposed to marriage-like institutions, such as civil unions—provides certain tangible benefits to its members. Chief among these benefits is a shared sense of identity that reflects a shared sense of values and generates expectations, both within the marriage and to outsiders. As part of the fundamental right we call marriage, these privileges should not be denied to anyone who wants them.

The second chapter argues that the institution of marriage can be "unbundled"—it can give up certain non-essential parts of its generalized understanding without losing its special status and without sacrificing the goods that it provides. Utilizing contract theory, the development of family law—especially in the areas of prenuptial and postnuptial agreements, and the history of the gay rights movement—demonstrates that the law has already admitted the possibility that certain parts of "marriage" as it has traditionally been understood in America[3] might, in fact, be non-essential and subject to change. A quick look at world history and even demographics today demonstrates that the numerosity requirement in marriage might also be contextual rather than imperialistic. The chapter does, however, make the point that the term marriage itself is

[3] The union of one man and one woman.

an essential part of the institution because it carries more than any other term, at least for the time being, the cultural understanding associated with the values and expectations we are trying to cultivate.

The third chapter takes a hard look at American society and culture. With an estimated 50,000 to 150,000 polygamous families already living in America—from the well-publicized Muslims and Mormons to the African and Vietnamese immigrants keeping up their cultural ways; from modern feminists looking for a better work/life balance to family traditionalists, who maintain that any marriage is better than none in the fight against the rising tide of single parents, cohabitation, and divorce, as well as the more than 500,000 others who identify as polyamorous, and engage in "ethical non-monogamy,"[4] the idea that we are an entirely monogamous nation is disproved. Culturally speaking, experts say that 30 to 60 percent of married people in the U.S. will commit adultery over the course of their "exclusive, dyadic relationships," producing a form of de facto polygamy. Thousands of others will actually marry a second, sometimes even a third person, albeit after a legal divorce from their original spouse. The rise of no-fault divorce has made "polygamy on the installment plan" more common for adults of all ages. Whether it's de facto polygamy in the form of adultery or serial polygamy with no-fault divorce, we as Americans have already broken the sanctity of the

[4] An individual practices "ethical non-monogamy" when she or he is engaged in loving, committed, concurrent, consensual relationships with multiple partners.

"couple." This chapter also argues that, while some believe that legalized plural marriage could lead to harm against women, such arguments might be paternalistic and that better regulation would actually provide more adequate protection. It also argues that post same-sex plural marriage, based on egalitarian adult consent is not at all inherently abusive.

The fourth chapter turns to the issue of children, and asks: If the concerns we have about polygamy are based on potential third-party harms against children, why would children in a polyamorous family be any different than the thousands who already grow up with more than two parents in their lives? Aside from stepparents, open adoptions, extended familial networks, and other "classic" multi-parental settings, instances of egg donors and surrogate mothers are becoming progressively more prevalent. Courts across the land have already ruled that children can have three natural parents. In the case of parent numerosity, more may be better. Recent studies indicate that children in polyamorous households actually benefit from increased attention and diversity of role models.

The fifth chapter moves on to discuss the process of legalization, arguing that making the change is not as complicated as it might at first seem. It provides guidelines for the legal structure of plural marriage, including decriminalization and new statutory definitions. It also makes recommendations regarding practical administrative concerns,

default rules, and procedures regarding everything from distribution of spousal benefits to proper methods of income taxation.

The final chapter reviews some of the main points and answers some other practical concerns—including those about fraudulent and opportunistic behavior—by relying on tests already established in other areas of law. It also acknlowedges that, aside from conforming with our legal values, legalization of polygamy may, in fact, end up bringing with it some other benefits, including a strengthening of the institution of marriage and better protection for vulnerable populations and communities.

The second half of this dissertation takes a very different approach. In terms of formulating a public policy position regarding plural marriage, advocates of the practice can point to its purported benefits, while opponents can cite its supposed harms in what would essentially be an exercise in trying to predict the future. Instead, this section looks to the past for guidance. In seven chapters, roughly chronological, it tells the complete story of polygamy in the Jewish tradition in an attempt to demonstrate why, after millennia of experimentation, a religion walked away from a practice it had once legitimized. In doing so, it argues from a historical and experiential perspective that while plural marriage is good in theory, it does not create the type of companionate marriages we are looking for when put into practice.

PART I

Chapter 1: What is Marriage? Privileging Function Over Form

[O]ne reason monogamy is so important to us is that we are so terrorized by what we imagine are alternatives to it. The other person we fear most is the one who does not believe in the unive sacredness of—usually heterosexual—coupledom.

—Adam Phillips

A. Introduction

For the past several years, the issue of marriage—and marital forms in particular—has been a prominent feature on both the national[5] and international stage.[6] Efforts to lift prohibitions on same-sex marriage, both in this country and abroad, have inspired people on all sides of the political spectrum to speak about the virtues of monogamy's core institution and to express views on who should be included therein.[7]

---

[5] *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1803-79 (1985).

[6] *See* Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (1989) [hereinafter Glendon, The Transformation of Family Law].

[7] In addition to the option of religious marriage available to same-sex couples in various religions and denominations, civil marriage has recently become open to same-sex couples in Massachusetts as of May 2004's *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Since that decision, and as of January 2013, nine states—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington—as well as the District of Columbia and two Native American tribes—have legalized same-sex marriage, representing 15.7% of the U.S. population. Additionally, Rhode Island recognizes same-sex marriages performed in other jurisdictions and California, which briefly granted same-sex marriages in 2008, now recognizes them on a conditional basis. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). Same-sex marriages have been recognized in two Canadian provinces, Ontario and British Columbia, since summer 2003. *See Tying the Knot*, Globe & Mail, July 15, 2003, at A9. At the national level, the Netherlands has recognized same-sex marriage since April 2001. *See* Wet wan 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in

Moving beyond gay marriage, the issue of legalizing plural marriage has been gaining considerable traction in the United States and around the world.[8] In the United States, TV shows such as TLC's Sister Wives, HBO's Big Love, and Showtime's Polyamory: Married and Dating, have brought the concept of plural marriage into the nation's collective living room. Polyamory—the practice of having more than one intimate relationship at a time with the knowledge and consent of everyone involved—has even been called "the next civil rights movement."[9] Despite what people might think about them not wanting to get married, going forward this population might even be extremely important in the plural marriage movement- a recent survey shows that

---

verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), Stb. 2001, nr. 9 (Neth.), *translated in* Kees Waaldijk, *Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 455, 455-56 (Robert Wintemute & Mads Andenaes eds., 2001). Another country, Belgium, has recognized same-sex marriage since early 2003. *See* Note, *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004 (2003); Elizabeth F. Emens, *Monogamy's Law: Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 376 (2004) [hereinafter Emens, *Monogamy's Law*].

[8] *See* 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, 812 (2001). A recent bill in the Kenyan Parliament, the Marriage Bill, No. 77 (2012), KENYA GAZETTE SUPPLEMENT NO. 179, *available at* http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2012/TheMarriageBill2012.PDF, legalizes polygamy, while, in August of 2012, the first polygamous civil union was granted in Brazil. *See* Kate Beioley, *First Polygamous Civil Union Granted in Brazil*, THE ARG. INDEP. (August 29, 2012), *available at* http://www.argentinaindependent.com/currentaffairs/brazil-first-polygamous-civil-union-granted-in-brazil/.

[9] *See* Kirsten Andersen, *Polyamory; The Next Civil Rights Movement?*, LIFE SITE NEWS (October 29, 2012, 4:50 PM), http://www.lifesitenews.com/news/polyamory-the-next-civil-rights-movement; Stanley Kurtz, *Beyond Gay Marriage*, 8.45 THE WEEKLY STANDARD 26, 26-33 (2003). *See also* Jaime M. Gher, *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 559 (2008). In Utah, polyamorius relationships qualify as cohabitation and thus are treated as polygamy or bigamy. *See* UTAH CODE ANN. § 76-7-101(1) (2003).

nearly two-thirds of them (65.9 %) would definitely be interested in legalized plural marriage, while 19.7% were not sure and only 14.4% were not.[10]

While public opinion seems to be moving in the direction of favoring consensual adult relationships, regardless of numerosity,[11] courts both domestic and abroad remain somewhat hesitant to allow polyamorous couples to marry, arguing that, despite the fact that marriage has been opened up to more people, the dyadic nature of marriage can never be changed.

Some participants in the marriage debate have taken the position that marriage, in its traditional form, should either be entirely abolished[12] or replaced with other, less

---

[10] From February 10th to April 2nd 2012, Loving More, the online polyamory magazine, with the endorsement of the National Coalition for Sexual Freedom (NCSF), conducted an internet-based survey of over 4000 participants who self-identify as polyamorous. This is the largest survey of self-identified polyamorous individuals to date. Individuals were recruited through local and regional listserves, Loving More email list, the PolyResearchers list, the Institute for Advanced Study of Human Sexuality's (IASHS) student and alumni lists, and the American Association of Sexuality Educators, Counselors and Therapists' (AASECT) AltSex list. With the exception of five questions, all the questions were drawn from among those asked in the National Opinion Research Center's biennial *General Social Survey* (GSS) in order to compare a sample of the polyamory community with the general US adult population. Results of this survey are available at http://www.lovemore.com/polyamory-research/2012-lovingmore-polyamory-survey/.

[11] *See generally* Janet Bennion, Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism (2011); Project MUSE, http://muse.jhu.edu (last visited Mar. 3, 2013). *See also* Chelsea Schilling, *Love, American Style: Polygamy Gets Sizzle*, WND (Aug 20, 2012, 8:08 PM) [hereinafter Schilling, *Love, American Style*], http://www.wnd.com/2012/08/love-american-style-polygamy-gets-sizzle/; Harry Phillips & Sean Dooley, *Modern Polygamist Family: Why They're Risking Jail*, ABC News (Nov. 16, 2011) [hereinafter Phillips & Dooley, *Modern Polygamist Family*], http://abcnews.go.com/US/modern-polygamist-family-risking-jail/story?id=14956226.

[12] *See* Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 228-229 (1995) [hereinafter Fineman, The Neutered Mother] (calling for the elimination of special rules governing marriage and divorce, and for regulating relationships between adult sexual partners according to the ordinary rules of civil and criminal law); Judith Stacey, Brave New Families: Stories of Domestic Upheaval in Late Twentieth Century America 269

historically, politically, and culturally-charged forms of affiliation.[13] They believe that familial tasks would be better performed by contractually-bound sets of individuals who ask nothing more from the state than that it enforce domestic obligations as it does other civil contracts.[14] Although some members of the movement to step away from marriage continue to recognize the importance of formality in marriage for purely

---

(1990) (arguing in favor of eliminating marriage as an "ideological concept that imposes mythical homogeneity on the diverse means by which people organize their intimate relationships"). Fineman "would take all the benefits we now attach to marriage and attach them to the caretaker-dependent unit." Gayle White, *Weighing the Pros & Cons of Marriage: Con: Shift Focus to Caretakers, Dependents*, ATLANTA J. CONST., Mar. 29, 2003, at B1 (quoting Martha Fineman); *see also* Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114, 115, 116 (2003) [hereinafter Nastich, *Questioning the Marriage Assumptions*] (arguing that "marriage itself is unjustifiable" and "elimination of the legal institution of marriage would accomplish the social goals and objectives of marriage more successfully than marriage currently does"); Emily Taylor, Note, *Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws*, 28 OHIO N.U. L. REV. 171, 174 (2001) (advocating the dismantling of all current marriage laws and their replacement by "civil union laws to be used by all couples who seek the state derived benefits of their partnership").

[13] *See, e.g.*, Naomi Cahn, *Looking at Marriage*, 98 MICH. L. REV. 1766, 1768 (2000) (questioning the utility of marriage and asking: "why not allow adults to choose their own means of commitment to each other and/or to others?"); June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 281-83 (1996) (discussing alternatives to marriage, including those based upon private ordering); Nastich, *Questioning the Marriage Assumptions*, *supra* note 12, at 114, 116 (arguing that "while limiting legal marriage to opposite-sex couples is completely unjustifiable, marriage itself is unjustifiable—whether opposite-sex, same-sex, or both"); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 167 (2000) (rejecting same-sex marriage in favor of a "truly transformative model of family for all people"); Ann Shalleck, *Foundational Myths and the Reality of Dependency: The Role of Marriage*, 8 AM. U. J. GENDER SOC. POL'Y & L. 197 (2000); Frank Browning, *Why Marry?*, *in* SAME-SEX MARRIAGE: PRO AND CON 133 (Andrew Sullivan ed., 1997) (1996) (rejecting marriage for same-sex couples in favor of "civic and legal support for different kinds of families that can address the emotional, physical, and financial obligations of contemporary life"); Michael Kinsley, *Abolish Marriage*, WASH. POST, July 3, 2003, at A23 (calling for the replacement of government-sanctioned marriage by a purely privatized version).

[14] James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003) [hereinafter DiFonzo, *Unbundling Marriage*].

pragmatic reasons,[15] others assume that marriage per se offers no inherently redeeming aspects and call for the registration of personal adult relationships in lieu of state-sanctioned marriage.[16] Some in this camp also take the view that, regardless of whether marriage should be washed away (and some even believe that it should not be), our society is inevitably headed in this direction and that efforts and campaigns aimed at continuing to reform and deform the institution of marriage so much and so often will leave the institution empty, void of meaning, and unrecognizable to all soon enough.[17] Blending as it does the strange and the normal, the old and the new, the traditional and the contemporary, the debate over plural marriage can be properly thought of as the next frontier in the evolution of 21st century family law.

---

[15] Most notably the ease of sharing resources, tax breaks, etc.

[16] *See* Law Comm'n of Can., Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships 117-24 (2001), *available at* http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pd.

[17] Some have pointed to Justice Scalia's famous dissent in Lawrence v. Texas, 539 U.S. 558, 601-02 (2003), as neatly making this point:

> This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage . . . . This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'CONNOR seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'CONNOR has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

Id.

B. The Value of Marriage as an Institution; Personal and Societal Benefits

In regard to the contentions that the institution of marriage as we know it offers no redeeming value and that states should not be in the business of regulating personal consensual relationships, the Supreme Judicial Court of Massachusetts was not wrong when, in 2003, it called marriage "a vital social institution."[18] Nor was the U.S. Supreme Court wrong in 1942, when it stated that "[t]he marriage relation [is] an institution more basic in our civilization than any other,"[19] nor even in 1888, when Justice Field wrote:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature . . . . The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[20]

It may be hard to put an exact finger on what it is that makes marriage special, but as Professor John Witte, Jr. of Emory University notes, a substantial new body of social science literature has emerged seeking to make the statistical case that marriage is, in fact, a good institution.[21] Specifically, he points to recent studies which show that,

---

[18] *Goodridge*, 798 N.E.2d at 948.
[19] Williams v. North Carolina, 317 U.S. 287, 303 (1942).
[20] Maynard v. Hill, 125 U.S. at 210.
[21] John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001) [hereinafter Witte, *The Goods and Goals of Marriage*].

among other things, married adults are less likely than non-married adults to abuse alcohol, drugs, and other addictive substances;[22] tend to live longer by several years;[23] are less likely to attempt or to commit suicide;[24] amass and transmit greater per capita wealth;[25] have better personal health care and hygiene;[26] provide and receive more effective co-insurance and sharing of labor;[27] and are more efficient in discharging essential domestic tasks.[28]

Strong marriages have been shown to be demonstrably good for spouses, their children, and society at large.[29] Unmarried opposite-sex couples break up at a higher rate than spouses and live together for a briefer period than married couples.[30] As it

---

[22] All of the studies mentioned in footnotes 14 through 21 are quoted in Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1019, and can be found in the following body of literature: *See* STEPHEN G. POST, MORE LASTING UNIONS: CHRISTIANITY, THE FAMILY, AND SOCIETY 54-55 (2000); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 486-87 (1995) [hereinafter Waite, *Does Marriage Matter?*]; LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2001) [hereinafter WAITE & GALLAGHER, THE CASE FOR MARRIAGE]; Waite, *Does Marriage Matter?, supra*; Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47; Barbara Dafoe Whitehead, *The Failure of Sexual Education*, ATLANTIC MONTHLY, Oct. 1994, at 55. It is interesting to note that in footnote 10 of his article, Professor Witte points to the fact that the comparative health benefits of monogamous versus polygamous unions has not yet been closely studied by social scientists.

[23] *See* WAITE & GALLAGHER, THE CASE FOR MARRIAGE, *supra* note 22, at 50-51; Waite, *Does Marriage Matter?*, *supra* note 22, at 486-89.

[24] WAITE & GALLAGHER, THE CASE FOR MARRIAGE, *supra* note 22, at 48, 52, 67.

[25] *Id.* at 111-18; Waite, *Does Marriage Matter?*, *supra* note 22, at 492-93; Whitehead, *supra* note 17, at 62.

[26] *See* WAITE & GALLAGHER, THE CASE FOR MARRIAGE, *supra* note 22, at 47-64.

[27] *See id.* at 114-16; Waite, *Does Marriage Matter?*, *supra* note 22, at 495-98.

[28] *See* Waite, *Does Marriage Matter?*, *supra* note 22, at 493.

[29] *See* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 41.

[30] *See* Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 33 (2000); Jay D. Teachman et al., *Legal Status and the Stability of Coresidential Unions*, 28 DEMOGRAPHY 571, 583 (1991). Even those cohabitants who later marry experience a greater incidence of divorce than spouses who did not cohabit before marriage.

turns out, the cast of the nuptial union matters less than the stake its members have in declaring and preserving their mutual commitment, intimate happiness, emotional forbearance, and financial support. Intact healthy marriages or domestic unions have been found to provide the most nurturing homes for children,[31] while numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents in committed relationships exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents.[32] This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to multiple committed and nurturing adults.[33]

In their comparative study of individuals living in plural marriage settings and monogamous marriage settings, Moller and Welch found that participants who were plural married reported a higher job satisfaction, feeling far less lonely, and were more

---

See William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 DEMOGRAPHY 357, 358 (1992); Lee A. Lillard et al., *Premarital Cohabitation and Subsequent Marital Dissolution: A Matter of Self-Selection?*, 32 DEMOGRAPHY 437, 438 (1995).

[31] *See* AMERICAN PSYCHIATRIC ASSOCIATION COMMITTEE ON GAY, LESBIAN AND BISEXUAL ISSUES POSITION STATEMENTS OF THE AMERICAN PSYCHIATRIC ASSOCIATION: ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES, Document Reference No. 200214 (2002), *available at* http://gbge.aclu.org/sites/default/files/images/stories/oppo12.pdf .

[32] *Id.*

[33] *Id.; see also* ELLEN C. PERRIN, M.D. ET AL., TECHNICAL REPORT: COPARENT OR SECOND-PARENT ADOPTION BY SAME-SEX PARENTS, 109 PEDIATRICS 341 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics; 109/2/341 (last visited Jan. 16, 2004); COMMISSION ON GAY AND LESBIAN ISSUES, AMERICAN PSYCHOANALYTIC ASSOCIATION, POSITION STATEMENT ON GAY AND LESBIAN PARENTING (2002).

likely to voluntarily retire than their monogamous counterparts.[34] They also reported better health, higher degrees of social adjustment, including a better adjustment to aging and retirement.[35] Aside from and on top of the traditional benefits of marriage, plural marriage has also been found to offer advantages over monogamous marriage for women, including a stronger sense of comradery and security both within and outside of the home,[36] as well as a legitimate form of de facto surrogacy in cases of infertility.[37] For children, plural marriage offers multiple benefits, including increased familial stability and support.[38]

Some argue that society generally benefits from the moral, spiritual, and economic strength generated from the ethos of caring exhibited by marital unions.[39]

---

[34] Valerie Moller & Gary John Welch, *Polygamy, Economic Security, and Well-Being of Retired Zulu Migrant Workers*, 5 J. CROSS-CULTURAL GERONTOLOGY 205, 205-16 (1990).

[35] *Id.*

[36] Helen Ware, *Social Influences on Fertility at Later Ages of Reproduction*, J. BIOSOCIAL SCI. 75, 75-96 (Supp. VI 1979).

[37] Melissa J. Pashigian, *The Womb Infertility and the Vicissitudes of Kin-Relatedness in Vietnam*, 4.2 J. VIET. STUD. 34, 34-68 (2009) ("Consider Vietnam, where polygamy was banned in 1959. Its practice persists and one of the reasons is infertility . . . . It is important to understand over the course of centuries polygamy has served as a socially legitimate form of de facto surrogacy in the absence of effective technological/medicinal solutions for infertility.") *Id.* at 52.

[38] B. CAMRON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 17 (1992) (discussing some scholars' findings that Mormon polygamous families have certain advantages over monogamous families).

[39] *See, e.g.*, Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 334 (2000). The Marriage Movement, a pro-marriage coalition, asserts in its "Statement of Principles," that "the decline of marriage weakens civil society and spreads social inequality." MARRIAGE MOVEMENT, A STATEMENT OF PRINCIPLES (2000), *available at* http://www.marriagemovement.org/html/report.html (last visited Dec. 21, 2003). These ideas are in no way new, *see generally* PLATO, *Republic*, *in* THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 575, 698 (Edith Hamilton & Huntington Cairns eds., 1961); ARISTOTLE, *Politica bk. I, ch. 3, § 1*,

While those who argue against gay marriage often proclaim marriage as a foundational social institution,[40] partisans on the other side of the fence have picked up on the exact same data point as a reason to offer more people the ability to marry. As Andrew Sullivan points out, legalizing gay marriage would offer homosexuals the same deal society now offers heterosexuals: general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself-from commitment to another human being. Like straight marriage, it would foster social cohesion, emotional security, economic prudence, and the nurturing of children.[41] The same can be said for plural marriage.

In setting expectations for new kinds of marriage, so the argument goes, history does matter. As Nancy Cott has demonstrated, "[f]rom the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy."[42] But what do we mean by form? Is it the technical requirements (of who or how many), or the overall bundle of benefits, rights, and responsibilities of which a "good marriage" is to be composed?

---

in THE POLITICS OF ARISTOTLE (Ernest Barker trans. & ed., 1962) (discussing strong marriages as the initial building blocks of society).

[40] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 217-19 (2000) [hereinafter COTT, PUBLIC VOWS] (citing the views of many who defend heterosexual marriage against the intrusion of gays and lesbians into the institution).

[41] Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20, 20-21 [hereinafter Sullivan, *Here Comes the Groom*].

[42] COTT, PUBLIC VOWS, *supra* note 40, at 2; DiFonzo, *Unbundling Marriage*, *supra* note 14, at 42 (emphasis added).

To summarize, marriage is too important a social reality to too many people, and too widespread an institution for it to ever likely be abolished.[43] Realizing this practicality then can help us focus our discussions about family law on what we can actually hope to accomplish within the system. Battles over the unsettled edges of marriage should not distract us from a focus on the important role marriage plays in refining and disseminating vital social norms.[44] Instead, we must continue to preserve that which is important and core to marriage, even as we seek to make it more fair, equitable, and available for all, so that the above-mentioned goods are more freely distributed. In order to preserve marriage's core values, however, we must first ask ourselves what marriage really means.

C. Formulating the Marriage Question Properly

This dissertation is about the possibility of legalizing plural marriage in the United States. However, before we can argue about why plural marriage should or should not be legalized, it is important to stop and define what, exactly, marriage is. Merriam-Webster's Dictionary defines marriage as:

> (1): the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by

---

[43] *See* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) ("[M]arriage is worth strengthening because its popularity and its associations with familial responsibility and commitment to others make it too beneficial a resource to abandon."); *see also* Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 727 (1998).

[44] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 41.

> law (2): the state of being united to a person of the same sex in a relationship like that of a traditional marriage <same-sex marriage>.[45]

While this definition may be technically correct, it does little justice to what is one of the oldest and, perhaps, most important societal institutions.[46] As Martha Fineman observes, there is no singular or universal experience or meaning that comes—or that individuals associate—with marriage; it can be variously and simultaneously experienced as, among other things,

> a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit, a way to ensure against poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.[47]

From an institutional perspective, marriage as an institution can also have multiple meanings to the society that constructs and contains it. From the state's perspective, marriage may be a practical means for keeping order,[48] a locus for child rearing and education,[49] a natural repository for dependencies,[50] or a mechanism through

---

[45] *Marriage Definition,* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/marriage (last visited June 2, 2013).

[46] Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 369 (2008).

[47] Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 242 (2001) [hereinafter Fineman, *Why Marriage?*].

[48] *See* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 204-334 (1982) [hereinafter Shultz, *Contractual Ordering of Marriage*].

[49] *See* Tim B. Heaton, *Marital Stability Throughout the Child-Rearing Years*, 27.1 DEMOGRAPHY 55, 55-63 (1990); *see also* Matthijs Kalmijn, *Father Involvement in Childrearing and the Perceived Stability of Marriage*, 61 J. MARRIAGE & FAMILY 409, 409-421 (1999).

which society distributes and delivers social goods to its citizens.[51]

People choose to get married for all kinds of reasons. They may do so for love;[52] for a green card;[53] for the purposes of procreation;[54] for tax benefits,[55] and the list goes on. However, many of these things are available without the wedded bliss.[56] It can therefore be presumed that many, if not most, of the people who get married do so because they believe that the state of marriage produces some list of goods or benefits that are otherwise unavailable to unmarried people.[57] When we ask ourselves, 'what is marriage?' aside from a formal technical definition that we can get from any dictionary, what we are also really asking is 'what are the expectations and assumptions that we, as a collective Western society, hold onto when we think about marriage?' We may think that we mean one thing and be surprised to find that, at the end of the day, what we

---

[50] *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 12, at 161-62 ("The family is the institution to which children, the elderly, and the ill are referred; it is the way that the state has effectively 'privatized' dependencies that otherwise might become the responsibility of the collective unit or state.").

[51] *See* Fineman, *Why Marriage?*, *supra* note 47, at 242.

[52] *See* PEPPER SCHWARTZ, PEER MARRIAGE: HOW LOVE BETWEEN EQUALS REALLY WORKS (1994).

[53] *See* David Seminara, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon*, BACKGROUNDER (2008), *available at* http://www.cis.org/marriagefraud.

[54] *See* Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2000).

[55] *See* Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41 (1998).

[56] *See generally* Patricia A. Cain, *Imagine There's No Marriage*, 16 Q.L.R. 27 (1996); Ingalill Montanari, *From Family Wage to Marriage Subsidy and Child Benefits: Controversy and Consensus in the Development of Family Support*, 10.4 J. EUR. SOC. POL'Y 307, 307-33 (2000); Jamal Greene, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989, 1989-96 (2005).

[57] Linda J. Waite & Evelyn L. Lehrer, *The Benefits from Marriage and Religion in the United States: A Comparative Analysis*, 29.2 POPULATION & DEV. REV. 255, 255-75 (2004); *see also* DAVID RIBAR, WHAT DO SOCIAL SCIENTISTS KNOW ABOUT THE BENEFITS OF MARRIAGE? A REVIEW OF QUANTITATIVE METHODOLOGIES (2004), *available at* ftp.iza.org/dp998.pdf .

really mean is something a little different.

Many of the players involved in the marriage debate have asked this question before,[58] but have gotten sidetracked by focusing on technical norms, as opposed to the goals of the marital relationship in formulating their answers. In that sense, they have given priority to form over function by responding with a defense of what marriage looks like from the outside,[59] as opposed to delving into a deeper discussion of what marriage provides from within.[60] These people tend to define relationships on a surface level, i.e. the Defense of Marriage Act's "legal union between one man and one woman as husband and wife."[61] Others who have succeeded in ignoring the epidermal layers of marriage have gotten caught up in the demands of their particular discipline and, having asked the question of what marriage means, really answered what marriage means through a particular and narrow lens—whether it be that of psychology,[62]

---

[58] *See* Sherif Girgis, Robert George & Ryan Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 245-87 (2010).

[59] *See id.* (defining marriage as the "union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally fulfilled by bearing and rearing children together, and renewed by acts that constitute the behavioral part of the process of reproduction . . . ."). *See also* Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

[60] *See generally* Judith A. Seltzer, *Families Formed Outside of Marriage*, 62.4 J. MARRIAGE & FAM. 1247, 1247-68 (2004).

[61] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1997); 28 U.S.C. § 1738C (1997)) [hereinafter referred to as DOMA].

[62] *See, e.g.,* Cormac Burke, *Does Homosexuality Nullify a Marriage? Canon Law and Recent Developments in Psychology and Psychiatry*, *in* SAME-SEX ATTRACTION; A PARENTS' GUIDE 33, 34-42 (John F. Harvey & Gerald V. Bradley eds., 2003); *see generally* Cheshire Calhoun, *Making up Emotional People: The Case of Romantic Love, in* THE PASSIONS OF LAW 217, 217-240 (Susan A. Bandes ed., N.Y.U. Press 1999) [hereinafter Calhoun, *Making up Emotional People*] (arguing for recognizing emotion in law and thus for equivalent respect for all emotional ties).

sociology,[63] anthropology,[64] or history.[65]

In this chapter then, instead of focusing on the different forms that marriage can take—e.g., civil, religious, traditional, or same same-sex unions—or the different conceptions of marriage as defined and delineated by academic discipline,[66] we will focus on the functions of marriage and ask: what exactly are the goods and goals of marriage per se that people entering into such a union both expect to get and hope to achieve?; what assumptions do people make, consciously and subconsciously, about the institution of marriage as distinguished from all other relationships, legal or otherwise?; and what role does marriage play that no other status can? Having established the answers to these questions, the rest of this dissertation will ask whether there is any reason why those same goods and goals could not be achieved—or approximately and substantively achieved—within consensual, adult, non-monogamous forms of marital unions.

D. Why Get Married?

---

[63] *See generally* Zhenchao Qian & Samuel H. Preston, *Changes in American Marriage, 1972 to 1987: Availability and Forces of Attraction by Age and Education*, 58 Am. Soc. Rev. 482 (1993).

[64] *See generally* Bronislaw Malinowski, Sex, Culture, and Myth (1962) (addressing the role of marriage in African, Aboriginal and Native American tribes); Margaret Mead, Male and Female: A Study of the Sexes in a Changing World (1949); Margaret Mead, *Anomalies in American Postdivorce Relationships*, *in* Divorce and After 97, 104-108 (Paul Bohannan ed., 1970); Margaret Mead, Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation (1928) (describing, inter alia, marriage and family ordering in South Pacific); Edward Adamson Hoebel, The Law of Primitive Man: A Study in Comparative Legal Dynamics (1954) (anthropological analysis of marriage and social ordering in primitive societies).

[65] *See generally* Cott, Public Vows, *supra* note 40; Mary Lyndon Shanley, *Review Essay, Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 L. & Soc. Inquiry 923 (2002).

[66] *See generally* Milton C. Regan Jr, Alone Together: Law and the Meanings of Marriage (1999).

If you were to ask a couple why they were getting married, the expected answer would run something like this: "we love each other and want to share our lives with each other." If you were to push a little harder about why they needed a wedding to do this, they might say something like, "we wanted to have a public ceremony to make a public commitment to that effect." Much like the dictionary definition of marriage, both of these are good and legitimate answers, but they clearly do not tell the whole story. If the only thing people were concerned about was loving each other and sharing their lives—and, we might add, their resources—with each other, and even if they also wanted to do so in a way that made their love public, all they would need to do is live together and have a party at which they wrote their own vows and performed their own commitment ceremony.[67] Even if a couple wanted to solemnize their marriage in accordance with their particular religious belief system, why bother getting a license from the State?

Practical reasons for marriage abound; on the simplest levels, spouses who get married can change their names without going before a judge;[68] may file income taxes jointly;[69] may be listed as a dependent of, and receive benefits through, their legal

[67] *See generally* Calhoun, *Making up Emotional People*, *supra* note 62, at 217-40 (arguing for recognizing emotion in law and thus for equivalent respect for all emotional ties).
[68] *See* Michael Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186 (2002).
[69] *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1993).

significant other;[70] and become subject to a slew of default rules that simplify the living together and sharing lives and resources part of marriage.[71] Such benefits include rules about intestacy and inheritance,[72] medical emergency decision-making,[73] and, in the event of a break-up and dissolution, rules about dividing property.[74]

All of the above are other (perhaps secondary) reasons why people in love might choose to get formally married. Again though, there are ways to do all of these things without that wedding license; wills and living trusts can take care of most inheritance issues,[75] a "Medical Power of Attorney," can aid in decision-making situations,[76] and owning a business together can help with insurance benefits and taxes.[77] What we are

---

[70] Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

[71] Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage,* 58.2 L. & CONTEMP. PROBS. 221, 221-49 (1995).

[72] Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004).

[73]Among the benefits of marriage, Chief Justice Marshall wrote in her *Goodridge* opinion, is "an automatic 'family member' preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy." *Goodridge*, 798 N.E.2d at 956.

[74] *See* Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1980); *see also* Severin Borenstein & Paul N. Courant, *How to Carve a Medical Degree: Human Capital Assets in Divorce Settlements*, AM. ECON. REV. 992, 992-1009 (1989); Martha Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 22.2 FAM. L.Q. 279 (1989).

[75] *See* Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340. *See also* Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006).

[76] *See* Linda L. Emanuel et al., *Advance Directives for Medical Care—A Case for Greater Use*, 324.13 NEW ENG. J. MED. 889, 889-95 (1991); *see also* George J. Annas, *The Health Care Proxy and the Living Will*, 324.17 NEW ENG. J. MED. 1210, 1210-13 (1991).

[77] *See* Relationship LLC, *Marriage Perfected*, http:// www.relationshipllc.com (last visited Feb. 11, 2006).

looking for then is perhaps less an identifiable and quantifiable privilege or set of privileges and more of a "meta-message, which the bundle of legal prerogatives brings."[78]

As a starting point then for the elusive answer to the question of 'why marriage?,' we can return to our original hypothesis. Most people nowadays at least think they get married because they love their significant other and vice versa.[79] While this may, in fact, be a modern take on the marital relationship, and especially so in a liberal society like the modern day United States, it is a take that ignores the centuries and millennia of practical marital arrangements that have existed throughout history.[80] Despite the fact that a person can find love and even commitment outside of a formal marriage, the sense of permanence that marriage evokes,[81] even today, somehow intensifies the bond,[82] perhaps because the increased difficulty involved in separating leads people to work harder on maintaining their relationships[83] and maybe even

---

[78] *See, e.g.*, JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 35 (2004) [hereinafter RAUCH, GAY MARRIAGE].

[79] *See* Andrew W. Collins, *More Than Myth: The Developmental Significance of Romantic Relationships During Adolescence*, 13.1 J. RES. ON ADOLESCENCE 1, 1-24 (2003); *see also* Jeffry H. Larson, *The Marriage Quiz: College Students' Beliefs in Selected Myths About Marriage*, FAM. REL. 3, 3-11 (1988).

[80] *See generally* Witte, *supra* note 21, at 1022-23 (quoting PLATO, *Laws*, *in* THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1225, 1350 ("A man should 'court the tie' that is for the city's good, not that which most takes his own fancy.")).

[81] *See* Ryan Nishimoto, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage: The Gay Rights Question in Contemporary American Law*, 23 B.C. THIRD WORLD L.J. 379, 379-399 (2003).

[82] Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, AM. SOC. REV. 333, 333-55 (1999).

[83] *See* Nicole Constable, *A Transnational Perspective on Divorce and Marriage: Filipina Wives and Workers*, 10.2 IDENTITIES: GLOBAL STUD. IN CULTURE & POWER 163, 163-180 (2003).

bettering themselves.[84]

Even if it was not always common in practice, the ideal of romantic love does have some ancient roots. As Professor Witte relates,

> Cicero (106-34 B.C.), the leading jurist and moralist of his day . . . called marriage a "natural partnership" of the person and property of husband and wife that served for procreation, . . . companionship, and ultimately for the broader cultivation of "dutiful affection, kindness, liberality, good-will, courtesy, and the other grace of the same kind . . . ."[85]

Just a few decades later, however, Musonius Rufus (b. ca. 30 C.E.), an influential moralist, described marriage in robust companionate terms, anticipating by many centuries the familiar language of the Christian marriage liturgy:

> The husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them, and nothing peculiar or private to one or the other, not even their own bodies. The birth of a human being which results from such a union is to be sure something marvelous, but it is not yet enough for the relation of husband and wife, inasmuch as quite apart from marriage it could result from any other sexual union, just as in the case of animals. But in marriage there must be above all perfect companionship and mutual love of husband and wife, both in health and in sickness and under all conditions, since it was with desire for this as well as for having children that both entered upon marriage.[86]

Despite the prevalence of both arranged and political marriages, this idea of companionate marriage was at least available for thought throughout the ages. In

---

[84] *See* WAITE & GALLER, THE CASE FOR MARRIAGE, *supra* note 22.

[85] Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1024 (quoting CICERO, DE FINIBUS bk. III, ch. 23, § 65 (H. Rackham trans., 1983)).

[86] Witte, *supra* note 21, at 1024-25 (quoting MUSONIUS RUFUS, *What Is the Chief End of Marriage?*, *in* MUSONIUS RUFUS: THE ROMAN SOCRATES 89 (Cora E. Lutz ed. & trans., 1947)).

addition, the ancients noted that marriage was quite useful; as Aristotle points out, it "combines the useful with the pleasant."[87]

From a Western religious perspective, according to the Jewish tradition, marriage is "very good."[88] One fragment found in the Cairo Geniza,[89] which has been referred to as the "sermon in praise of a wife,"[90] notes that there are, in fact, twelve good measures in the world and any man who does not have a wife in his house who is good in her deeds is prevented from enjoying all of them. These twelve good measures are: good, happiness, blessing, peace, help, atonement, a (protective) wall, Torah (Jewish law), life, satisfaction, wealth, and a crown.[91] Marriage in Judaism is so important that a man may sell a Torah scroll in order to afford to marry,[92] and both spouses must seek to

---

[87] *Id.* at 1023 (quoting ARISTOTLE, *Ethics*, bk. VIII, ch. 12, *in* THE ETHICS OF ARISTOTLE, 24, 225-26 (J.A.K. Thomson trans., reprinted ed. 1965)).

[88] Midrash Genesis Rabbah, 9:7.

[89] The Cairo Geniza is a collection of some 300,000 Jewish manuscript texts and fragments that were found in the *geniza* or storeroom of the Ben Ezra Synagogue in Old Cairo, Egypt. It includes both religious and secular writings composed from as early as 870 to as late as 1880. *See* S.D. GOITEIN, A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA, VOL. I: ECONOMIC FOUNDATIONS. (2000) [hereinafter GOITEIN, A MEDITERRANEAN SOCIETY].

[90] *See* MICHAEL L. SATLOW, JEWISH MARRIAGE IN ANTIQUITY 2 (2001) [hereinafter SATLOW, JEWISH MARRIAGE IN ANTIQUITY] (quoting S.D. GOITEIN, THE JEWS IN EGYPT AND IN PALESTINE UNDER THE FATIMID CALIPHS, 2 VOLUMES IN ONE, WITH PREFACE AND READER'S GUIDE (1970)).

[91] *See id. See also* BABYLONIAN TALMUD, *Yevamot* 61b-64a ("He who has no wife is not a proper man . . .") *id.* at 63a. Moreover, he lives "without joy, blessing, goodness . . . Torah protection[,] . . . and peace." *Id.* at 62b. Finally, he may not officiate as high priest on the Day of Atonement, BABYLONIAN TALMUD, *Yoma* 1:1; and probably not as leader of the services on the High Holy Days. *See* Isserles to Sh. Ar., OH 581:1, based on BABYLONIAN TALMUD, *Yoma* 1:1; BABYLONIAN TALMUD, *Yevamot* 37b.

[92] BABYLONIAN TALMUD, *Megillah* 27a. *See also Marriage*, *in* 13 ENCYCLOPEDIA JUDAICA 563, 563-74 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007) [hereinafter ENCYCLOPEDIA JUDAICA] (citing various rabbinic statements about the goods and goals of marriage). Because of the support it affords her, a woman will tolerate an unhappy marriage rather than remain alone. BABYLONIAN TALMUD, *Yevamot*

raise their marriage to the highest level by means of mutual consideration and respect.[93] Note that these expressions of love and blessing are given in a tradition that not only believes polygamy is allowed, but that it is, in fact, Biblically ordained and occasionally mandated.[94]

Over the centuries, Christian writers have devoted much thought to the goods and goals of marriage. Perhaps most famous is the formulation of St. Augustine (354-430), which posits the idea that marriage has primarily three goods, oft elaborated and

---

113a; BABYLONIAN TALMUD, *Kiddushin* 7a. "Hasten to buy land; deliberate before taking a wife." BABYLONIAN TALMUD, *Yevamot* 63a. Marriage should not be for money, BABYLONIAN TALMUD, *Kiddushin* 70a, but a man should seek a wife who is mild-tempered, tactful, modest, and industrious, BABYLONIAN TALMUD, *Sotah* 3b, and who meets other criteria: respectability of family, BABYLONIAN TALMUD, *Ta'anit* 4:8; BABYLONIAN TALMUD, *Baba Bathra* 109b; similarity of social background, BABYLONIAN TALMUD, *Kiddushin* 49a; and of age, BABYLONIAN TALMUD, *Yevamot* 44a; BABYLONIAN TALMUD, *Sanhedrin* 76a–b; beauty, BABYLONIAN TALMUD, *Berakoth* 57b; BABYLONIAN TALMUD, *Yoma* 74b; and a scholarly father. BABYLONIAN TALMUD, *Pesachim* 49b. A man should not betroth a woman until he has seen her. BABYLONIAN TALMUD, *Kiddushin* 41a. Early marriage is preferred. *See* Avot 5:21 (18 years old). If one is not married by 20, God curses him. BABYLONIAN TALMUD, *Kiddushin* 29b–30a. Only a person intensively occupied in Torah study, e.g., Ben Azzai, 3 Zvi *Kaplan, Ben Azzai, Simeon*, *in* ENCYCLOPAEDIA JUDAICA 322-23 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007), may postpone marriage, *Yevamot* 63b; *cf.* BABYLONIAN TALMUD, *Ketubot* 63a; BABYLONIAN TALMUD, *Sotah* 4b; though in Babylon it was suggested that one should first marry and then study. BABYLONIAN TALMUD, *Kiddushin* 29b. A practical order of procedure, derived from *Deuteronomy* (20:5–7), states; "First build a house, then plant a vineyard, and after that marry." BABYLONIAN TALMUD, *Sotah* 44a. As far as a girl is concerned, if her father does not find her a husband while she is young (from the age of 12), she may become unchaste and he will have transgressed the commandment in *Leviticus* 19:29: "Profane not thy daughter to make her a harlot." BABYLONIAN TALMUD, *Sanhedrin* 76a.

[93] *Id.* The husband must deny himself in order to provide for his wife and children. BABYLONIAN TALMUD, *Yul.* 84b. He must not cause his wife to weep. BM59a. If he loves her as himself and honors her more than himself, he will merit the blessing in *Job* 5:24, "And thou shalt know that thy tent is in peace." BABYLONIAN TALMUD, *Yevamot* 62b. If husband and wife are worthy, God will dwell with them; otherwise, there will be a consuming fire between them. BABYLONIAN TALMUD, *Sotah* 17a; *PdRE* 12. The rabbis, like the prophets, use marriage to symbolize other perfect relationships: e.g., God and Israel, Israel and the Torah, and Israel and the Sabbath.

[94] *See* Addendum, below, and discussions of levirate marriage.

explained by both theologians and canonists,[95] which are: procreation, fidelity, and sacrament.[96] Augustine also echoed the idea that marriage is the seedbed of the city.[97] The Second Vatican Council (1962-1965) proclaimed that "[t]he family is a kind of school of deeper humanity," holding out a model of love, charity, stewardship, authority, dignity, faithfulness, education, nurture, discipline, and care for each new generation of children to learn and for other institutions to emulate.[98] The Protestant formulation of the three purposes of marriage—mutual love and respect, mutual procreation and nurture of children, and mutual protection from sexual sin—overlapped somewhat with the Augustinian formula, but also stressed the companionship aspect of marital love and the idea that,

> [o]ver and above all [other loves] is marital love . . . . All other kinds of love seek something other than the loved one: this kind wants only to have

---

[95] From the twelfth century forward, the Church's doctrine of marriage was categorized, systematized, and refined, notably in: HUGH OF ST. VICTOR, ON THE SACRAMENTS OF THE CHRISTIAN FAITH (ca. 1143); PETER LOMBARD, BOOK OF SENTENCES (1150); THOMAS AQUINAS, SUMMA THEOLOGIAE (ca. 1265-1273); and the scores of thick glosses and commentaries on these texts published in subsequent centuries. From the twelfth century forward, the Church's canon law of marriage was also systematized, first in Gratian's Decretum (ca. 1140), then in a welter of new papal and conciliar laws that eventually would form the Corpus Iuris Canonici and the backbone of a massive body of canon law jurisprudence. "These core theological and legal texts of medieval Catholicism repeated St. Augustine's formulation of the marital goods of procreation, faith, and sacrament." Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1033.

[96] Witte, *supra* note 21, at 1030 (quoting Augustine, *A Treatise on the Grace of Christ, and on Original Sin*, *in* 5 A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 213, 251 (Philip Schaff ed., Peter Holmes et al. trans., Reprinted ed. 1978)(A.D. 418)).

[97] AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS bk.XV, ch.16, 667 (R.W. Dyson trans. & ed., 1998).

[98] Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1042 (quoting Second Vatican Council, *Gaudium et Spes*, *in* THE DOCUMENTS OF VATICAN II 199, 257 (Walter M. Abbott & Joseph Gallagher trans. & eds., 1966)).

> the beloved's own self completely . . . . The chief virtue of marriage [is] that spouses can rely upon each other and with confidence entrust everything they have on earth to each other, so that it is as safe with one's spouse as with oneself . . . .[99]

In both Judaism and Christianity, marriage as an institution has elements of both contract and Divine covenant.[100] While some have argued that Judaism does not view marriage as a sacrament because the groom—and not the officiant—is the one who consecrates the ceremony,[101] it actually does, just not in the same way as Christianity. Jewish law in particular literally divides the marriage ceremony between these two elements. First there is a process called kiddushin (literally sanctification),[102] after which the husband and wife are ritually married but are not yet obligated to fulfill their contractual obligations towards each other.[103] The second step is called nissuin (literally marriage), whereby the couple becomes obligated to fulfill all aspects of the marital contract.[104] Traditionally, these two parts of marriage were carried out up to a year

---

[99] *See* Witte, *supra* note 21, at 1046-47 (quoting 2 MARTIN LUTHERS WERKE: KRITISCHE GESAMTAUSGABE 167 (1883)).

[100] For a detailed discussion of these elements in the Western tradition, see JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2012), which discusses, in detail, the elements of Western tradition.

[101] *See* PHILIP GOODMAN & HANNA GOODMAN, PREFACE TO THE JEWISH MARRIAGE ANTHOLOGY viii (observing that "Jewish matrimony is not comparable to a 'sacrament' performed by a priest, for it is the Jewish bridegroom who weds the bride under the guidance of a rabbi or another qualified person").

[102] *See* BABYLONIAN TALMUD, *Kiddushin* 2a-2b. The first step is also called *erusin* (lit. bethrothal, but not in the way that we use it nowadays; the couple would require a divorce after *erusin*). *See also* MAIMONDIES, LAWS OF MARRIAGE ch.10; *Shulchan Aruch* EH 55.

[103] BABYLONIAN TALMUD, *Ketubot* 7b and commentary of *Rashi* there; *Shulchan Aruch,* EH 55:1, 6.

[104] The act of *nissuin* requires that the bride, after completion of the *kiddushin*, be brought to the bridegroom under the *huppah* before two competent witnesses, for purposes of the marriage proper, i.e., the *nissu'in* "according to the law of Moses and of Israel." There are different opinions concerning the

apart from one another,[105] oftentimes so that both the bride and the groom could make sure that their houses and finances were in order before assuming their marital obligations.[106] By the twelfth century, it had become the custom to do these two ceremonies one right after the other[107] to avoid the extraneous cost of two ceremonies on the families[108] and to remove temptation from the married couple, who were not allowed to live together after only the kiddushin phase and before the nissuin.[109] Again, we find a common theme: the union of the pragmatic and the pleasant.

Even among the Church Reformers, despite the fact that Calvin vehemently denied the sacramentality of marriage, observing that marriage is "a good and holy ordinance of God[,]" but no more so than "agriculture, architecture, shoemaking, and shaving,"[110] when writing about the evil of adultery, he stated that marriage was

---

import of the term *huppah*. One view is that the bride must be brought to the home of the groom for the *nissu'in* (*Ran* to *Ketubot* 2a; *Beit Shemu'el* 55, no. 4), an interpretation forming the basis of the present custom of bringing the bride to a place symbolizing the domain (*reshut*) of the bridegroom, i.e., to the place where a canopy is spread across four poles and where the bridegroom is already waiting. According to another opinion *huppah* embraces a private meeting between bridegroom and bride, at a place set aside for the purpose, as an indication of their marriage proper (*Ketubot* 54b; 56a; *Rosh* 5:6; *Yad Hazakah, Ishut* 10:1, 2; *Isserles* EH 55:1; 61:1; *Shulchan Aruch*, EH 55:2). In order to dispel doubt, custom requires that, in addition to *huppah*, the couple also have said private meeting. *See* ENCYCLOPEDIA JUDAICA, *supra* note 92.

[105] *See* BABYLONIAN TALMUD, *Ketubot* 57b.

[106] MISHNA, *Ketubot* 5:2.

[107] Although the custom was already around much earlier, possibly as early as the seventh century. *See also* OTZAR HAGEONIM, *Ketubot* no. 82.

[108] *See* RONALD L. EISENBERG, THE JPS GUIDE TO JEWISH TRADITIONS 33 (2004).

[109] Rashi to BABYLONIAN TALMUD, *Ketubot* 7b; *see also* A. FREIMANN, SEDER KIDDUSHIN VE-NISSU'IN AḤAREI ḤATIMAT HA-TALMUD VE-AD YAMEINU (1945).

[110] JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 646-47 (Henry Beveridge trans., 1989) (1536).

instituted by God, "sanctified with His blessing[,]" and "entered into under His authority."[111]

Like Jewish law and unlike canon law, Protestant Christian theology allowed for the possibility of divorce and remarriage if a first marriage did not work. Protestants were also wont to speak of the civil, spiritual, social, and political 'uses' of marriage; marriage deters vice by furnishing preferred options to prostitution, promiscuity, pornography, and other forms of sexual pathos; it cultivates virtue by offering love, care, and nurture to its members and holding out a model of charity, education, and sacrifice to the broader community; and it enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare.[112] Marriage also enhances the life of a child by providing him with a chrysalis of nurture and love, with a highly individualized form of socialization and education.[113]

Building especially on Aristotelian and Roman law antecedents, Lutheran, Calvinist, and Anglican writers alike treated marriage as the created, natural foundation of civil society and political authority.[114] They utilized the principles foundational to marriage as an educational platform, through which to teach all persons—particularly children—Christian values, morals, and mores. These writers also utilized marriage as a

---

[111] *Id.* at 348.

[112] *See* Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1054.

[113] *See id.*

[114] *See id.* at 1071 (quoting John Witte & Thomas C. Arthur, *The Three Uses of Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 434 (1994)).

stabilizing force of social order, able to take in wayfarers, widows, and destitute persons.[115] Most early Protestants, especially Lutherans and Calvinists, thus tended to view the goods of marriage in more teleological terms than their Catholic brethren.[116] Anglican and Anglo-Puritan writers argued even more expansively than Continental Protestants that marriage at once served and symbolized the commonwealth (literally the "common good") of the couple, the children, the Church, and the state.[117] William Perkins put it thus in 1590: "[M]arriage was made and appointed by God himself to be the foundation and seminary of all other sorts and kinds of life in the commonwealth and in the church."[118]

The Protestant tradition was brought to the New World by its European settlers and had a strong impact on the way in which early Americans understood the ideas and institutions of marriage and family.[119] For example, John Bayley, an influential Methodist preacher, wrote a lengthy volume in 1857 expounding on the ideal nature, structure, and purpose of marriage. His central thesis was that "prudent marriages are

---

[115] *See id.* at 42-73.

[116] *See id.* at 1052.

[117] *See id.* at 1058.

[118] *See id.* at 1057-58 (quoting William Perkins, *Christian Oeconomy or a Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures*, *in* 3 THE WORK OF WILLIAM PERKINS 419 (Ian Breward ed., 1970).

[119] PHILIP GREVEN, THE PROTESTANT TEMPERAMENT: PATTERNS OF CHILD-REARING, RELIGIOUS EXPERIENCE, AND THE SELF IN EARLY AMERICA (1988).

favorable to health, long life, and prosperity."[120] Such formulations certainly had an effect on the development of American law. Chancellor James Kent—one of the great early systematizers of American law—wrote, in reference to the spiritual and social utility of marriage,

> [t]he primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.[121]

Other early standard American legal texts spoke of marriage as "a public institution of universal concern,"[122] "the very basis of the whole fabric of civilized society,"[123] and "transcendent in its importance both to individuals and to society."[124]

E. Legal and Social Recgonition of the Marital Entity

---

[120] *See* Witte, *The Goods and Goals of Marriage*, *supra* note 21, at 1064 (quoting JOHN BAYLEY, MARRIAGE AS IT IS AND AS IT SHOULD BE 13 (1857)).

[121] *See id.* at 1065 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 104 (John M. Gould ed., 14th ed. 1896)).

[122] *See id.* at 1066 (quoting 2 JOEL BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 480 (1891)).

[123] *See id.* (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 109 (Morton J. Horowitz & Stanley N. Katz eds., 1972)).

[124] *See id.* (quoting 1 CHESTER VERNIER, AMERICAN FAMILY LAWS 45 (1931)); *see also* 1 Bishop, *supra* note 267, §§ 4-15; JAMES SCHOULER, A TREATISE ON HUSBAND AND WIFE 17-19 (1882) (discussing the importance of marriage).

As American law and family law, in particular, developed, a presumption of "privacy" arose around this ever-important relationship.[125] This presumption iterated the idea that, aside from formal nominal regulation,[126] the state would not interfere with a citizen's marriage on any kind of regular basis. For on-going marriages at least, the norms are non-intervention and minimal regulation.[127] This is quite different from the norm in other on-going formal and legal relationships that are embodied by state-sanctioned license. In the relationship between shareholder and corporation, for instance, there is no expectation of privacy from the licensing state. Once a corporate license has been issued and filed, rights and obligations are defined, limited, and structured so that the range and nature of interactions are predictable and potentially publicly enforceable.[128] The issuance of a marriage certificate, on the other hand, does not determine the conduct of any specific marriage or marriage participant, nor does it define what the marriage means to its participants, or how those participants will function within the day-to-day implementation of their relationship. The law views marriage as "an association that promotes a way of life, not causes; a harmony in living,

---

[125] *See* Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (2000); *see also* Jed Rubenfeld, *The Right of Privacy*, HARV. L. REV. 737, 737-807 (1989); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOWARD L.J. 173 (1991).

[126] Excluding, in particular, the moment of formation and/or dissolution.

[127] There are, of course, exceptions to this norm of family privacy, as in the cases of abuse and neglect. *See* Frances E. Olsen, *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504-05 (1983); Fineman, *Why Marriage?*, *supra* note 47, at 271.

[128] Fineman, *Why Marriage?*, *supra* note 47, at 241.

not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[129] Respect for this noble purpose prevents the law from injecting itself into the marital relationship. In order for the married way of life to thrive, the law must leave marriages alone so that the union born of two individuals may come to exist as a separate entity.[130]

In theory, both individuals and society benefit from the law's deference to the marital entity. The parties themselves, expressly or by their conduct, are allowed to define their own marriage and give it personal content and meaning.[131] The law recognizes and reinforces this individualized characteristic of marriage through the doctrine of marital privacy.[132] Privileging these relationships, for the most part by affording their participants the negative right to be let alone, but also through a host of other benefits,[133] fosters interdependence, selflessness, and a connection that is thought to be beneficial to all involved.[134]

---

[129] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[130] For explication and critique of this legal deference to the marital entity, see Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1529-38, 1549-58 (1998) [hereinafter Baker, *Property Rules Meet Feminist Needs*].

[131] Fineman, *Why Marriage?*, *supra* note 47, at 241.

[132] *Id. See* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (refusing to order the husband to provide more for his wife because "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said on his behalf").

[133] *See* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 141 (2003), where Bernstein catalogues the benefits that the state confers upon marital couples, including special treatment under estate and gift tax laws, exemptions from loss-gain valuations for property transfers between spouses, the ability to file joint tax returns, receipt of benefits granted to military spouses and spouses of civil service employees, evidentiary privileges, receipt of family medical leave from certain large employers,

If we were to try and develop our list of goods then, in our quest to find what exactly it is that makes the marital state special, and if we were to separate the claims that religion makes about marriage as an institution rather than as a sacrament, we find the proposition that the marital state is somehow helpful in refining its participant people as individuals, and as members of society at large, in ways that cohabitation—even long-term committed procreational cohabitation—is not able. While religion might say that this is so because the Creator reserves certain blessings only for a marital union, if we were to look at these claims with a more secular eye and try to find reasons why this might be so that are cloaked in more neutral terms, perhaps marriage is, by its nature, different than other relationships due to the fact that entering the state of 'Marriage' literally creates a new entity,[135] the contours of which can then be self-

---

protection under state inheritance, community property and deferred community property laws, standing to recover for loss of consortium, ability to hold property in a tenancy by the entirety and other state-level benefits. *Id.* Parents can get government subsidies under federal TANF laws, and the Family Leave Act allows spouses and parents to take leave from work when a family member is ill. Family members qualify for Social Security survivor benefits, government health insurance, and pensions. Zoning ordinances favors families over other groups. *See* Moore v City of East Cleveland, 431 US 494, 496 (1977); City of Ladue v Horn, 720 S.W.2d 745, 747 (Mo. App. 1986); David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15 (1996). Family members also have a special status under rent control regulations. *See* Braschi v. Stahl Ass'n, 543 N.E.2d 49 (N.Y. 1989).

[134] *See* Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) ("[O]ur law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship."); Maguire v. Maguire, 59 N.W.2d 336, 341 (Neb. 1953) (holding that a state cannot interfere in how to allocate finances between a married couple). Interspousal immunity doctrine and spousal evidentiary privileges, although both are eroding somewhat, also demonstrate the legal privileges associated with horizontal relationships.

[135] This is relevant for legal concepts like estate by entireties. "That husband and wife constitute a legal entity separate and distinct from the component parts of the marital status was recognized as early as the Fourteenth Century. It was so declared by this Court as early as 1837. Motley v. Whitemore, 94 S.E.2d 466, 468 (1956). *See also* Fairclaw v. Forrest, 130 F.2d 829 (D.C. Cir. 1942); Farrey v. Sanderfoot, 500 U.S. 291, 303 (1991). Or, for spousal tort immunities, see U. S. v. Jones, 542 F.2d 661 (6th Cir. 1976).

defined.[136] The new marital entity chooses what it takes from each member's background, strengths, and personalities in the formation of a new and more perfect union. By its declarations, vows, and actions, both at the time of formation and during the course of its existence—both internally between the spouses and externally in child-rearing and in its interactions with the world—the new unit actively establishes, affirms, and loudly declares the values it holds dear.[137]

As Milton Regan observes, legal marriage is so important because it may reconstitute personal identity, leading spouses to define themselves in part by their

---

[136] This becomes evident in a tort claim for loss of consortium. The phrase, "loss of consortium" consists of several compensable elements encompassing not only loss of the performance of material services, aid and assistance, but also the loss of such intangibles as loss of love and affection, society, guidance, companionship, and sexual relations. Boynton Beach v. Taylor, 813 So. 2d 1039 (Fla. 4th DCA 2002); Gorman v. McMahon, 792 So. 2d 307 (Miss. Ct. App. 2001) *, cert. denied. See also*, for instance, Morales v. Davis Bros. Const. Co., Inc., 706 So. 2d 1048 (La. Ct. App. 4th Cir. 1998). Note, though, that the emotional injury, no matter how deeply felt, does not give rise to a loss of consortium claim; instead, the existence of the legal relationship between the claimant and the injured party fosters the claim. Bashaway v. Cheney Bros., Inc., 987 So. 2d 93 (Fla. Dist. Ct. App. 1st Dist. 2008). Accordingly, marriage is a central element of the cause of action.

[137] Whereas marriage establishes "a social institution that rests upon common values and shared expectations for appropriate behavior within the partnership," cohabitational relationships lack "social blueprints" and even a nomenclature; cohabitation thus does not produce a consistent meaning either for those within such a relationship or those outside it. Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 74 (1995) [hereinafter Nock, *A Comparison of Marriages*] ("[C]ohabitation is an incomplete institution. No matter how widespread the practice, nonmarital unions are not yet governed by strong consensual norms or formal laws . . . . [T]here is no widely recognized social blueprint or script for the appropriate behavior of cohabiters, or for the behavior of the friends, families, and other individuals and institutions with whom they interact."). *See also* STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1998). In his dissent in *Bowers*, Justice Blackmun noted the critical element that choice plays in relationships: "[M]uch of the richness of a relationship will come from the freedom an individual has to choose the form and nature of intensely personal bonds." Bowers v. Hardwick, 478 U.S. 186, 186, 205 (1986) (Blackmun, J., dissenting).

commitment to others.[138] Participation in this shared identity leads to an expanded idea of self,[139] in which one sacrifices for the other not because that is one's duty, but because the other is a part of oneself.[140] If that is the case then "marriage . . . is not simply a valuable vehicle for achieving personal satisfaction . . . . It is a web of interdependence, a 'shared history in which two people are bound together in part by what they have been through together.'"[141] The interdependence that characterizes intimate relationships makes those relationships self-constitutive.[142] Regan argues that choosing to become part of an officially interdependent relationship means choosing to accept responsibility in a

---

[138] *See* REGAN, JR., ALONE TOGETHER, *supra* note 61, at 22-30 (1999). *See also id.* at 94-95 ("Spouses . . . don't simply help each other construct separate individual identities . . . . [T]hey participate in the creation of a shared reality in which each partner's identity is dependent in part on interaction with the other."). Note that this is NOT an argument for the reinstatement of coverture or the disenfrancshising of women, or any other marital partner. For a discussion of the history and abolition of coverture and the Married Women's Property Acts, see NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17, 29 (1982); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings*, *1860-1930*, 82 GEO. L.J. 2127 (1994) ("the ideal of unity suggests that economic and political parity should be seen as a prerequisite for, not an impediment to, loving and selfless and honorable marriages."). When both parties are capable of independence, yet opt instead for a life of interdependence, the union formed is far less likely to fall victim to one-sided exploitation. Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 832 (2000). Kenneth Karst's vision of intimacy is comparable: "When this choice [to enter into an intimate relationship] is exercised, . . . the caring partner affirms her autonomy and her responsibility by choosing the commitment.", Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 629, 633 (1980) [hereinafter Karst, *The Freedom of Intimate Association*].

[139] *See* MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 96 (1993) [hereinafter REGAN, FAMILY LAW] ("Status is the embodiment of [marital] responsibility, a proclamation that certain intimate relationships . . . give rise to obligation because they shape each partner's sense of self."). *See also* Karst, *The Freedom of Intimate Association*, *supra* note 138, at 633 ("Some of the primary values of intimate association depend on this sense of collectivity, the shared sense that 'we' exist as something beyond 'you' and 'me.'").

[140] *See* LAURENCE D. HOULGATE, FAMILY AND STATE 39 (1988).

[141] REGAN, FAMILY LAW, *supra* note 139, at 96 (quoting R. BELLAH ET AL., HABITS OF THE HEART 103 (1985)).

[142] Baker, *Property Rules Meet Feminist Needs*, *supra* note 130, at 1531-32.

manner that necessarily involves a kind of self-expression and self-development.[143] The entity created by an intimate relationship is uniquely personal to the parties involved; it is each individual member's perspective, choices, feelings, and actions that, in concert with the choices, feelings, and actions of the other, create another entity. The exact nature of this intensely unique bond thus expresses the essence and the selves of the parties.[144] Honoring and protecting the marital relationship becomes a way of honoring and protecting self-expression.

But it's not only that; Regan goes on to argue that one's discernable role within a relationship is critical to the development of the relationship's entity status because roles "offer a model of identity defined in terms of communal norms, which can root the self in context."[145] This teleologic view of marital roles closely parallels the channeling function that Carl Schneider suggests for family law.[146] Schneider argues that the institution of marriage serves an efficiency function by "sav[ing] our lovers from having to invent their own language," and an integrative function by "help[ing] integrate

---

[143] *Id.* at 1532.

[144] *See Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting). *See also* Karst, *The Freedom of Intimate* Association, *supra* note 138, at 635-36 ("[O]ur intimate associations are powerful influences over the development of our personalities.").

[145] REGAN, FAMILY LAW, *supra* note 139, at 89.

[146] *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992), in which Schneider offers a tennis analogy. Just as knowing about the institution of tennis—the roles, obligations, and different behaviors that make the game enjoyable—facilitates the lives of those who happen upon a net, a ball, and two tennis rackets, so knowing about the institution of marriage facilitates the lives of lovers who want to spend their lives together. *See id.* at 511.

members of society over time and place."[147] Life is easier—and better—with such roles, Regan and Schneider argue, because we have a model to work from and, more important, that model shows us the acceptability and rich tradition of interdependency.[148]

> For intimate commitment to be constitutive of identity requires that it be seen as something that derives its value from a source outside the self's choice to engage in it. It requires, in other words, social validation . . . . Those who marry participate in a public ritual that marks entry into a social institution that is intended to embody the value of intimate commitment.[149]

The law, then, is the outside source that both respects that individual expression of identity and protects it with default rights to privacy,[150] both between spouses and with regard to the decisions made in raising and caring for children.[151] It also provides norms

---

[147] *Id.* at 508, 511.

[148] For Regan, the roles that facilitate intimacy and interdependency are at risk in a post-modern world because a constant search for an authentic self leads one to avoid context, indeed to avoid too much connection to anything or anyone. "[T]he late twentieth century is marked by 'role distance'-a greater sense of an authentic self that stands apart from the roles that it may be asked to play." REGAN, FAMILY LAW, *supra* note 139, at 34. The post-modern "fragmentation of the self may result in less emotional investment in any particular personal relationship." *Id.* at 89. If we constantly strive to define ourselves, we have less time to invest in others and, therefore, less time to experience the enhanced form of self-expression that relationship affords.

[149] *See* Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1445 (2001) [hereinafter Regan, *Calibrated Commitment*].

[150] Griswold v. State of Connecticut, 381 U.S. 479 (1965).

[151] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) (right to make decisions regarding care, custody, and control of one's children); Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (right to refuse unwanted medical treatment); Roe v. Wade, 410 U.S. 113, 153 (1973) (right to choose to have an abortion as part of the right of privacy); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (internal citations omitted) (right to travel freely); Loving v. Virginia, 388 U.S. 1, 12 (1967) (internal citations omitted) (right to marry a person of one's choice); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (citations omitted) (right to use contraception); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (internal citations omitted) (right of procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-

and benefits that help shape the newfound entity by giving language and expression (in the form of benefits and default rules) to unstated but presumable feelings and desires.

F. It, and Nothing But It

In our current American society, this only works for marriage. Other forms of non-marital cohabitation, wherein individuals live together even formally, such as in the case of civil unions or domestic partnerships, but do not join to create something new by which they redefine themselves in terms of a shared identity based on well-established defaults, deeply rooted communal norms, and express mutual understanding, do not force participants, upon entering, to consider and reconsider what it is that they actually value and want to be passed on to the new entity which they will create.[152] Nor, as the claims of history, religion, and the court all assert, do these other unions produce

---

35 (1925) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)) (parents' right to direct their children's "upbringing and education"). Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making A Federal Case Out of Education*, 59 S.C. L. REV. 755, 784 (2008).

[152] Given the lack of uniformity in cohabitants' understandings and behaviors, the mere fact of living together provides little evidence of what understandings a particular relationship has produced. One partner may deeply believe that the relationship is committed; the other may deeply believe the reverse. This basic problem is exacerbated by the range of meanings associated with cohabitation and the fact that cohabitants often do not agree about the nature of their relationship. Researchers have found that, in twenty to forty percent of cohabiting relationships, partners express different views on whether they plan to marry each other. *See* Susan L. Brown, *Union Transitions Among Cohabiters: The Significance of Relationship Assessment and Expectations*, 62 J. MARRIAGE & FAM. 833, 838 (2000) (about 20%); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 923 (1991) (same); Sharon Sassler & James McNally, *Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553 (2004) (42%). Moreover, in one survey, about a third of the time, only one partner felt that the couple spent a lot of time together, and in forty percent of the cases, one partner, but not the other, reported a high degree of happiness with the relationship. *See* Brown, *supra*, at 838.

a new familial identity that they will hold together—a sense of permanence,[153] security,[154] and commitment,[155] or the resulting building blocks of the next generation of society.[156] The act of identity reformation that is specific to a marriage—the moment of

---

[153] *See* Regan, *Calibrated Commitment*, *supra* note 149, at 1439-42 (2001); Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 240 [hereinafter Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*] (observing that "[i]n the aggregate, marriages last longer and produce greater happiness and less conflict than cohabitation unions"); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 868 (2005); Marsha Garrison, *Reviving Marriage: Should We? Could We?* 19-22 (Brooklyn Law Sch. Legal Stud. Research Paper No. 43, 2005) [hereinafter Garrison, *Reviving Marriage*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829825. *See* WAITE & GALLAGHER, THE CASE FOR MARRIAGE, *supra* note 22; Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 408-09 (2004) [hereinafter Brinig & Nock, *Marry Me, Bill*]; William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005-11 (2003); Garrison, *Reviving Marriage*, *supra*, at 32-35.

[154] The disparities in security and relationship quality remain even when comparing married and cohabiting unions of long duration: indeed, the limited research available suggests that "longer cohabitation periods are negatively correlated with relationship stability and quality." Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 846 (2005) (quoting Susan L. Brown, *Relationship Quality Dynamics of Cohabiting Unions*, 24 J. FAM. ISSUES 583, 598 (2003)); *see also* Marsha Garrison, *Marriage Matters: What's Wrong with the A.L.I.'s Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY: CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 312 (Robin Fretwell Wilson ed., 2006) [hereinafter Garrison, *Marriage Matters*]; Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 675 (1996) [hereinafter Brown & Booth, *Cohabitation Versus Marriage*].

[155] "Compared to married couples of the same duration (i.e., couples who have been together for the same length of time) those in informal (cohabiting) unions are less committed to their partnership . . ., and report poorer quality relationships . . . ." Brinig & Nock, *Marry Me, Bill*, *supra* note 153, at 409; *see also* WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 13 (2d ed. 2005) (observing that "[c]ouples who live together . . ., on average, report relationships of lower quality than do married couples with cohabitors reporting more conflict, more violence, and lower levels of satisfaction . . . and commitment"); Margaret F. Brinig, *Domestic Partnership and Default Rules*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 269, 274-77 (Robin Fretwell Wilson ed., 2006); Brown & Booth, *Cohabitation Versus Marriage*, *supra* note 154; Garrison, *Marriage Matters*, *supra* note 154; Nock, *A Comparison of Marriages*, *supra* note 137, at 67; Scott M. Stanley, *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496 (2004).

[156] *See generally* COTT, PUBLIC VOWS, *supra* note 40. The central tenet of the book is that marriage has always been a key, if sometimes tacit, element of American government and public policy, and that as the

pronouncement—forces a crystallization of beliefs in each spouse and, in its attempt to communicate and convey those beliefs to the other and to society, marriage produces a harmony of thought and practice in both individuals and in the new unit.[157]

---

power of the federal government has grown, so has the role of family in matters of public policy. Far from being a private concern, Cott argues, marriage always "participates in the public order." *Id.* at 1.p. 1 As many scholars have noted, the early theory for privileging familial relationships focused on the good such relationships did for the social whole. *See* Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 874 (1989) .

874 (noting the nineteenth century legal rationalizations for "society's interest" in familial relationship); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1447 [hereinafter Singer, *The Privatization of Family Law*] (detailing the ways the law traditionally granted privileged status to the marital relationship); *see also Maynard*, 125 U.S. at 211 (noting the importance marriage has to the public); Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 178 (1916) (noting that the security of the familial relationship confers economic benefits to society). More recent trends suggest that we privilege familial relationships for the sake of the individuals involved. *See Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting) (stating that courts protect familial rights because "they form so central a part of an individual's life"); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (noting that an individual enjoys a constitutional right to marry because the "decision to marry [is] among the personal decisions protected by the right of privacy").

[157] Formal marriage signals intention. It signals each partner who enters into a new marital union, their friends, and their families. *See* Michael J. Trebilcock, *Marriage as a Signal, in* THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999) (concluding that willingness to marry signals the undertaking of a long-term, exclusive relational commitment); Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 225. It also signals strangers; those who meet or do business with the married couple understand that each spouse has entered into a binding commitment that entails expectations of fidelity, sharing, and lifetime partnership. *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907 (2000) [hereinafter Scott, *Social Norms*]; Eric A. Posner, *Family Law and Social Norms, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 256, 259-62 (F.H. Buckley ed., 1999); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1288-92 (1998) [Scott & Scott, *Marriage as Relational Contract*].

Formal marriage also signals intention to the state; government officials can and do assume that the married couple has undertaken obligations to each other that both justify treating them as an economic unit, such as assuming that a deceased spouse would want his or her marital partner to obtain the lion's share of the decedent spouse's assets. One partner cannot surprise the other by bringing a fraudulent claim, nor can one partner surprise the other by trying to evade a just claim. *See* Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 493 (2007) [hereinafter Garrison, *The Decline of Formal Marriage*].

The wedding ceremony and accompanying traditions contribute to this cultural phenomenon, and can be understood as a public announcement of an important change in status.[158] The ceremony usually includes the couple's exchange of vows and a declaration of commitment before friends and family. The various paraphernalia and accoutrements, including wedding and engagement rings, announcements, bachelor parties, and formal receptions, the legal action required for both entry and exit, all underscore the seriousness of the commitment that the change in status represents.[159] Symbolically at least, the formal act of marriage represents an expression of each spouse's willingness to be held accountable for the faithful performance of marital duties, not only by the other spouse, but also by the broader community.

Lon Fuller famously described legal formalities as serving three functions in contract law: an evidentiary function of clarifying the terms and meaning of the contract, a cautionary function of encouraging deliberation by the parties in executing the agreement, and a channeling function of providing a simple external test of an intention by the parties to undertake a particular set of legally enforceable obligations.[160] These functions are all evident in the legal formalities associated with marriage. Although wedding ceremonies vary a great deal depending on the couple's religious traditions, wealth, and preferences, all couples must register their marriage

---

[158] *See* Scott, *Social Norms*, *supra* note 157, at 1901.

[159] *Id.*

[160] Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

with civil authorities as a legal change in status. The formality of the occasion encourages deliberation and solemnity—an acknowledgment that the decision represents an important commitment and the undertaking of legal obligations between the spouses.[161] Finally, the nature and extent of these obligations are defined by the formal legal status.[162] Although spouses are freer than they were a generation ago to contract out of some marital obligations, comparatively few actually do so.[163] Thus, the goals and personal expectations of most individuals entering marriage align with the legal obligations that they actually undertake in deciding on this formal status.[164] The formality of marital status, together with all of its expectations, including the requirement of legal action for divorce, clarifies the meaning of the commitment that the

---

[161] Majoritarian default rules, in general, have this information-forcing property as applied to parties who want to opt out. For a discussion of default rules generally and their information-forcing properties, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989). *See also* Robert Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J.L. STUD. 597, 606-13 (1990) ("Where the default rule does not reflect both parties' expectations, it has a useful information forcing function, putting the burden on the dissatisfied party to identify himself explicitly as a "'non-committer.").

[162] *Id.*, *quoted in* Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 243. The package of substantive legal obligations that comes with the formal status of marriage serves independently to promote stability in the relationship. The mutual duty of financial support and physical care. (Under the necessaries doctrine, spouses are liable to third parties who provide "necessaries" to the other spouse including medical care, shelter, and other needs. North Carolina Baptist Hospitals v Harris, 354 S.E.2d 471 (N.C. 1987) (establishing the presumption that marital property and income will be shared, and the duty to share a portion of each spouse's estate automatically attach upon marriage). These obligations sharply distinguish this relationship from other affective bonds; and the willingness to conform to the law's expectations is a good measure of each party's intentions for an enduring union.

[163] Usually premarital agreements are executed to protect the inheritance of children of an earlier marriage from a spousal claim or to protect one spouse's wealth and/or income from the other. IRA MARK ELLMAN, PAUL M. KURTZ & ELIZABETH S. SCOTT, FAMILY LAW: CASES, TEXT, PROBLEMS 801 n.2 (3d ed. 1998).

[164] Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993).

members of the newly-formed couple are making to each other and underscores its seriousness to outsiders, encouraging cooperation between spouses and deterring exit from the relationship.[165]

Research has also shown that marriage per se confers an advantage upon children in terms of parental involvement above and beyond the characteristics of the parents themselves, whereas other possible frames of reference for such measurements, such as biology, do not.[166] For one thing, married parents tend to invest more time and energy in their children than do unmarried parents.[167] Parents in marital relationships also tend to be less frazzled and more content, which may impact the quality of their interaction with their children.[168] Likewise, whether a child feels confident that a parent will always be there will certainly impact the quality of their interaction, and thus, the parent's

---

[165] While at first glance the doctrine of common law marriage might seem at variance with this theory, it actually is based on the same principles; when there is an ex-post facto determination that indeed there was this meeting of the minds and identity-formation, a marriage is constructively created. *See generally* Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931 (2011).

[166] Importantly, these differences persisted even after socioeconomic status was stripped away. Thus, differences attributable to family form add to and compound the wealth and educational advantages also experienced by children in marital households. *See* Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 11 (2000) (noting that "children already disadvantaged in terms of parental income and education are relatively more likely to experience" a cohabitational setting and, "on average, cohabiting households tend to be less well-off financially than married-couple households").

[167] Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 864 (2005) (quoting Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 213 (2003)). *See also* Rachel Dunifon & Lori Kowaleksi-Jones, *Who's in the House? Race Difference in Cohabitation, Single Parenthood, and Child Development*, 73 CHILD DEV. 1249, 1252 (2002).

[168] Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879, 891 (2003). at 891

investment in the child.[169] Children's development usually is enhanced if their parents' relationship endures.[170] Children of other types of cohabiting unions have good reason to worry about the long-term prospects of the adult-adult relationship, as much research indicates that marriages are more stable and welfare-enhancing relationships than are other forms of unions.[171] This is true even when non-marriage is legally equivalent to marriage. In Sweden, for instance, where state policies "tend to view cohabitation as equal to marriage, and many of the regulations of marriage are applied to cohabiting relationships," cohabiting parents are greater than four times more likely than married parents to separate before their first child turns five.[172] From a practical standpoint,

---

[169] William Marsiglio, *When Stepfathers Claim Stepchildren: A Conceptual Analysis*, 66 J. MARRIAGE & FAM. 22, 22, 37 (2004)., at 37

[170] ROBERT EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT (1999). *See also* the studies described in Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CALIF. L. REV. 615 (1992).

[171] *See* STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES: A COMPARISON OF MARRIAGE AND COHABITATION (1998); Nock, *A Comparison of Marriages*, *supra* note 137, at 53; Waite, *Does Marriage Matter?*, *supra* note 22, at 483. Children whose parents were never married also see their fathers less frequently after a divorce. *See* LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 46 (2001) [hereinafter CASPER & BIANCHI, CONTINUITY AND CHANGE].

[172] *See* Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 527 (2003). *See also* Kathleen Kiernan, *European Perspectives on Union Formation*, *in* TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 84 (Linda Waite et al. eds., 2000).

unmarried parents are also less likely to pass on their wealth to their children,[173] while once-married fathers are also more likely to make regular child support payments.[174]

Again, the reasons why this is so are clear, even if there is nothing holy or "magic" about marriage that inherently sets it apart from other forms of union. In contrast to marriage, no well-defined social norms exist that encourage or direct cohabiting parties in other unions—informal or formal—to act toward one another in ways that reinforce the relationship in the same way that marriage does. Moreover, even if a particular couple reaches a level of understanding, the cohabiting couple's family, friends, and community may lack clear expectations about the union, thus eliminating the social context aspect. Research, however, shows that the expectations and understandings of even the parties themselves in these unions often vary. While people entering marriage are provided with an established template of behavioral patterns that allows them to coordinate expectations and gauge commitment at the outset,[175] which

---

[173] *See* Frank F. Furstenberg, Jr. et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319 (1995); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5 (1995).

[174] Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269 (1996).

[175] *See* Eric Posner, *Family Law and Social Norms*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 260 (F.H. Buckley ed., Duke 1999). Also on the signaling function of marriage, see Michael Trebilcock, *Marriage as a Signal*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 245-55 (F.H. Buckley, ed., 1999); William Bishop, *Is He Married? Marriage as Information*, 34 U. TORONTO L. J. 245 (1984).

most spouses will end up following,[176] no such template guides other unions, even among those who are inclined toward commitment. The lack of uniformity in expectations about everything from financial responsibility to permanence naturally leads cohabitants in relationships without the grounded norms of marriage to make fewer joint investments in the relationship, to avoid the formation of a new immersive identity, and thus to have fewer "sunk costs" that would make exit more difficult.[177] A lack of understood norms might also lead to more selfish patterns of behavior that strain the core of the relationship as people try to protect their own interests instead of the

---

[176] The marital vows also represent explicit and implicit promises by each spouse to accept a set of responsibilities that will assure that the other's dependency needs are met. *See* Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 50-56 (1990) [hereinafter Scott, *Rational Decisionmaking*].

[177] Parties in informal unions can establish financial claims, but it is a cumbersome and uncertain business. The A.L.I. approach (see, for instance, A.L.I. Principles, § 6.03(2)) invites litigation about the status itself, and only when that is settled can dependant partners have any measure of security. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 6.03(2) (Tentative Draft No. 4, April 10, 2000). Substantial benefits follow if couples in functional family unions formalize their relationships; at that point, the terms of their commitment and the extent of mutual financial obligations are clear and need not be determined through ex post inquiry. As noted, t he extent and nature of understandings about financial sharing and support vary in informal unions, and the ability of third parties (for example, courts) to discern accurately the parties' expectations on the basis of their conduct in this context is limited. Even where cohabitants have held themselves out as a married couple for many years, courts sometimes conclude that the parties' understandings are not sufficiently definite for contractual enforcement. *See generally* Friedman v Friedman, 24 Cal. Rptr. 2d 892, 901 (Cal Ct. App. 1993); Morone v Morone, 429 N.E.2d 592 (N.Y. 1992); Tapley v Tapley, 449 A.2d 1218 (N.H. 1982). Some courts and legislatures have found that a written agreement between cohabiting parties is necessary for enforcement of financial obligations. Posik v Layton, 695 So. 2d 759 (Fla. 5th DCA App 1997); MINN. STAT. §§ 513.075; 513.076; TEX. BUS. & COM. CODE § 26.01 (b)(3). Since few cohabiting couples execute written agreements, a writing requirement means that few claims will be recognized. *See* Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Therapeutic and Preventative Approach*, 41 ARIZ. L. REV. 417 (1999), *cited in* Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 243. Thus, society quite sensibly might prefer that couples in long-term intimate unions choose marriage over cohabitation.

interests of the unit.[178] In a marriage, by way of contrast, due to the inherently acknowledged long-term nature of the agreement, simple relational contract theory predicts that the parties will not engage in sharp bargaining or tit-for-tat reciprocity, grabbing for everything they are entitled to and blaming each other for every perceived fault.[179]

Some have framed the absence of marriage in a long-term relationship as the loss of a "master point of reference," and claim that the "marriage void"[180] actively frames pivotal choices along the life course, or complicates major life events with lack of clarity, definitions, and meanings.[181]

---

[178] Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 335 (1999). The antipathy to joint investments makes sense in light of the fragility of cohabiting relationships. As Brines and Joyner explain, "[w]hen couples choose to cohabit, the choice signals uncertainty and a short-term time horizon, prescribing a cautious approach to the relationship that might produce patterns of sharp bargaining between partner . . . .s... On the other hand, when high expectations of permanence accompany the decision to share a household . . . these expectations encourage early and frequent joint investments." *Id.* at 335. Cohabitants often do not combine resources, "choosing instead to maintain separate bank accounts and hold property in their separate names." [141] Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 871-72 (2005). ("All of this adds up to me and me rather than we."). This lack of "'we-ness'" extends beyond the big purchases and life decisions." *Id.*

[179] See Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 577-78 (1999) (noting how parties to relational contracts do not "conduct a series of tit-for-tat transactions"); *see also* Scott & Scott, *Marriage as Relational Contract*, *supra* note 152, at 1251; Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 765 (1998); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 487 (1985).

[180] Adam Green, *Until Death Do Us Part? The Impact of Differential Access to Marriage on a Sample of Urban Men*,. 49.2 SOC. PERSP. 163-89 (2006).

[181] Elisabeth Sheff, *Polyamorous Families, Same-Sex Marriage, and the Slippery Slope*, 40.5 J. CONTEMP. ETHNOGRAPHY 487, 487-520 (2011) [hereinafter Sheff, *Polyamorous Families*].

Professors Margaret Brinig and Steven Nock point out that the defining difference between legal marriage and other relationships is that there is no consensus—within society or even within many cohabiting relationships—about the meaning of those other relationships.[182] In contrast, marriage not only provides a well-defined package of rights and obligations for the commitment-minded, but also often shapes and deepens the commitment of the partners once they marry. "[T]he institutional dimensions of marriage," writes Professor Elizabeth Scott, "reinforce commitment."[183] Professor Scott goes on to note that

> marriage is an institution that has a clear social meaning and is regulated by a complex set of social norms that promote cooperation between spouses—norms such as fidelity, loyalty, trust, reciprocity, and sharing. These norms express the unique importance of the marriage relationship. They are embodied in well-understood community expectations about appropriate marital behavior that are internalized by individuals entering marriage . . . . [M]any marital norms (loyalty, fidelity, trust) create behavioral expectations for both husband and wife that underscore their mutual commitment to the relationship.[184]

At this point in our cultural history, it is difficult to unbundle how much of the observed "marriage advantage" is traceable to social norms and how much is traceable to

---

[182] Brinig & Nock, *Marry Me, Bill*, *supra* note 153, at 408-09, *quoted in* David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 920 (2006).

[183] Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 241.

[184] *Id.*; *see also* Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 304 (2001) (observing that "many laws are designed to reflect and facilitate the emotional commitment spouses make to each other . . . .").

state-conferred marital status itself.[185] Ultimately, however, it makes little sense to try; from a functional perspective, the state's role in defining and regulating marriage has helped to construct and reinforce the relevant social norms which, in turn, have given shape to the legal institution of marriage.[186]

Nevertheless, the norms associated with marital status plausibly cut both ways: they not only strengthen interdependence and commitment within the circle of marriage, but have also impeded the development of sets of norms in relationships left outside the scope of marriage. One of the reasons "marriage" appears to matter to spouses in shaping their conduct is that society regards marriage as the ultimate marker of commitment and permanence. This notion is backed up with legal ramifications that make exit costly and cumbersome, even with the availability of unilateral divorce. The norms regarding the joining of partners in matrimony are so strong that they even create new legal relationships which, although outside of the primary marriage, are

---

[185] Kimberly A. Yuracko*, Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889, 893-94 (2005).

[186] For lucid accounts of the ways in which government helps shape and enforce social norms through marriage, see COTT, PUBLIC VOWS, *supra* note 40; LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY (2006) [hereinafter MCCLAIN, THE PLACE OF FAMILIES]. As Professor McClain observes, "viewing families solely as a realm of 'private' life, free from governmental intrusion, misses the active role of government in regulating families by defining 'family' and the roles, rights, and obligations of family life." MCCLAIN, THE PLACE OF FAMILIES, *supra*; *see also* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 997-1008 (1993); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 167 (2000); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985). *But cf.* Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 n.29 (2000) (criticizing emphasis on state's role in constructing family and contending that "[t]he law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt").

based entirely on the marriage itself—i.e., the legal status of in-laws.[187] On the other hand, couples who are excluded from marriage must construct their relationships not only without the benefits conferred by marriage, but also in the face of state-backed norms denigrating, in a sense, the seriousness and substantiality of all non-marital relationships.[188] Through this lens, the state's exclusion of some persons from marriage, consigning them to occupy indefinitely the informal status of cohabitation, may not simply deny them a positive benefit, but do them a distinct harm.[189] Separate here is not equal.

At least presently, the norms that regulate other unions outside of formal marriage—regardless of what they are called—are tentative, uncertain, and unstable at best when we compare them to the formal regime of expectations and norms that reinforce cooperative and mutually beneficial behavior in formal marriage.[190] Couples in

---

[187] *See* 42 C.F.R. § 411.12 ("Public Health Charges imposed by an immediate relative or member of the beneficiary's household"); 1 MEDICARE AND MEDICAID CLAIMS AND PROCEDURES § 2:56 (4th ed. 2001) (defining 'immediate relative' as any of the following: "Husband or wife; Natural or adoptive parent, child, or sibling; Stepparent, stepchild, stepbrother, or stepsister; Father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; Grandparent or grandchild; Spouse of grandparent or grandchild.") *Id.* (emphasis added). *See also* 42 C.F.R. § 411.12(b)(1)–(6); 3 ADVISING THE ELDERLY CLIENT § 27:25. (defining persons considered an immediate relative)'; 42 USC § 3056 *et seq.*; Pub. L. No. 109–365; 20 C.F.R. § 641.841 ("Employee benefits- 'What policies govern nepotism?'").

[188] Meyer, at 910.

[189] *Id.*

[190] Nock, *A Comparison of Marriages*, *supra* note 137, at 56. *See also* Julie Brines & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333 (1999). These authors describe costs and benefits of the absence of a system of social norms regulating informal unions. Cohabiting couples are freer to experiment and develop relationships that are tailored to their individual needs. However, the partners may have less incentive to jointly invest in the relationship and

more stable and predictable intimate partnerships are better able to generate the financial and emotional resources necessary for the care of children and other dependent family members over an extended period of time.[191] They are also more likely to be available to provide care to one another in old age and in times of illness.[192]

It is important to stop here and recognize that it is hard at this point in time to get a good sense of what same-sex marriage and divorce really looks like in statistical comparison to traditional, heterosexual marriage.[193] This is partially because the instituion is so new, and partly because same-sex divorce law is unbelievably complex in the United States; most states won't even grant divorces for same-sex unions formed in other states.[194] Dissolving civil unions or domestic partnerships is even more

---

they lack guidelines for "how partners might conduct themselves once they set up a household." *Id.* at 350-51.

[191] To be sure, the marital duty to provide financial support to dependant spouses and children is seldom legally enforced in intact families. Nonetheless, the obligation is well understood and, for the most part, legal enforcement is unnecessary. *See* Scott & Scott, *Marriage as Relational Contract* 1230, *supra* note 152, at 1230. (1998). Still, Family members living together usually tend to identify individual and collective interests--and it is hard *not* to share a standard of living. A combination of strong social norms and affective bonds usually is sufficient to encourage spouses and parents to provide adequate care and support to dependent family members. The refusal to provide adequately for family members' needs, despite the ability to do so, is likely to be met with disapproval from friends, neighbors, and community members. *Id.* at 1292-1293.

[192] Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 245. The value of family stability is important in other ways. It is well established that secure relationships with parents contribute in critical ways to healthy child development and that family dissolution imposes financial and psychological costs on children. *Id.*

[193] *See* Carl Bialik, *Same-Sex Divorce Stats Lag*, WALL STREET J., May 3, 2013 [hereinafter Bialik, *Same-Sex Divorce Stats Lag*].

[194] *See* Colleen McNichols Ramais, *'Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013 (2010).

complicated,[195] which in fact points to another benefit of the marital entity: the ease and norms of divorce.[196] Experts, however, suggest that there is no reason to suspect that same-sex couples would be more likely to divorce if they had the same rights to marriage and divorce as heterosexual couples.'[197] In fact, based on the data that is available, same-sex marriages are less likely to fail.[198] What is clear at this time is that same-sex couples do suffer in a variety of ways when they are denied the right to marriage, even when they are given marriage "equivalents," such as civil unions or domestic partnerships. The consequences of lacking the marital title include such harsh realities as stereotyping, prejudice, and discrimination,[199] and more cultural impediments

---

[195] *Id.* at 1041-42.

[196] *See* Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225 (2010). *See also* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011); Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447 (2011); Mary P. Byrn & Morgan L. Holcomb, *Same-Sex Divorce in A DOMA State*, 50 FAM. CT. REV. 214 (2012); Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169 (2013).

[197] Susan Sommer, Director of Constitutional Litigation for Lambda Legal, a New York based group litigating on behalf of gay rights, *quoted in* Bialik, *Same-Sex Divorce Stats Lag*, *supra* note 193.

[198] The number of gay marriages was recorded for the first time in the 2010 census. In November 2011 the esteemed Williams Institute published a body of research which included rates that same-sex couples were getting married and divorced. The percentage of those same sex couples who end their legal relationship ranges from 0% to 1.8% annually, or 1.1% on average, whereas 2% of married different-sex couples divorce annually. They also discovered that couples are more likely to legally formalize their relationship when marriage is an option, as opposed to a marriage-equivalent domestic partnership or civil union registration in states where only those options are allowed. M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* (Williams Institute November 2011) *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-MarriageDissolution-Nov-2011.pdf.

[199] *See* Marc R. Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425 (2009).

related to the stabilizing effect of social identity/expectations and kinship,[200] including such intangibles as esteem, self-definiton, and social understanding.[201] Recent studies have shown that even these marriage 'equivalents' result in all kinds of legal inequalities for their participants,[202] and that they produce psychosocial effects that can be observed

---

[200] *Id.* The idea of a 'separate but equal' structure has also been analogized unfavorably to the illegal and unconstitutional separation of accommodations for different races. *See* William N. Eskridge, Jr., *Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853 (2001).

[201] *See* Misha Isaak, *"What's in A Name?" : Civil Unions and the Constitutional Significance of "Marriage"*, 10 U. PA. J. CONST. L. 607 (2008). *See also* Douglas NeJaime, *Framing (In)equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184 (2013).

[202] Including not being entitled to legal recognition of the couple's commitment to and responsibility for one another; legal recognition of joint parenting rights when a child is born or adopted; legal recognition of a child's relationship to both parents; joint or coparent adoption (in most states); second-parent adoption (in most states); foster parenting (in some states); eligibility for public housing and housing subsidies; ability to own a home as "tenants by the entirety" (ie, a special kind of property ownership for married couples through which both spouses have the right to enjoy the entire property, and when one spouse dies, the surviving spouse gets title to the property [in some states]); protection of marital home from creditors (in some states); automatic financial decision-making authority on behalf of one's partner; access to employer-based health insurance and other benefits for nonbiological/not-jointly-adopted children (considered a taxable benefit for same-gender couples by the Internal Revenue Service, which is not the case for married heterosexual couples); access to spouse benefits under Medicare and certain Medicaid benefits (spouses are considered essential to individuals receiving Medicaid benefits and, therefore, are eligible for medical assistance themselves; family coverage programs would deny coverage to same-gender partners and nonbiological/not-jointly-adopted children); ability to enroll nonbiological/not-jointly-adopted children in public and medical assistance programs; ability of both parents to consent to medical care or authorize emergency medical treatment for nonbiological/not-jointly-adopted children; ability to make medical decisions for an incapacitated or ailing partner; recognition as next of kin for the purpose of visiting partner or nonbiological/not-jointly-adopted child in hospitals or other facilities; ability to take advantage of the federal Family Medical Leave Act to care for a sick partner or nonbiological/not-jointly-adopted children; ability to obtain life insurance (because of findings of no insurable interest in one's partner or nonbiological/not-jointly-adopted child); ability to obtain joint homeowner and automobile insurance policies and take advantage of family discounts; recognition as an authority in educational settings to register a child for school, be involved in a child's education plan, and provide consent on waivers and sign permission forms; ability to travel with a child if it will require proof of being a legal parent; access to spousal benefits of worker's compensation; ability to file joint income tax returns and take advantage of family-related deductions; privilege afforded to married heterosexual couples that protects one spouse from testifying against another in court; immigration and residency privileges for partners and children from other countries; protections and compensation for families of crime victims (state and federal programs); access to the courts for a legally structured means of dissolution of the

at the personal, couple, parental, child, family, and even community levels.[203] These can even impact their psycosocial and physicial health and safety.[204] Studies also show that, for same-gender couples, legal recognition of marriage strengthens ties between partners, their children, and their extended families.[205]

Marriage as a status promotes healthy families by conferring a powerful set of rights, benefits, and protections that cannot be obtained by other means or with other names.[206] It can help foster financial and legal security, psychosocial stability, and an augmented sense of societal acceptance and support. Legal recognition of a spouse can

---

relationship (divorce is not recognized because marriage is not recognized); visitation rights and/or custody of children after the dissolution of a partnership; children's rights to financial support from and ongoing relationships with both parents should the partnership be dissolved; legal standing of one partner if a child is removed from the legal/adoptive parent and home by child protective services; domestic violence protections such as restraining orders; automatic, tax- and penalty-free inheritance from a deceased partner or parent of shared assets, property, or personal items by the surviving partner and nonbiological/not-jointly-adopted children; children's right to maintain a relationship with a nonbiological/not-jointly-adopting parent in the event of the death of the other parent; surviving parent's right to maintain custody of and care for nonbiological/not-jointly-adopted children; Social Security survivor benefits for a surviving partner and children after the death of one partner; exemptions from property tax increases in the event of the death of a partner (offered in some states to surviving spouses); automatic access to pensions and other retirement accounts by surviving partner; access to deceased partner's veteran's benefits; and ability to roll deceased partner's 401(k) funds into an individual retirement account without paying up to 70% of it in taxes and penalties; and right to sue for wrongful death of a deceased partner.

[203] James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118.1 PEDIATRICS 349-64 (2006).

[204] *Id.* at 358. *See also* AMERICAN PSYCHOLOGICAL ASSOCIATION. RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE, *available at* www.apa.org/pi/lgbc/ policy/marriage.pdf; AMERICAN PSYCHOLOGICAL ASSOCIATION. RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN, *available at* www.apa.org/pi/ lgbc/policy/parentschildren.pdf.

[205] RF Oswald, CJ Patterson & KA Kuvalanka, National Council on Family Relations, *NCFR Fact Sheet: Same-Sex Marriage* (2004), *available at* www.ncfr.org/pdf/ Same_Sex_Marriage_Fact_Sheet.pdf; *see also* N. Gartel, A. Banks, J. Hamilton, N. Reed, H. Bishop & C. Rodas, *The National Lesbian Family Study II: Interviews with Mothers and Toddlers*, 69 AM. J. ORTHOPSYCHIATRY 362, 362-69 (1999).

[206] *Id.* at 361.

increase the ability of adult couples to provide and care for one another and it fosters a nurturing and secure environment for children.[207] Children who are raised by civilly married parents also benefit from the legal status granted to their parents.[208]

In short, marriage is an institution that has tangible benefits and a clear social meaning. It is regulated by a complex set of social norms that promote cooperation between spouses—norms such as fidelity, loyalty, trust, reciprocity, and sharing. If marriages are more predictable and more stable than other unions then, in this regard, at least until other forms of unions have developed well-established and well-known real and lasting norms familiar to all inside and out, marriage is superior to other forms of union—formal or informal—as a stable setting for satisfying family dependency needs. It is therefore appropriate for the state to reward the commitment to care for another, a burden that the state itself would otherwise have to bear.[209] The question then is why

---

[207] *Id.*; *see also* NATIONAL ASSOCIATION OF SOCIAL WORKERS, GAY, LESBIAN AND BISEXUAL ISSUES POLICY, *available at* www.socialworkers.org/da/da2005/policies0505/documents/lgbissues.pdf.

[208] *Id.*

[209] Benefits that are available to families that include children, regardless of whether parents are married, include government employee health care benefits, family leave, and Social Security disability and survivor benefits. *See generally* 42 USC § 402 (2000) (making Social Security benefits available to surviving spouses); 29 USC § 2612(a)(1) (2000) (allowing employees up to twelve weeks a year to care for a child, spouse or parent suffering from a "serious medical condition"). Single-parent families may also be eligible for direct financial subsidies that are not available to married couples, under programs such as TANF. *See* 42 USC §§ 601-619 (2000). Cohabiting couples may also qualify for some family benefits and privileges, for example, civil union or domestic partnership ordinances under which partners are eligible for health insurance, family leave benefits, hospital visitation rights, or guardianship status would be compatible with maintaining the privileged status of marriage. Such rights could be extended to non-conjugal families as well. All of the above is meant to reinforce the idea that marriage is and deserves to be a special status, but not to exclude other families from government benefits that they should be entitled to.

the state will only award and reward the marital status, contract, and identity to some, but not all, comers.

Chapter 2: Unbundling Marriage

Having laid out the benefits of marriage per se, the following chapter takes a look at marriage in the post-modern world of no-fault divorce jurisprudence and increasing contractual norms. It describes how, despite what people may think, the marital relationship has throughout history always and often changed its contours in response to pressures and influences, all the while maintaing the core aspects of what makes it special. It has done this through a process call 'unbundling,' i.e. by opening up the marital package and selecting the combination of benefits, privileges, assumptions, responsibilities, beliefs, etc., that actually make marriage what marriage is, while still being open to the possibility of, in some cases, setting aside those elements that have traditionally been included in the package, but are not core to the experience. The chapter explores in depth how this concept has been used in the gay rights movement, among other examples, before asking whether or not such a concept might be an appropriates lens through which to approach the issue of plural marriage in the 21st century.

A. Modern Marriage; The More Things Change, The More They Stay The Same

It would be easy to argue that such identity-based descriptions of marriage might once have been true when marriage was really a status, but that the reality is no longer

so now that marriage is moving ever closer to a more businesslike contractual arrangement. It has been said that the no-fault divorce revolution effected a significant alteration in the institution of marriage, transforming it from the constitutive family entity to a partnership of individuals.[210] Now that the state has largely retreated from the enforcement of fault-driven exit rules to marriage, connubially-minded individuals have increasingly begun to bargain, ab initio, their own terms of disengagement.[211] Prenuptial contracting, quite rare before the era of no-fault, has blossomed in popularity.[212] Broader legal and cultural acceptance of couples' bargaining before marriage has even led to the related phenomenon of postnuptial contracts, in which the couple decides on property division and other issues after exchanging vows,

---

[210] *See generally* J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 145-77 (1997) [hereinafter DIFONZO, BENEATH THE FAULT LINE] (describing the effect of California's no-fault divorce legislation within California and subsequently across the nation).

[211] DIFONZO, BENEATH THE FAULT LINE, *supra* note 210, at 45. Two recent proposals have even called for marriage partners to have substantial power over choice of law issues. *See* Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255, 255 (2002); F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 568-71 (2001), *cited in* DIFONZO, BENEATH THE FAULT LINE, *supra*, at 70.

[212] *See* Rachel Emma Silverman, *Don't Like Your Prenup? Blame Barry Bonds*, WALL ST. J., Apr. 9, 2003, at D1 (observing that such "contracts have become increasingly popular among couples of all ages and incomes who want to set their own marital rules"); Jenifer Warren, *Protections Added to Prenuptial Pacts*, L.A. TIMES, Sept. 13, 2001, pt. 2, at 1 (reporting on protective measures adopted to California law in light of the increasing profusion of prenuptial agreements, requiring that a spouse have seven days to sign a premarital deal, that a person waiving alimony be represented by counsel, and that a spouse must receive a full explanation of contract terms in his or her native language); *see generally* Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231 (2001); DiFonzo, *Unbundling Marriage*, *supra* note 14, at 70.

but not in contemplation of divorce.[213] These developments have had some remarkable, if oft-unrecognized, consequences. Ever-more-common injections of contract law principles have largely transformed what had once been the status-centered realm of domestic relations.[214] One might conceivably argue that this shift from status to contract in which, as Henry Maine posited, the "individual is steadily substituted for the Family, as the unit of which civil laws take account."[215] This, he argues, has eliminated the special transcendent aspect of the marital relationship and put it back on the level of just another profit seeking business venture or collaboration.

And yet, in truth, one could argue that the opposite may actually be true. Practically speaking, the spread of bargaining theory in family law may only increase the very aspects of marriage that tend to make it special, namely its crucible effect on

---

[213] *See* Tamar Lewin, *Among Nuptial Agreements, Post- Has Now Joined Pre-*, N.Y. TIMES, July 7, 2001, at A1; Pamela Yip, *Married? Consider a Postnup*, SEATTLE TIMES, Mar. 16, 2003, at F6. "Postnuptial" agreements, which have also recently mushroomed, differ from the older separation and property settlement agreements in that the latter are generally negotiated as a prelude to dissolution. *See* JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 4.05, at 103-04 (2d ed. 2001).

[214] Compare with the 1930 Colorado Supreme Court opinion denouncing and voiding a couple's attempt to modify a marriage contractually by providing that, in the event of a separation, the husband pay the wife one hundred dollars per year of married life in settlement of her property and alimony claims:

> The antenuptial contract was a wicked device to evade the laws applicable to marriage relations, property rights, and divorces, and is clearly against public policy and decency... The contract is utterly void. It is against public policy. The marriage relation lies at the foundation of our civilization. Marriage promotes public and private morals, and advances the well-being of society and social order. The sacred character of the marriage relation is indissoluble, except as authorized by legislative will and by the solemn judgment of a court. It cannot be annulled by contract, or at the pleasure of the parties.

Popham v. Duncan (In re Duncan's Estate), 285 757, 757-58 (Colo. 1930), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 70.

[215] SIR HENRY SUMNER MAINE, ANCIENT LAW 163 (1884).

defining values. The paradox of the contemporary divorce regime is that, while individuals may leave a marriage without mutual consent, it takes two to tangle with a wedding license or a prenuptial agreement.[216] Far from eliminating the specialness of marriage, the family law revolution of the late-twentieth and early-twenty-first century, paralleling the ascendancy of individual freedoms in law,[217] has left spouses even more jointly in charge of their own fate and self-definition. The continuing infusion of contractual norms into marital relations also serves, at least in part, to render individual action of any single participant subservient to the will of the nuptial pair. Contractual understandings allow for greater individual scope of action while, at the same time, "[e]very contract reduces freedom."[218] The maverick impulse driving marital bargains collides with the desire to limit future individualism at the heart of contract[219] and, in fact, couple-crafted covenants begin to organize the escape from the excessive freedom of no-fault divorce. Marriage is even more personally defining as spouses are forced to

---

[216] *See, e.g.*, N.Y. DOM. REL. LAW § 170 (McKinney 1999) (stating that an action for divorce can be maintained by either the husband or wife); *What Are the Key Elements Necessary for a Valid Agreement?*, FREEADVICE.COM, http://familylaw.freeadvice.com/pre_marital_agreement/key_elements.htm (last visited Jan. 19, 2004) (stating that a prenuptial agreement must generally be signed by both the husband and wife).

[217] *Id.* For a modern view of the continuing impact of Henry Maine's thought in family law, see David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1476-78 (2001).

[218] Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 466 (1998).

[219] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 32, 46.

openly consider and negotiate not only terms, but also value-driven principles of the relationship.

Undoubtedly, some aspects of western family life, specifically in the United States, have changed; the uprising in divorce law and culture that has characterized the period beginning in approximately 1970,[220] along with the marked increase in cohabitation among unmarried couples,[221] are but two indicia that the classic family formation, with a married mother and father and their children living as a unit, is no longer a given, or even the norm.[222] According to the U.S. Census Bureau's 2007 America's Families and Living Arrangements report, the proportion of married-couple households living with their own children have declined from 40% of all households in 1970 to only 23% of households in 2007.[223] Moreover, recent U.S. Census statistics show

---

[220] *See generally* DIFONZO, BENEATH THE FAULT LINE, *supra* note 210, at 145-77 (describing the effect of California's no-fault divorce legislation within California and subsequently across the nation).

[221] From 1990 to 2000, the number of unmarried couples increased seventy-two percent, from 3.2 million to 5.5 million. A Census report released in 2003 indicated that, while married couples make up fifty-two percent of all households, their prevalence continues to decline as the households of unmarried domestic partners, both opposite-sex and same-sex, proliferate. *See* Christopher Marquis, *Total of Unmarried Couples Surged in 2000 U.S. Census*, N.Y. TIMES, Mar. 13, 2003, at A22; *see also* Regan, *Calibrated Commitment*, *supra* note 149, at 1436 (attesting to signs that, given the proliferation of marital alternatives, the "institutionalization of cohabitation already has begun").

[222] *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 386 (2008), *quoted in* John W. Ellis, *Yours, Mine, Ours?-Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code*, 42 TEX. TECH L. REV. 987, 1030 (2010).

[223] *Id.* Of the 24.3 million citizens in Texas, approximately 6.7 million, or 27%, are under eighteen years of age. U.S. CENSUS BUREAU, 2008 AMERICAN COMMUNITY SURVEY (2008), *available at* http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_2&_lang=en&_ts= (search the "Selected Population Profiles" for the Texas statistics, select "state" in drop down box, select Texas, click "add" and "next"-select "total population" and

that from 1990 to 2000 the number of unmarried partner households increased by 72%, from 3.2 million to 5.5 million.[224] Still the argument goes, the more things change, the more they stay the same. Scholars of the family point out that "our yearning for a halcyon past has led many to the erroneous belief that the family formation consisting of two parents and the children of their 'til-death-do-they-part union is the only culturally authentic and 'traditional' one."[225] In fact, as Michael Grossberg has observed, our domestic past has been characterized by "the constant reality of American family diversity."[226] Families and family law have always responded to pressures and influences by changing, adapting, and molding their contours,[227] all while retaining the core parts and aspects of the family, the heart of which is the marital relationship. According to

---

click "show result") (last visited Apr. 13, 2010). Additionally, nearly 50% of the Texas population fifteen years and over are married, over 10% of that group are individuals in that group are divorced, nearly 3% are separated, and approximately 30% have never married. *Id.*

[224] *See* Tavia Simmons & Martin O'Connell, *Census 2000 Special Reports: Married-Couple and Unmarried Partner Households: 2000*, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf.

[225] *See* JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 6 (1996); *see also* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992), *cited in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 70.

[226] *Id.* (quoting Jeffrey Evans Stake & Michael Grossberg, *Roundtable: Opportunities for and Limitation of Private Ordering in Family Law*, 73 IND. L.J. 535, 554 (1998) (remarks by Michael Grossberg); *see also* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 9-30 (1985) (discussing a legal climate characterized by disputes over the proper scope of domestic authority, both in public and private realms).

[227] *See generally,* Stephanie Coontz, *Historical Perspectives on Family Diversity*, *in* AMERICAN FAMILIES PAST AND PRESENT: SOCIAL PERSPECTIVES ON TRANSFORMATIONS 65, 65-66 (Susan M. Ross ed., 2006).

the 2000 U.S. Census, sixty percent of Americans over eighteen are married[228] and seventy-six percent of Americans over eighteen are, or have been, married.[229] In addition, seventy percent of those who divorce will remarry,[230] and over ninety percent of Americans say they want to marry.[231] These numbers clearly demonstrate that, despite what we might have thought due to changes in the familial structure and even in some penumbral assumptions about family makeup and dynamics, the core drive towards marriage is still alive and well. A careful look at one subgroup of the population's overt fight for marriage might reveal why this is so.

Aside from heterosexual couples seeking to customize their marriages, in some parts of the country the concept of marriage is also being reformulated in the law in response to a variety of social pressures from same-sex couples seeking admission, to states, municipalities, and private groups crafting alternative versions of marriage-like partnerships.[232] The key to this re-imagining of marriage, the reason that people who can get married still want to get married, at least some day, even after all that change

---

[228] U.S. Census Bureau, *Statistical Abstract of the United States: 2000* 47, tbl. 46 (2002) (reporting data from 2000); *see also* David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1347 (2001); U.S. Census Bureau, *Households and Families 2000*, Census 2000 Brief 2 (2001) (reporting that 51.7% of households are "married-couple households"), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf, *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 376.

[229] *Id. See* Statistical Abstract, *supra* note 207, at 47, tbl. 46.

[230] *Id.* (quoting David L. Weis, *Adult Heterosexuality*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF SEXOLOGY 1498, 1503 (Robert T. Francoeur ed., 1997), *available at* http://www2.hu-berlin.de/sexology/.

[231] *Id.* (quoting Patricia Donovan, *The Decline of the Traditional Family*, U. BUFFALO REP., Feb. 4, 1999, at 6 (quoting sociologist Lynn Magdol), *available at* http://www.buffalo.edu/reporter/vol30/vol30n19/n7.html)).

[232] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 32.

and even with rampant divorce, and the key to why people who are outside still want in, even if 'in' will look a little different, is the concept of 'unbundling,' as applied to the law of marriage.[233]

B. Unbundling Marriage

"Bundling" is "the practice of grouping together several services or products into a single package that is then offered to the consumer at one price."[234] The bundling of principles in marriage, then, is the recognition that, when we use the term 'marriage' in a legal sense, what we are legally referring to is a marital package—a set of off-the-shelf defaults that we group together and hand to a couple when they fill out their wedding license and pay a fee. The way this dissertation uses the term "unbundling" then, in the marital context, would mean the process of opening up the marital package and selecting the combination of benefits, privileges, assumptions, responsibilities, beliefs, etc., that actually make marriage what marriage is, while still being open to the possibility of, in some cases, setting aside those elements that have traditionally been included in the package, but are not core to the experience.

---

[233] James Herbie DiFonzo uses this term in the context of marital law, but in a different way, arguing that allocating these bundles of domestic burdens and benefits may become the primary way for the state to preserve its important "channelling function." *See id.*

[234] Business Encyclopedia Dictionary, http://www.economist.com/encyclopedia/Dictionary.cfm (last visited Jan. 19, 2004); *see also* Scott Worden, Micropayments and the Future of the Web (1998), available at http://cyber.law.harvard.edu/fallsem98/final_papers/Worden.html.

Several states have already experimented with the unbundling and, in some cases, even the repackaging of marriage. In 1999, the Vermont Supreme Court issued "the most closely-watched opinion in [its] history" in *Baker v. State*, a case involving the denial of marriage licenses to three same-sex couples. Acknowledging the "deeply-felt religious, moral, and political beliefs" which swirled around the issue, the court decided that the Common Benefits Clause of the Vermont Constitution required the state to extend to same-sex couples the benefits and protections that its laws provide to opposite-sex married couples.[235] Rather than directing the issuance of marriage licenses, however, the court left to the state legislature "[w]hether [the remedy shall be] . . . inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."[236]

Baker was, at its core, a case about bundling and unbundling the package of marriage in the legal system as we know it. The State pressed its interest in defending the traditional understanding of marriage, a package that revolved around "promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support."[237] The State

---

[235] *Baker*, 744 A.2d at 867-77. The Common Benefits Clause reads, in pertinent part, as follows:
"That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community."
VT. CONST. ch. I, art. 7.

[236] *Baker,* 744 A.2d at 867.

[237] *Id.* at 881 (quoting the brief of the State Attorney General).

pointed to the inability of same-sex couples to procreate on their own, and argued that sanctioning such unions "'could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children."[238]

The Vermont court knew that marriage has historically meant the "joining of the two sexes into a community that connects the generations."[239] Not long ago, the United States Supreme Court affirmed that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[240] But the Vermont court here made the historic decision to ask why this was so; it chose to, in a sense, pierce the wedding veil in order to determine whether this historic linkage still reflected social reality. This question devolved into two related lines of inquiry—whether society countenanced means other than through the heterosexual marital union to procreate and raise children and whether marriage has acquired other central meanings which should be legally sanctioned.

In its opinion, the Vermont court quickly dispensed with most of the rationales the State had advanced in support of limiting marriage to opposite-sex couples.[241] The court did not argue with the assertion that the State undeniably had a convincing and enduring interest in championing a "permanent commitment between couples for the

---

[238] *Id.*

[239] David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 639 (2001).

[240] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[241] *Baker*, 744 A.2d at 886.

security of their children."[242] To that end, state sanctioning of the unions of those capable of having children was eminently justified. But the court did observe that the secular blessings of marriage are also unreservedly extended to heterosexual couples who never intend to have children, as well as to those incapable of procreating.[243] Thus, the link between marriage and procreation is "significantly under-inclusive."[244] Conversely, same-sex parents are increasingly engaged in raising a considerable number of children, with many such couples even conceiving a growing number of children through the varied methodologies of assisted reproduction.[245] The marriage statutes thus exclude many who, through their conduct in rearing children whom they have adopted or brought into the world, are fulfilling one of the goals of marriage, even though they are prevented from enjoying its protection.[246]

In going through this analysis, the court picked up one of the branches in the marital bundle—the ability to biologically procreate—and made the claim that this was, in fact, only a secondary benefit in the package and not core to its definition; not only was the same branch available to people outside of a marriage (and here the court noted that the legislative policy already granting same-sex couples equality with their heterosexual counterparts in the areas of adoption, child support, and the regulation of

[242] *Id.* at 881.
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*

parent-child contact after dissolution of a relationship belied the State's claim that its laws privileged opposite-sex couples with regard to child-rearing),[247] the State was, in fact, already prepared to offer the actual marital package where it did not include this branch, i.e., in the case of those heterosexual couples who, for whatever reason, would not or could not have children.[248] Having established that the ability to have and raise children is not, in fact, the essential core element of the marriage bundle, the court then asked what other branches were traditionally included therein.[249]

The *Baker* court began its search with the historically grounded avowal that marriage legally includes, but is not limited to, the contractual undertaking of the parties.[250] The "value-added" by the societal imprimatur is considerable, for "the marriage laws transform a private agreement into a source of significant public benefits

---

[247] *Id.* at 886.

[248] *Accord Lawrence*, 539 U.S. 558 (2003) (Scalia, J., dissenting) (recognizing that "the encouragement of procreation" is not a strong argument in support of limiting marriage to heterosexuals, "since the sterile and the elderly are allowed to marry"). The Massachusetts Supreme Judicial Court similarly rejected the connection between marriage and child-bearing:

> Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [State law] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.

Goodridge, 798 N.E.2d at 961. In its recent decision invalidating the common law limitation of marriage to heterosexuals, the Court of Appeals for Ontario held that the government had failed to show a rational connection between the opposite-sex requirement in marriage and the encouragement of procreation and childrearing. "The ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so." Halpern v. Canada (A.G.), [2003] 225 D.L.R.4th 529, 566 (Can.).

[249] *Baker*, 744 A.2d at 882.

[250] *Id.* at 883.

and protections,"[251] "reflecting the cornucopia of public interests at play in the exercise of the state's regulatory authority.[252] In Vermont, these included, for example, the right to bring a lawsuit for the wrongful death of a spouse;[253] the right to receive a portion of the estate of a spouse who dies intestate;[254] the right to bring an action for loss of consortium;[255] the right to workers' compensation survivor benefits;[256] the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance;[257] the opportunity to be covered as a spouse under group life insurance policies issued to an employee;[258] the opportunity to be covered as the insured's spouse under an individual health insurance policy;[259] the right to claim an evidentiary privilege for marital communications;[260] homestead rights and protections;[261] the presumption of joint ownership of property and the concomitant right of survivorship;[262] hospital visitation and other rights incident to the medical treatment of

[251] *Id.*, *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 52.
[252] *Id.*
[253] *See* VT. STAT. ANN. tit. 14, § 1492 (2002).
[254] *See id.* §§ 401-404; *see also id.* § 551 (providing protection against disinheritance through elective share provisions); *id.* § 903 (granting preference in being appointed as the personal representative of a spouse who dies intestate).
[255] *See* VT. STAT. ANN tit. 12, § 5431.
[256] *See* VT. STAT. ANN. tit. 21, § 632 (1987).
[257] *See* VT. STAT. ANN. tit. 3, § 631 (1995).
[258] *See* VT. STAT. ANN. tit. 8, § 3811 (2001).
[259] *See id.* § 4063.
[260] *See* VT. R. EVID. §504 (2003).
[261] *See* VT. STAT. ANN. tit. 27, §§ 105-06, 141-42 (1998).
[262] *See id.* § 2.

a family member;[263] and finally, the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.[264]

The list in *Baker* is not meant to exhaust the corpus of "rights, powers, privileges, and responsibilities triggered by marriage,"[265] but only illustrates its range and diversity.[120] When measured against the formidable array of legal encumbrances and

---

[263] *See* VT. STAT. ANN. tit. 18 § 1852 (2002).

[264] *See id.* tit. 15, §§ 751-752. That the court identified key rights and obligations in relation to dissolution proceedings is, of course, unremarkable. But, as we shall see, the state legislature chose to funnel civil union dissolutions into the ordinary court processes applicable to the break-ups of marriages. *See id.* § 1206 (giving the state's family law courts jurisdiction over civil union dissolutions, which shall be dictated by the same procedures for dissolving marriages). This decision makes the civil union law unique. Most domestic partnership acts, even when they provide more than symbolic measures, allow the parties to dissolve their relationship with little or no consequences. *See* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 42-43 (2000) [hereinafter Johnson, *Vermont Civil Unions*] (describing the obligation of civil union spouses to go to family court alongside married couples to obtain a divorce as "a first in America"). Professor Eskridge celebrated civil unions for offering greater stability than domestic partnerships precisely because the latter "offer much easier exits than marriage does, and ease of exit will undermine the durability of the relationship." William N. Eskridge, Jr., *The Emerging Menu of Quasi-Marriage Options*, FINDLAW'S WRIT, July 7, 2000, http://writ.news.findlaw.com. New Jersey's recent domestic partnership law provides an exception to the trend, by providing grounds for termination of the same-sex partnership similar to the state's divorce grounds. *See* Joanna Grossman, *The New Jersey Domestic Partnership Law*, FINDLAW'S WRIT, Jan. 13, 2004, http://writ.news.findlaw.com (comparing New Jersey's recent statute with other domestic partnership laws). One commentator on marital alternatives prior to civil unions argued that "[i]t is the crucial obligation to share material assets--not only in good times during the course of a relationship, but in settling accounts when it ends--that most distinguishes the burdens of marriage from those imposed by domestic partnership laws in the United States." Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage*," 66 FORDHAM L. REV. 1699, 1749 (1998) [hereinafter Christensen, *If Not Marriage?*]. For example, Hawaii's reciprocal beneficiary law has been criticized for its "failure to protect individuals in same-sex relationships from financial hardship once their relationships collapse." W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 93 (1998). Recognizing that the state must provide appropriate methods for fairly resolving the child custody, support, and property issues at the demise of these unions provides another affirmation that they share the public space allocated to family formation.

[265] *Baker*, 744 A.2d at 884.

advantages flowing from a marriage license, the assertion that society sanctions domestic unions as the cradle of childhood proves to be a woefully inadequate representation of a far richer tableau.[266] Providing for the nurture of children is a cardinal obligation of society; marriage serves this end, but it satisfies many other social aims as well.[267]

Having removed as non-essential the childbearing and childrearing branch from the marital bundle, the same branch which the State had said was the main impediment to same-sex marriage, and standing on the brink of creating a new marital package (minus this branch) for same-sex couples, the Vermont court made the interesting and politically safe choice of going one step further in their unbundling. Having taken a careful look at the goods and goals of marriage, the Court decided that there was another non-essential branch that it could leave the legislature the option to remove; the very name of the institution, i.e., the label marriage. The court, again in obvious recognition of the "deeply-felt religious, moral, and political beliefs" which swirled around the issue, did not require that the State allow same-sex couples to marry, as long as they gave them an identical package that would "conform with the constitutional

[266] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 55.
[267] *Id.*

imperative to afford all Vermonters the common benefit, protection, and security of the law."[268]

Following *Baker v. Vermont*, the state legislature passed the "Act Relating to Civil Unions."[269] This statute preserved the legal definition of marriage in heterosexual terms,[270] but made it clear that those who established a civil union "may receive the benefits and protections and be subject to the responsibilities of spouses."[271] The statute declared its intention to render civil unions the legal equivalents of marriage: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[272] The legislature then promulgated a "list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union."[273]

---

[268] *Baker*, 744 A.2d at 867.

[269] *See* 2000 VT. ACTS & RESOLVES 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2001)).

[270] *See* VT. STAT. ANN. tit. 15, § 1201(4) (2002) (defining marriage as "the legally recognized union of one man and one woman").

[271] *Id.* § 1201(2).

[272] *Id.* § 1204(a). The legislature's intention to equalize the status of a married person with that of member of a civil union was articulated in unmistakable terms. *See, e.g., id.* § 1204(b) ("A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law."); *id.* § 1204(c) ("Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons."); *id.* § 1204(d) ("The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

[273] *Id.* § 1204(e), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 56. Difonzo points out that although the statute describes it as "nonexclusive," the list is a nearly encyclopedic compendium of the blessings and duties of marriage. In both their scope and their detail, these rights and responsibilities

Not all of the Justices on that Vermont court agreed that the name 'marriage' was a non-essential branch in the marital bundle. Justice Johnson, concurring in part and dissenting in part, would have enjoined the State from denying marriage licenses to same-sex couples.[274] She rightfully noted that in 1948, when the California Supreme Court struck down a state law prohibiting the issuance of a license authorizing interracial marriages, the court did not suspend its judgment to allow the legislature an

---

constitute the elements of marriage, laid out and unbundles, and supply the frame of reference for the continuing debate over the rules governing the entrance, exit, and content of marriage. Because of their importance—and because few statutes so clearly detail the elements of marriage—the list merits an extensive summary. "It includes laws relating to the acquisition, ownership, and transfer of real and personal property (including eligibility to hold property as tenants by the entirety); as well as tort actions dependent upon spousal status, such as wrongful death, emotional distress, loss of consortium, or dram shop. Laws dealing with probate, adoption, certain kinds of group insurance, spouse abuse programs, prohibitions against discrimination based on marital status, victim's compensation rights, worker's compensation benefits, and provisions for affirmance of relationship are also itemized. Key health law provisions are included, relating to the provision of medical care, hospital visitation and notification, terminal care documents, durable power of attorney for health care execution and revocation, and the making, revoking and objecting to anatomical gifts by others. Also covered are family leave and public assistance benefits, as well as laws relating to immunity from compelled testimony and the marital communication privilege. The list extends to a surviving spouse's homestead rights, laws relating to loans to veterans, and the definition of a family farmer and family landowner rights to fish and hunt. Also encompassed are certain tax laws, state pay for military service, application for an absentee ballot, and the legal requirements for assignments of wages. In addition to this sizable compilation, the burdens and benefits at stake include those relating to the partners' mutual economic support, as well as the corpus of domestic relations legislation on annulment, separation and divorce, child custody and support, and property division and spousal maintenance." *See* VT. STAT. ANN. tit. 15, § 1204(e); DiFonzo, *Unbundling Marriage*, *supra* note 14, at 57.

[274] *Baker*, 744 A.2d at 898. The majority did not necessarily disagree either, but rather felt that they were being 'constitutionally responsible.' The opinion notes that 'the dissent's suggestion that her mandate would avoid the "political caldron," *id.*, of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—significantly insulated from reality. *See* HAWAII CONST., art. I, § 23; *see also* ALASKA CONST., art. I, § 25 (state constitutional amendment reversed trial court decision in favor of same-sex marriage—Brause v. Bureau of Vital Statistics, No. 3AN–95–6562 CI, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998)—by providing that "a marriage may exist only between one man and one woman," and assumes that this is reason enough to at least try out another remedy. *Baker*, 744 A.2d at 888.

opportunity to enact a separate licensing scheme for interracial marriages,[275] and that such mandate in that context would be unfathomable to us today. Addressing the majority's claim that it was declining to provide plaintiffs with a marriage license because of the fact that a sudden change in the marriage laws "may have disruptive and unforeseen consequences," and that "uncertainty and confusion could result,"[276] she accused the court of acting hypocritically; "Thus, within a few pages of rejecting the State's doomsday speculations as a basis for upholding the unconstitutionally discriminatory classification, the majority relies upon those same speculations to deny plaintiffs the relief to which they are entitled as the result of the discrimination.[277] She went on further to compare this to the civil rights movements of the 1960's, noting that,

> [d]uring the civil rights movement of the 1960's, state and local governments defended segregation or gradual desegregation on the grounds that mixing the races would lead to interracial disturbances. The Supreme Court's "compelling answer" to that contention was "that constitutional rights may not be denied simply because of hostility to their assertion or exercise."[278] Here, too, we should not relinquish our duty to redress the unconstitutional discrimination that we have found merely because of "personal speculations" or "vague disquietudes."[279] While the laudatory goals of preserving institutional credibility and public confidence in our government may require elected bodies to wait for changing attitudes concerning public morals, those same goals require courts to act

[275] *See* Perez v. Lippold, 198 P.2d 17, 29 (Cal. 1948) (granting writ of mandamus compelling county clerk to issue certificate of registry).
[276] *Baker*, 744 A.2d at 887
[277] *Id.* at 902.
[278] *Watson,* 373 U.S. at 535, *quoted in Baker*, 744 A.2d at 902.
[279] *Id.* at 536.

> independently and decisively to protect civil rights guaranteed by our Constitution.[280]

C. The Term "Marriage" as an Essential Branch

Justice Johnson's dissent is extremely important because it gets right to the heart of our earlier discussion about whether or not the institution of marriage is special per se. One could argue that, even if Johnson is right, she is only narrowly so—that is to say, it is only wrong to create a new status because in a post-Brown v. Board of Education world, any form of legalized 'separate but equal' standard is inherently unequal.[281] This is especially so in regard to creating a differently named marriage, where even if the couple themselves reach an understanding, and even if one state knows how to deal with it, practical considerations like portability, including recognition in other states and countries might, at any time, become an issue. There are also,

---

[280] *Id. See also* Andrew Sullivan, *Why "'Civil Union"' Isn't Marriage*, THE NEW REPUBLIC, May 8, 2000, *available at* http://igfculturewatch.com/2000/05/08/why-civil-union-isnt-marriage/. Sullivan notes:

> if civil union gives homosexuals everything marriage grants heterosexuals, why the fuss? First, because such an arrangement once again legally divides Americans with regard to our central social institution. Like the miscegenation laws, civil union essentially creates a two-tiered system, with one marriage model clearly superior to the other. The benefits may be the same, as they were for black couples, but the segregation is just as profound. One of the greatest merits of contemporary civil marriage as an institution is its civic simplicity. Whatever race you are, whatever religion, whatever your politics or class or profession, marriage is marriage is marriage. It affirms a civil equality that emanates outward into the rest of our society. To carve within it a new, segregated partition is to make the same mistake we made with miscegenation. It is to balkanize one of the most important unifying institutions we still have. It is an illiberal impulse in theory and in practice, and liberals should oppose it.)

Id.

[281] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954), *supplemented sub nom.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955).

according to a 1997 GAO report,[282] the roughly 1,049 legal protections and responsibilities granted by the federal government to marital couples that have to be reckoned with, including the right to take leave from work to care for a family member, the right to sponsor a spouse for immigration purposes, and Social Security survivor benefits that can make a difference between an old age spent in poverty and an old age in security.[283] Civil unions bring none of these critical legal protections. They also leave their members in a sort of state of limbo regarding taxes and public benefits for their families, and may encourage or give effect to private biases.[284]

But one could also argue more expansively that, if the court was wrong here and Johnson is right, it is because there is still something inherently special in marriage per se that even a mirror image substitute cannot perfectly replicate. Marriage, as opposed to any proxy, may be more than the sum of its legal parts; it is also a cultural institution.[285] Despite the fact that civil unions provide most of marriage's "tangible

---

[282] *See* Letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to Henry J. Hyde, Chairman, House of Representatives Committee on the Judiciary 1-2 (Jan. 31, 1997).

[283] *See* GAY & LESBIAN ADVOCATES & DEFENDERS, CIVIL MARRIAGE VERSUS CIVIL UNIONS: WHAT'S THE DIFFERENCE? (2013), *available at* www.glad.org/uploads/docs/publications/cu-vs-marriage.pdf .

[284] *See Lawrence*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) ("'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples.").

[285] *See* Sullivan, *Here Comes the Groom*, *supra* note 41. Sullivan notes that

> because marriage is not merely an accumulation of benefits. It is a fundamental mark of citizenship. In its rulings, the Supreme Court has found that the right to marry is vested not merely in the Bill of Rights but in the Declaration of Independence itself. In the Court's view, expressed by Chief Justice Earl Warren in Loving v. Virginia in 1967, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." It is one of the most fundamental rights accorded under the Constitution. Hannah Arendt put it best in her evisceration of

benefits"—being easily recognized and having state-conferred rights and privileges—they fail to provide marriage's intangible benefits, such as esteem, self-definition, and the stabilizing influence of social expectations.[286] Although these benefits may be less concrete than, say, tax exemptions, as Brown points out, intangible benefits are no less constitutionally significant than tangible ones.[287]

In attempting to define some of these intangible, but very real benefits, policy analyst Jonathan Rauch explains that a set of informal, yet powerful rules and expectations accompany the legal institution of marriage, a "hidden law," as he calls it, composed of "norms, conventions, implicit bargains, and folk wisdoms that organize social expectations, regulate everyday behavior, and manage interpersonal conflicts."[288] Because "[t]he institution of marriage offers structural and cultural support to heterosexual partners[,] the denial of marriage to gay couples deprives them of this

---

> miscegenation laws in 1959: "The right to marry whoever one wishes is an elementary human right compared to which 'the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one's skin or color or race' are minor indeed." Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to "life, liberty and the pursuit of happiness" . . . and to this category the right to home and marriage unquestionably belongs.)

Id.

[286] *See* Misha Isaak, *"What's in a Name?": Civil Unions and the Constitutional Significance of "Marriage",* 10 U. PA. J. CONST. L. 607, 612 (2008) [hereinafter Isaak, *What's in a Name?*].

[287] *Id.*

[288] Jonathan Rauch, *Conventional Wisdom: Rediscovering the Social Norms that Stand Between Law and Libertianism*, REASON, Feb. 2000, at 37 [hereinafter Rauch, *Conventional Wisdom*], *quoted in* Isaak, *What's in a Name?*, *supra* note 286, at 642.

support."[289] Thus, barring same-sex couples from the opportunity to enter a marriage, with all of its associated social rules and expectations, robs gay families, partners, and children of the resulting stability that their heterosexual counterparts enjoy.[290]

Going back once more to our original assertion—that perhaps what makes marriage special is that crystallizing moment in the formation of a new identity—maybe the formation of a civil union just does not inspire that same level of introspection and identification with a set of values. Alternatively, even if it does so for the couple themselves, perhaps it does not send the same message to the outside world. As Chief Justice Poritz of the Supreme Court of New Jersey wrote in his dissent in the noted case of *Lewis v. Harris*, which gave New Jersey domestic partnerships:

> We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as "real" marriage, that such lesser relationships cannot have the name of marriage.[291]

Though it is not often mentioned alongside the list of tangible benefits denied to same-sex couples, the ability for two individuals to commit themselves to one another and to

---

[289] *Id.* (quoting M. D. A. Freeman, *Not Such a Queer Idea: Is There a Case for Same Sex Marriages?*, 16 J. APPLIED PHIL. 1, 12-13 (1999).
[290] Jonathan Rauch, *Conventional Wisdom*, *supra* note 288, at 37.
[291] Lewis v. Harris, 908 A.2d 196, 226-27 (N.J. 2006).

a new shared identity, especially in the eyes of the public, is a very real benefit,[292] perhaps producing a different kind of commitment, or at least a different kind of message (and again, at least for now).

As the Massachusetts Supreme Court observed in the landmark case of *Goodridge v. Department of Public Health*, the first decision by a U.S. State's highest court to find that same-sex couples had the right to marry,[293]

> Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family . . . . Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.[294]

The Supreme Court itself has repeatedly held marriage to be something above and beyond a list goodies, classifying it as a "fundamental constitutional right."[295] To justify, analyze, and apply this right, the Court has focused on its intangible benefits over its instrumental purposes.[296] In *Griswold v. Connecticut*, the Court defended the inviolability of the marital relationship from intrusion by the State, describing marriage as "a coming together for better or for worse, hopefully enduring,

---

[292] *See* Tyler S. Whitty, Comment, *Eliminating the Exception? Lawrence v. Texas and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813, 816 (2005).
[293] *Goodridge*, 798 N.E.2d at 954.
[294] *Id.* at 954-55 (emphasis added).
[295] *See, e.g.*, *Zablocki*, 434 U.S. at 383 ("[T]he right to marry is of fundamental importance . . . ."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival") (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942)).
[296] Isaak, *What's in a Name?*, *supra* note 286, at 615.

and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[297] In *Zablocki v. Redhail*,[298] by identifying marriage as a fundamental right, the Court held that the Constitution protected "something less tangible [than living together and having children] and more important: the values of self-identification and commitment."[299]

The Court later endorsed an inmate's right to get married in Turner v. Safley, describing marriage as an "expression of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship . . . as an expression of personal dedication."[300] In each of the above-mentioned cases, the Court notably identified the intangible benefits flowing from the title "marriage," not the associated state-conferred benefits, as constitutionally significant.[301] In fact, the primacy of the intangible meeting of the minds and public mutual self-identification as the core feature of marriage—as opposed to any technical aspect—can be inferred from the case of its absence; a couple that marries only for instrumental reasons, such as helping a

---

[297] *Griswold*, 381 U.S. at 486, *quoted in* Isaak, *What's in a Name?*, *supra* note 286, at 615.

[298] *Zablocki*, 434 U.S. 374.

[299] Karst, *The Freedom of Intimate Association*, *supra* note 138, at 670. The couple in *Zablocki*, for instance, wanted to marry partly because the woman was pregnant; the complaint alleged that they wanted to marry before the child was born. They were concerned, that is, about appearances and about status, their own and their child's. Those concerns are both real and important, long recognized by the law in areas such as defamation, and obviously a principal focus for the self-identification of the man and woman who wanted to marry.

[300] *Turner*, 482 U.S. at 95-96.

[301] Isaak, *What's in a Name?*, *supra* note 286, at 616.

friend immigrate legally into the United States, is considered to be engaging in "marriage fraud" under federal law.[302] "By prosecuting such marriages, government insists on a tighter connection between civil marriage and the affect and commitment thought to justify marriage."[303]

A person's intimate associations have a great deal to do with the formation and shaping of an individual's sense of his or her (or, for a couple, their) own identity.[304] It is an individual's intimate associations that give him or her the best chance to be seen (and thus to see themselves) as a whole person rather than simply as an aggregation of social role-players.[305] For most of us, our intimate associations are powerful influences over the development of our personalities.[306] An intimate association may influence a person's self-definition not only by what it says to him or her, but also by what it says (or what he or she thinks it says) to others.[307]

In the traditional domain of the freedom of association, this phenomenon of association-as-statement is familiar. In the politics of the 1960s, political association

---

[302] *See, e.g.*, United States v. Chowdhury, 169 F.3d 402, 405-07 (6th Cir. 1999) (upholding conviction for marriage fraud for the purpose of violating immigration laws).

[303] David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 940 (2001) [hereinafter Cruz, *Just Don't Call It Marriage*].

[304] *See, e.g.,* H. GERTH & C. MILLS, CHARACTER AND SOCIAL STRUCTURE II, 84-86, 90-91 (1953).

[305] *See* R. UNGER, KNOWLEDGE AND POLITICS 213-22, 262-263 (1975).

[306] For example, a child's mental picture of the "family" may be a "dramatic template," a more or less permanent, internalized structure of human relations around which her perceptions of others and her actions toward them may be organized long after childhood's end. R. LAING, THE POLITICS OF THE FAMILY AND OTHER ESSAYS 17 (1969), *quoted in* Karst, *The Freedom of Intimate Association*, *supra* note 138, at 692.

[307] *See* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 105-06 (1963) (distinguishing "ego identity" and "social identity").

served not only to promote specific policy goals, but also as an outlet for expressiveness, for self-identifying assertions. So it is with many intimate associations.[308] Indeed, as the legal consequences of a couple's living together come to approximate those of marriage, and as divorce becomes more readily available, marriage itself takes on a special significance for its expressive content as a specific statement that the individuals who make up a couple wish to identify with each other.[309] Intimate associations thus take on expressive dimensions as statements defining ourselves, and it is the choice to go ahead and form and maintain an intimate association that permits full realization of the associational values that we cherish most. The connection between the choice principle and these values is delicate, but vital.[310] It is possible, of course, to realize some measure of the values of self-identification, intimacy, caring, and commitment through an intimate association one has not chosen.[311] In general, however, freedom of associational choice enhances the values of intimate association to a degree that would not be attainable if choice were absent. A chosen intimate association can serve, for example, as a statement of self-identification in a way that cannot be matched by an association imposed by force of law, and intimacy implies the choice not to associate oneself in

---

[308] Karst, *The Freedom of Intimate Association*, *supra* note 138, at 624.

[309] *See* E. GOFFMAN, THE PRESENTATION OF THE SELF IN EVERYDAY LIFE 77-105 (1959) (on presentation of self as member of a "team"); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 887-88, 989 (1978) (privacy values are matched by outward-looking aspects of the self, including right to make the "statement" implicit in a public identity).

[310] Karst, *The Freedom of Intimate Association*, *supra* note 138, at 636.

[311] Such as in arranged marriage.

intimate ways with the world at large.[312] Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity. Striking at core aspects of personhood in contemporary society, in relegating same-sex couples to "civil unions" while allowing mixed-sex couples "marriage," the state denies same-sex couples the expressive potential of civil marriage both in violation of First Amendment guarantees of freedom of speech[313] and the Vermont Supreme Court's mandate to provide same-sex couples all the benefits of civil marriage. It does matter whether or not one calls it "marriage,"[314] in large part because of the centrality of marriage to identity.

The flipside of expression, and wanting to express, is recognition, and wanting to be recognized. The importance of government recognition in the area of marriage is not easily overstated. State recognition is an essential part of the traditional marriage ceremony script. A familiar passage in that script—"By the power vested in me by the State of . . ."—represents the state's legitimization of the union.[315] One article, written jointly by a lesbian couple, bemoaned the fact that "[t]he

---

[312] *Id.* (emphasis added).

[313] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

[314] Cruz, *Just Don't Call It Marriage*, *supra* note 303, at 928.

[315] Isaak, *What's in a Name?*, *supra* note 286, at 642 (noting anecdotally: "[W]e both were profoundly moved when the marriage commissioner said, 'By the power vested in me by the province of British Columbia, I now pronounce you wife and wife.' It was another transformative moment that solidified our foundation . . . . [O]ur marriage is strengthened by legal recognition in Canada . . . ."); Barbara J. Rhoads-Weaver & Heather E. Rhoads-Weaver, *In the Pursuit of Happiness: One Lesbian Couple's Thoughts on Marriage*, 2 SEATTLE J. FOR SOC. JUST. 539, 544 (2004) [hereinafter Rhoads-Weaver &

law . . . forces us to operate in a system that will only recognize each of us as individuals, rather than acknowledging and protecting our desired status as unified individuals."[316] Recognition is also valuable inasmuch as it facilitates an understanding of the relationship by others, providing the language and context in which to situate same-sex couples.[317] To family members, acquaintances, colleagues, and passing associates, a same-sex relationship not solemnized as a marriage may seem more like cohabitating friends or elderly sisters who provide care for one another than a marriage, which further erodes that moment of self-definition and commitment.[318] Some domestic partnership legislative proposals actually do provide marriage-like rights to any two people who register with the state, including elderly sisters and cohabitating friends, further conflating these different types of relationships in the eyes of the state.[319]

Rhoads-Weaver, *In the Pursuit of Happiness*]; *see also* Johnson, *Vermont Civil Unions*, *supra* note 264 ("[W]hen you go into a ceremony and hear a justice (of the peace) say, 'By the power vested in me,' it truly was the most joyous experience I'd ever had.") (quoting David Mace, *A Year with Civil Unions*, TIMES ARGUS, July 1, 2001), *quoted in* Isaak, *What's in a Name?*, *supra* note 286.

[316] Rhoads-Weaver & Rhoads-Weaver, *In the Pursuit of Happiness*, *supra* note 315, at 542.

[317] *See id.* ("[T]he absence of legal recognition makes it more difficult for those in our family and community to understand . . . our marriage.").

[318] In its Principles, the A.L.I. has included a chapter governing inter se claims of domestic partners. The A.L.I. defined domestic partners broadly to include "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as couple." *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002) ("Domestic Partners").

[319] *See, e.g.*, Michelle Cole, *Benefits Bill Follows Measure 36*, OREGONIAN, May 29, 2005, at B01 (describing a reciprocal benefits scheme); *see also* Beccah Golubock Watson, *Beyond Marriage: Love and the Law*, NATION, Jan. 29, 2007, *available at* http:// www.thenation.com/doc/20070212/watson (discussing the extension of marriage benefits by contrasting marriage with non-traditional partnerships, like same-sex couples and families or friends with integrated finances, and asserting that "[p]artnerships like these, rather than marriage, hold many American families together.") *Id.* (emphasis added).

In regard to preventing tangential third-party harms, the beneficiaries of state recognition both directly (through benefits) and indirectly (in terms of having family value definition and social status) are not only the spouses, but also the children of a marriage.[320] Therefore, denying both the self-identification value and the cultural context of marriage hurts both the partners and their offspring. Aside from tangible financial benefits, it may not give children the same sense of identity that coming from a marital unit can, both as individuals and as members of society.[321] The claim is made

---

[320] *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, 8 (Haw. Cir. Ct. Dec. 3, 1996) ("[C]hildren of same-sex couples would be helped if their families received the social status derived from marriage."); *Goodridge*, 798 N.E.2d at 956-57 ("[C]hildren are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage . . . . Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child."). One civil-unioned parent complained that he "does not want [his son] to have to explain to anyone who asks that what his parents have is something like a marriage . . . [or] almost a marriage." Brief of Plaintiffs-Appellants at 3, Kerrigan v. Comm'r of Pub. Health, S.C. 17716 (Conn. Nov. 22, 2006) (internal quotations omitted), *available at* http:// www.glad.org/marriage/Kerrigan-Mock/Kerrigan_%20Supreme_Court_Final.pdf.

[321] For more on the proposition that name does matter, compare the speech of then-Senator Barack Obama in an August 2007 debate sponsored by the Human Rights Campaign; "My view is that we should try to disentangle what has historically been the issue of the word *marriage*, which has religious connotations to some people, from the civil rights that are given to couples, in terms of hospital visitation, in terms of whether or not they can transfer property or Social Security benefits and so forth." *See* Jacob Sullum, *Gay 'Marriage' vs. 'Civil Unions': What's in a Name?*, Reason (May 10, 2012, 12:43 PM), http://reason.com/blog/2012/05/10/gay-marriage-vs-civil-unions. *See also* President Obama's statement to ABC News in May 2012:

Over the course of several years, as I have talked to friends and family and neighbors, when I think about members of my own staff who are in incredibly committed monogamous relationships, same-sex relationships, who are raising kids together, when I think about those soldiers or airmen or marines or sailors who are out there fighting on my behalf and yet feel constrained, even now that Don't Ask Don't Tell is gone, because they are not able to commit themselves in a marriage—at a certain point I've just concluded that for me personally it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.

Id.

here that the name marriage is an essential element in the bundle of the marital package.

D. Unbundling Continued

While the civil union statute aims to package all of the important elements and branches of traditional marriage (except its name) and transpose them into the newly-created bundle, a host of other ordinances, usually called domestic partnerships, as well as private programs, have unbundled marriage even more, directing the extension of a portion of the universe of marital attributes to same-sex unions and unmarried heterosexual couples.[322] In theory, they attempt to install the combination of elements that most seems appropriate to the public or private employer in a given situation, and are often achieved after a period of negotiation. Although the advantages afforded by these laws fall short of those provided to members of civil unions, they are far from insubstantial,[323] and are quite common nowadays.[324] Some commentators have criticized

---

[322] *See* J. Robert Cowan, Note, *The New Family Plan: Employee Benefits and the Non-Traditional Spouse*, 32 U. LOUISVILLE J. FAM. L. 617 (1994); William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 961, 962; Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 165-66 (1995). While domestic partnership laws have heretofore provided far fewer than all marriage-type rights, there is no conceptual reason why they may not approach near-parity with marriage. *See, e.g.*, Christopher Lisotta, *California Bill Upgrades Gay Partner Rights* (Jan. 28, 2003), http:// www.gay.com/news/article.html?2003/01/28/1 (describing bill designed to "grant the state's more than 400,000 same-sex couples nearly all the rights, benefits, and obligations available to heterosexual spouses under state law").

[323] *See* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1194-95 (1992); DiFonzo, *Unbundling Marriage*, *supra* note 14, at 59 ("Domestic partners may be entitled to health insurance plan participation, as well as to illness, disability, and bereavement leave."). Additionally, the public registration provisions

domestic partnership laws for only partially incorporating marital benefits,[325] while, in truth, this is simply what unbundling means—the recognition that different combinations of the elements of marriage may achieve diverse policy aims. Perhaps the real objection here is that not all of the right core branches were included in the bundle. As noted above, federal law alone makes marital status a factor in the administration of 1,049 federal laws, the sum of which elements comprise the legal content of contemporary marriage in the United States. Presumably, not every one of those laws would be considered core to marriage as an identity.[326] The unbundled view of marriage

---

may facilitate the granting of hospital visitation rights and may supply proof of an officially-sanctioned relationship when needed at other times. *Id.*

[324] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 59. Several examples illustrate the "proliferation of domestic partnership legislation and contractual arrangements." Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 108 (2001) [hereinafter Ertman, *Marriage as a Trade*]. Atlanta's Domestic Partnership Benefits Ordinance extends health, dental, sick leave, and funeral leave benefits to city employees and their registered domestic partners; San Francisco has passed an ordinance requiring employers contracting with the city government to offer the same benefits to employees' domestic partners as they offer to their legal spouses; the Hawaii legislature enacted a law regulating "reciprocal beneficiaries." As part of its reaction to the decision in *Baehr v. Lewin*, reciprocal beneficiaries may receive health insurance coverage, possess health care decision-making authority and hospital visitation privileges, obtain the rights of a spouse in a decedent's estate, and sue for the wrongful death of their partners. As of 2001, "[e]ight states and 105 city and county governments or quasi-government agencies" provided benefits, including health insurance, to their employees' domestic partners. *See* HUM. RTS. CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 6 (2001).

[325] *See, e.g.*, Christensen, *If Not Marriage?*, *supra* note 264, at 1734 ("The much-heralded advent of local domestic partnership laws . . . is mostly about modest symbolic gestures accompanied by few if any tangible benefits."); Debbie Zielinski, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281, 298 (1999) ("[T]he benefits bestowed upon married couples are far more than those given to individuals living in a domestic partnership.").

[326] Just as an example, the law limits the amount of certain crop support payments that any one person can receive. For this purpose, a husband and wife are considered to be one person, except to the extent each may have owned property individually before the marriage. While same-sex partners may want this particular branch of the bundle and may even fight for it when relevant, it is likely that if it was excluded

suggested here can be used to clarify the essential nature of marriage by determining which pre-sorted bundle of rights and responsibilities provides a floor for social recognition and the range of permissible options allocable by private ordering.[327] It does this by focusing on function, by considering which elements, or which bundles of elements, appropriately pertain to specific unions or types of partnerships—for instance, which ones can be contracted away, and which ones are immutable.

Two other forms of unbundled marriage are also worthy of mention. In *Marvin v. Marvin*, the California Supreme Court held that unmarried cohabitants could form enforceable contracts to divide property in the event of a breakup, and were entitled to the "fulfillment of the[ir] reasonable expectations."[328] It recognized the full panoply of contract theories, adding that,

> in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations. The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties.[329]

---

from gay marriage they would not feel that their identity as a unit was less strong or less visible in the same way that they do when the government uses a different term than marriage to describe their bond.

[327] *See* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 66.

[328] Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

[329] *Id.* at 122-23.

States vary as to how many of the traditionally married-centric property rights they will give to unmarried cohabitants, but at least three states apply the Family Code provisions that would apply to the divorce of a marriage.[330]

Finally, some nine states still recognize the formerly widespread doctrine of common law marriages,[331] which purport to be unbundled marriage with every element in place except the state-based formality of licensing upon initiation.[332] Under common law marriage, a couple can petition to have the state recognize a marriage that was established without the benefit of a license and ceremony. Common law marriage's four elements—capacity, agreement, cohabitation, and holding out—essentially guarantee that even without the state based interaction which typically guarantees the meeting of the minds and renewed sense of identity for the couple, and tells the community what to expect, in this particular case, this particular couple surely had done those things anyway, and the community had gotten notice and known what to expect. That is exactly why the 'holding out' aspect is so important; the couple has to be known in the community and present themselves as husband and wife—a marital unit. In doing so,

---

[330] Washington, Oregon, and Nevada. *See* Janet Halley, *Behind the Law of Marriage (i): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 20 (2010) [hereinafter Halley, *Behind the Law of Marriage*].

[331] Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Utah, Texas, and the District of Columbia. The principle of common-law marriage was affirmed by the United States Supreme Court in Meister v. Moore, 96 U.S. 76 (1877), which ruled that Michigan had not abolished common law marriage merely by producing a statute establishing rules for the solemnization of marriages.

[332] *See* Cynthis Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712 (1996).

they recreate everything a 'traditional' marriage is supposed to be about. Interestingly, as more and more states are moving away from common law marriage recognition, which used to be common, Utah just recently codified common law marriage in order to be able to prosecute fundamentalist Mormons for living a polygamous lifestyle while identifying themselves as "single" on their welfare applications.[333]

Shifting back to the other side of the traditional spectrum, away from the same-sex marriage movement, it is important to remember that the move toward unbundled marital diversity is not radical or new. Nor did it begin at the margins; prenuptial and postnuptial agreements long preceded civil unions and domestic partnerships. Historian Stephanie Coontz has observed that "[m]ost discussions of family issues assume too sharp and permanent a division between different family forms.[334] In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts did an excellent job of putting these changes into clear historical perspective, noting that

> [a]larms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.[335]

---

[333] 15 UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2007); Ryan D. Tenney, *Tom Green, Commonlaw Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 148–49 (2002) (discussing legislative history of Utah statute).

[334] STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 3 (1997).

[335] *Goodridge*, 798 N.E.2d at 967.

Marriage is like a multi-layered onion. For centuries, the most visible outer surface might have been revealed as a heterosexual dyad, centered on procreation. However, if we were to peel it back, we might find that, at a deeper level, marriage consists of different people coming together and committing to loving, living, and working with each other. That second layer might also be a bit more specific; i.e. living, loving, and working with each other, AND enjoying hospital visitation rights and tax breaks. Considering marriage in the abstract, or in terms of some asserted central meaning, does not sufficiently credit the contingency of history.[336] Identifying, carefully cataloguing, recombining, and implementing different branches and bundles of marital elements may best accommodate marriage's increasingly divergent constituencies, as well as the greater social good of nourishing healthy families in a pluralistic world.[337]

Taking this process to the extreme, and combining it with the general push for more individual freedoms, some contemporary scholars of family law see the various

---

[336] DiFonzo, *Unbundling Marriage*, *supra* note 14, at 70.

[337] Some have already started the process of naming and organizing the myriad attributes of marital unions. Professor William Eskridge's preliminary assessment divides this universe of social rules and norms into three categories. The first set consists of commands requiring private parties to heed or be chargeable to the "emotional unity of the married or unioned couple," the second division relates to parental rights and obligations, and the third classification deals with the parties as an economic unit "for purposes of their own internal accounting, their commercial dealings with third parties, and their obligations (taxes) to the state." *See* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853 (2001), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 67. An earlier effort by Professor David Chambers suggested three similar criteria: regulations that "recognize emotional attachments (things like intestacy laws and decision-making rules);" those dealing with parenting; and those setting out the partner-partner and couple-state economic framework. 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, 454 (1996), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 68.

relaxations of forms as a chance for everyone to design their own marriage, as "opportunities for replacing one-size-fits-all laws with individually tailored regimes."[338] The significant increase in couples customizing their marriages with agreements exemplifies this propensity for marital privatization.

But there has also been a push back. Where some see a new morality in the reshaping of family norms,[339] others see a surrender of moral values.[340] Around the same time that prenuptial contracts began to proliferate, the divorce counterrevolution zeroed in on the surging divorce rates of the last third of the twentieth century, denouncing a "divorce culture"[341] whose aim was "the abolition of marriage."[342] To reinforce their goals of protecting what they felt should be the norm, they defined marriage exclusively in heterosexual terms, and promoted life-long marriages between men and women.[343] The promulgation of DOMA[344] (recently repealed) and the Covenant Marriage statutes[345]

---

[338] *See* Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 587 (1996);
Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1482 (2001).

[339] *See* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228 (1997).

[340] *See* Maggie Gallagher, *Fatherless Son Champions Marriage*, N.Y. POST, Sept. 1, 2000, *available at* http:// www.allianceformarriage.org/press/MaggieGallager.htm (objecting to the characterization of family breakdown as "family diversity").

[341] BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1997).

[342] MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996).

[343] *See, e.g.*, DAN QUAYLE & DIANE MEDVED, THE AMERICAN FAMILY: DISCOVERING THE VALUES THAT MAKE US STRONG 2 (1996), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 47.

[344] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1996)) (defining marriage for purpose of federal law as exclusively heterosexual, thus barring federal court or agency recognition of same-sex marriage in federal law).

exemplify this double-barreled campaign. DOMA provided a mandatory gloss on all federal laws and regulations by directing that marriage "means only a legal union between one man and one woman as husband and wife."[346] The Covenant Marriage statutes similarly posit a union between "one male and one female who understand and agree that the marriage between them is a lifelong relationship."[347] For better or for worse though, what our case study of the campaign for same-sex marriage has shown is that, for all members of society, and for both sides of the debate, family law is in the

---

[345] In general, covenant marriage laws allow a couple to opt out of the generally applicable no-fault divorce law and agree to terms which will make it more difficult for them to later divorce. Covenant marriage statutes were drafted with the specific goal of converting "a 'culture of divorce' to a 'culture of marriage.'" Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 929 (1998) (quoting State Rep. Tony Perkins, sponsor of Louisiana's Covenant Marriage Law). Covenant marriage options are at present available in Arizona, Arkansas, and Louisiana. *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000 & Supp. 2002); ARK. CODE ANN. §§ 9-11-801 to -811 (2002 & Supp. 2003); LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000 & Supp. 2002).

[346] 1 U.S.C. § 7 (2000) (further narrowing the term "spouse" in any federal act or agency rule to refer "only to a person of the opposite sex who is a husband or wife.") *Id.* In 2001 and 2002, the Federal Marriage Amendment, described as "the best and most realistic chance we have to preserve and protect traditional marriage," was introduced in the House of Representatives in an effort to inscribe DOMA into the Constitution. *See* Stanley Kurtz, *Marriage's Best Chance*, NAT'L REV. ONLINE (Aug. 16, 2001), http://www.nationalreview.com/contributors/kurtz081601.shtml. The text of the amendment read as follows:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

H.R.J. Res. 93, 107th Cong., 2d Sess. (2002). The bill died in committee.

[347] LA. REV. STAT. ANN. § 9:272(A) (West 2000).

midst of a thorough reexamination—possibly even a reconfiguration—of the elements of marriage.[348]

The next question that we have to ask is whether the shifting marital contours affect only same-sex unions, or whether they more broadly adumbrate an alteration of the social and legal world of the family.[349] If no single element, taken alone, adequately explains the concept of legal marriage,[350] but rather a conglomerate of core elements; if we were to focus on marriage's functions, its goods, and its goals, rather than on its inherent natural or secular meanings; if we were to continue shifting the public debate away from whether any particular type of couple fits within the definition of marriage, and toward a more pragmatic inquiry into whether particular types of entitlements and obligations should be available to all our domestic households, then one can easily imagine not a slippery slope, but an open doorway of possibility for reconsidering the issue of plural marriage.[351]

E. Framing Plural Marriage

---

[348] *See also* James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 3 (2001) (criticizing step-by-step strategy to obtain equality for same-sex partnerships).

[349] DiFonzo, *Unbundling Marriage, supra* note 14, at 32.

[350] David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 627 (2001).

[351] *See* JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE, *supra* note 204, at 127. Stacey recommends challenging the "dyadic limitations of Western marriage and seek[ing] some of the benefits of extended family life through small-group marriages arranged to share resources, nurturance and labor." *Id.*, *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 65.

Unlike either gay marriage or incest, the question of plural marriage is novel because it turns not on the idea of who can be in a marriage, but rather on the very institution of marriage itself as consisting of a two-and-only-two part unit. On the other hand, it may, in fact, represent the most fitting test case for a re-bundling of marital principles without drawing the ire of traditionalists.

Even the most liberal advocate of gay marriage has to admit that, from a historical, philosophical, and religious perspective, same-sex marriage represents a conceptual revolution. Plural marriage, on the other hand, in a fascinating way, presents almost the exact opposite side of the question. From a historical, philosophical, and religious perspective, it's almost too easy. Plural marriage has existed since recorded history, across cultures, and across the world. Many of the major world religions, even those in the Western tradition[352] have had, supported, condoned, or at least acknowledged and allowed for the practice of plural marriage—usually polygny.[353] The

[352] Typically conceived of as the Judeo-Christian tradition, i.e. Judaism.

[353] Scholars and lawyers alike routinely conflate polygamy, polygyny, and polyamory, mistakenly collapsing them into a single relationship category. While they are all forms of non-monogamy, they have some profound differences that make them quite distinct. Polygamy is the practice of marriage among groups of people larger than two, and its most popular form by far is polygyny in which one man is married to multiple women. Polygyny's gender correlate, polyandry, is quite rare, and few societies today or historically have been based on marriages of one wife to multiple husbands. Those that do include Tibet, Nepal, India, parts of West Africa, and, as mentioned above, some North American tribes. Historically and cross culturally, having polygyny as a legally recognized familial option is more common world-wide than is a pure monogamy regime. In contrast to the more conventional gender limited versions of polygamy, polyandry, and polygyny, polyamory allows both men and women to engage in concurrent sexual or romantic relationships with multiple people, with the knowledge and consent of everyone involved. Polygamy, polyandry, and polygyny are all heterocentric in that they require relationships to

Bible records at least forty men by name with multiple wives.[354] Confucianism, Islam, Hinduism, and Mormonism also support plural marriage.[355] Catholicism, on the other hand, clearly bans it,[356] while other forms of Christianity, such as Protestantism, are less

---

occur between women and men; polyamory further differs from these other forms of non-monogamy in that it allows participants to have same-sex relationships as well.

[354] Including four Gentile kings: Abimelech (*Genesis* 20:17-18), Benhadad (1 *Kings* 20:3-4), Ahasuerus (*Esther* 1:9), and Belshazzar (*Daniel* 5:2). At least half the men had more than two wives. The earliest recorded plural marriage was Lamech, who had two wives (*Genesis* 4:19), six generations after Adam. Even though Lamech is the only polygamist identified before the global flood, there is no reason to believe that he was alone in that status. The post-flood patriarchs continued the plural marriage tradition: Terah (*Genesis*, 11:26; 20:12), Nahor (*Genesis* 22:20-24), and Abraham (*Genesis* 16:1-3; 25:1-6). While Isaac was monogamous his two famous sons were polygamous. Esau had five wives (*Genesis* 26:34; 28:9; 36:2-3), and Jacob had four (*Genesis* 29:23-28; 30:4, 9). Eliphaz, son of Esau, had two wives (*Genesis* 36:11-12).
The twelve sons of Jacob and their descendants no doubt continued to be polygamous considering the number of men of fighting age and the number of firstborn counted after the Exodus (*Numbers* 1:2; 3:40). Other notable men during the Israelite confederacy identified with plural mates included Simeon, (*Genesis* 46:10; *Exodus* 6:15), Manasseh (1 *Chronicles* 7:14), Moses (*Exodus* 2:21; 18:1-6; *Numbers* 12:1), Caleb (1 *Chronicles* 2:18-19, 46, 48), Gideon (*Judges* 8:30), Gilead (*Judges* 11:1-2), Elkanah (1 *Samuel* 1:2), Jerahmeel (1 *Chronicles* 2:26), Ashhur (1 *Chronicles* 4:5), Ezra (1 *Chronicles* 4:17f), Mered (1 *Chronicles* 4:17-19), Machir (1 *Chronicles* 7:15f) and Shaharaim (1 *Chronicles* 8:8). The tribe of Issachar was particularly noted for its practice of polygamy (1 *Chronicles* 7:4). Other men during this time may be considered polygamous by virtue of the number of sons listed: Jair (*Judges* 10:4), Abdon (*Judges* 12:14), Ibzan (*Judges* 12:9), and Shimei (1 *Chronicles* 4:27). During the Israelite monarchy, the kings, their sons and other prominent men took multiple wives. Named individuals include King Saul (1 *Samuel* 14:50; 2 *Samuel* 3:7), King David (1 *Samuel* 25:42-44; 2 *Samuel* 3:13-14; 5:13; 6:20-23; 12:8), King Solomon (1 *Kings* 11:3), King Rehoboam (2 *Chronicles* 11:18-21), the sons of Rehoboam (2 *Chronicles* 11:23), King Ahab (1 *Kings* 20:3), King Jehoiachin (2 *Kings* 24:15), King Abijah (2 *Chronicles* 13:21), King Jehoram (2 *Chronicles* 21:14), King Joash, (2 *Chronicles* 24:2-3), and King Zedekiah (*Jeremiah* 38:23). Other men during this time may be considered polygamous by virtue of the number of sons listed: Heman (1 *Chronicles* 25:4) and Ziba (2 *Samuel* 9:10). *Listed in* Blaine Robinson, M.A., *Polygamy*, BLAINE ROBINSON (Feb 17, 2013), http://www.blainerobison.com/concerns/polygamy.htm.

[355] "Polygamy," NEW WORLD ENCYCLOPEDIA, *available at* http://www.newworldencyclopedia.org/p/index.php?title=Polygamy&oldid=950022.

[356] Perhaps the first known Christian leaders to advocate plural marriage were Basilides and Carpocrates, early second century religious teachers in Alexandria, Egypt (IRENAEUS, AGAINST HERESIES, BOOK I, 28:2). They were condemned as heretics by the Church, more for their theology than their marriage beliefs. Even as late as the Roman councils of 1052 and 1063, the suspension from communion of laymen who had a wife and a concubine at the same time implies that mere concubinage was tolerated. "Concubinage," ENCYCLOPEDIA BRITANNICA 1911. At the Council of Trent in 1563, however, the Catholic Church opposed plural marriage in the strongest terms. In Canon II of the *Doctrine on the Sacrament of Matrimony*, the Church declared: "If any one saith, that it is lawful for Christians to have several wives at

opposed.[357] In fact, according to some scholars' counts, there are currently twelve polygamous Christian denominations in the United States alone today,[358] and several more in Africa.[359]

---

the same time, and that this is not prohibited by any divine law; let him be anathema." In the Decree on the Reformation of Marriage the Church banned "concubinage" in all their lands and called upon the civil authority to enforce this ruling by the most severe punishments to those who did not put away their concubines. Still, even though the Church frowned on the practice, scholars point out that it was occasionally sanctioned by religious leaders, especially in light of necessity arguments. Thus, in the 8th century, Pope Gregory II permitted some men to have more than one wife, and a 15th century pope permitted a Spanish king to marry a second wife. *See* IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 41 (1996). *See also* Peggy Fletcher Stack, *Globally, Polygamy is Commonplace*, SALT LAKE TRIBUNE, Sept. 20, 1998, *available at* http://www.4thefamily.us/polygamy_commonplace.

[357] A few first generation Protestant reformers experimented with polygamy, and a few later Protestant writes continued to speculate about its virtues. *See* JOHN CAIRNCROSS, AFTER POLYGAMY WAS MADE A SIN 7 (1974) (noting:

> If Luther rejected pleas for the re-introduction of polygamy, this is not because he thought such a move would be morally wrong but because he was convinced that it was not all expedient, since it would be bound to discourage potential converts to the new faith. In fact, Luther was so opposed to divorce that he wrote, 'Indeed, I detest divorce so much, that I prefer bigamy rather than divorce, but whether it may be permitted, I do not dare to determine by myself.')

Id.; *See also* ROBERT KILBRIDE, PHILIP L. KILBRIDE & DOUGLAS R. PAGE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 21 (Kindle ed. 2012) (1994) [hereinafter KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES] (quoting LEON MILLER & JOHN MILTON, AMONG THE POLYGAMOPHILES 17 (1974)). In 1539, Philip of Hess, with the written consent of Martin Luther and other Lutheran theologians and priests, approved a bigamist marriage that was consecrated by a wedding ceremony performed on March 4, 1540 by Philip's court preacher. His first wife had given her written permission for the ceremony. *Id.* From this and from other quotations (he apparently also told Phillip that he advised against plural marriage, especially for Christians, *unless* there be the highest need. *Id.* (emphasis added). It is fair to say that Luther did oppose plural marriage, unless it was really needed. Other Christian advocates of polygamy arose in the 17th and 18th centuries, most notably John Milton (1608-1674), the famous author of Paradise Lost, Martin Madan (1726-1790), an itinerant English preacher in the Calvinist Methodist movement, and author of *Thelyphthora, or A Treatise on Female Ruin*, and Wesley Hall (1711-1776), brother-in-law to John Wesley and dedicated evangelist. Hall had the distinction of actually practicing polygamy and yet many churches and Christian evangelicals supported him throughout his ministry (Milton). *See* Don Milton, *John and Charles Wesley's Sister Married a Polygamist*, CHRISTIAN MARRIAGE, Sept. 24, 2006, *available at* http://www.christianmarriage.com/home/index.php?name=News&file=article&sid=115. Many, however, consider Hall a heretic and point out that he did not become a polygamist until after he became a Deist. *See* Christopher Howse, *John Wesley's Polygamous Brother-in-law*, THE TELEGRAPH, May 31, 2008,

As of 2012, it was estimated that over three billion people in the world believe in plural marriage, and that over two billion actually live in plural marriages.[360] Plural marriage is legal in over 150 countries, in places like South Africa, Egypt, Eritrea, Morocco, Malaysia, Iran, and Libya, and in other places—such as Israel, Chechnya and Burma—it is illegal, but the law is not regularly enforced. Even in countries we tend to think of as being strictly against the practice of plural marriage, an estimated 100,000 people in the "monogamous" United States practice plural marriage secretly (with another half a million living in long-term committed 'polyamorous' relationships)[361] and another estimated 100,000 polygamists live in the countries of "monogamous" Western Europe.[362] According to the ethnographic data in the 1998 Atlas of World Cultures, 1041 out of the 1231 societies in the world feature plural marriage in one form or another.[363] Of 1,154 societies described in the Human Relations Area Files, 93% recognize some

---

available at http://www.telegraph.co.uk/comment/columnists/christopherhowse/3558946/John-Wesleys-polygamous-brother-in-law.html.

[358] *See* RICHARD N. OSTLING & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE 74 (1999). *See also* ROBIN GILL, CHURCHGOING AND CHRISTIAN ETHIC 249 (1999) (noting that, according to the 1988 Lambeth Conference, "It has long been recognized in the Anglican Communion that polygamy in parts of Africa, and traditional marriage, do genuinely have features of both faithfulness and righteousness." *Id.*

[359] KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, ch.12.

[360] Nigeria alone has an estimated 40 million.

[361] Jessica Bennett, *Only You. And You. And You*, NEWSWEEK, July 28, 2009 [hereinafter Bennett, *Only You.*] *available at* http:// www.thedailybeast.com/ newsweek/ 2009/ 07/ 28/ only-you-and-you-and-you.html.

[362] Campaign Against Polygamy And Women Oppression International, *History of Polygamy*, POLYGAMYSTOP (2005), http://www.polygamystop.org/history.html.

[363] J. Patrick Gray, *Ethnographic Atlas Codebook*, *in* 10.1 WORLD CULTURES 86-136 (1998). That same year, the University of Wisconsin surveyed more than a thousand societies and found that, of these, just 186 were monogamous.

degree of socially sanctioned polygyny, and in 70% of all cases, polygyny is the preferred choice.[364]

Some anthropologists believe that polygamy has been the norm through at least most of human history. In 2003, New Scientist magazine suggested that, until 10,000 years ago, most children had been sired by comparatively few men. Variations in DNA, it said, showed that the distribution of X chromosomes suggested that a few men seem to have had greater input into the gene pool than the rest. By contrast, most women seemed to get to pass on their genes. Humans, like their primate forefathers, were at least "mildly polygynous."[365] Moderate – and ecologically mediated – polygyny appears to have dominated for millions of years.

Even when Greek culture began to socially impose monogamy, concubinage remained a viable option in much of the ancient world. Concubinage was a common institution in early Rome both before and after the Christianization of the empire,[366] even though Roman emperors insisted that men keep either one wife or one concubine,

---

[364] Walter Scheidel, *Monogamy and Polygyny in Greece, Rome, and World History*, ROME & WORLD HIST. (2008). In a more recent study of 348 better-known societies, 20% (n=71) are defined as monogamous, whereas another 20% displayed limited plural marriage and fully 60% more frequent displayed frequent plural marriage.

[365] Paul Vallely, *The Big Question; What's The History of Polygamy And How Serious A Problem Is It In Africa?*, THE INDEP., January 6, 2010, *available at* http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html.

[366] *See* PAUL MEYER, DER ROMISCHE KONKUBINAT NACH DEN RECHTSQUELLEN UND DEN INSCHRIFTEN (1895), *quoted in* JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 58 (2009) [hereinafter WITTE, THE SINS OF THE FATHERS].

but not both, even before Constantine.[367] It was not until the sixth century CE, after centuries of Christian influence that the Roman emperor Justinian claimed that "ancient law" prohibited husbands from keeping wives and concubines at the same time.[368] Even then, sexual relations of married men with their own slave women were not unlawful, including relationships that resulted in offspring. Formal recognition of the latter was optional, but not unknown.[369] Eventually, the Christian ideal of monogamy spread to Europe, and with overseas colonization, diffusion and imitation by non-European populations, has only very recently spread to some other parts of the world, despite what people may think. Outside of (Christian) Europe, Japanese legislation against polygyny only commenced in 1880. Polygamy was banned in Thailand in 1935, in China in 1953, for Hindus in India in 1955, and in Nepal in 1963.

Even natural law arguments about monogamy are susceptible to easy rejoinder. Biologists lately have discovered that, in the animal kingdom, there is almost no such

---

[367] Justinian Code 5.26.1 (quoting Constantine in 326), *quoted in* WITTE, THE SINS OF THE FATHERS, *supra* note 366, at 58-59. *See also* JUDITH EVAN GRUBBS, LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE'S MARRIAGE LEGISLATION 294-305 (1995).

[368] JUSTINIAN CODE § 7.15.3.2 (Justinian's legislation on cocubinage, raising it to almost virtual parity with marriage, as well as his repeated insistence that concubinage must be permanent and that men must not have more than one concubine at a time, clearly accords with the views of Christian authorities). *See also* JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 117-18 (2009).

[369] *Id.* at 9 ("In the very long run, the trajectory of historical change reaches from habitual resource polygyny at low levels of overall development to formal monogamy coupled with various forms of concubinage in early agrarian states and on to socially imposed universal monogamy in parts of the first-millennium BCE Mediterranean that co-existed with de facto polygyny with slave women, a practice that subsequently declined together with the institution of chattel slavery and evolved into church-backed monogamy accompanied by more casual relations with servants or other subordinates that were gradually curtailed by modernization.").

thing as monogamy. In a burst of new studies that are destroying many of the most deeply cherished notions about animal mating habits, researchers report that even among species assumed to have faithful tendencies and to need a strong pair bond to rear their young, infidelity is rampant.[370] Of the 5,000 or so mammal species in the world, only about 3 percent to 5 percent are engaged in any sort of monogamous relationship. Moreover, not all of these monogamous relationships would be viewed, in the eyes of the Western world, as purely monogamous.[371] As one study put it, "there is no reason to think that human beings represent a mammal group that is predisposed to monogamy."[372]

Finally, even as a particularly North American value, plural marriage is older than monogamous dyads. The Mormons were not the first people to bring plural

---

[370] DAVID P. BARASH & JUDITH EVE LIPTON, THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE (2002) [hereinafter BARASH & LIPTON, THE MYTH OF MONOGAMY]. *See also* Natalie Angier, *Mating for Life? It's Not for the Birds of the Bees*, N.Y. TIMES, Aug. 1, 1990, *available at* http://www.nytimes.com/1990/08/21/science/mating-for-life-it-s-not-for-the-birds-of-the-bees.html?pagewanted=all&src=pm ("'This is an extremely hot topic,' said Dr. Paul W. Sherman, a biologist at Cornell University in Ithaca, N.Y. 'You can hardly pick up a current issue of an ornithology journal without seeing a report of another supposedly monogamous species that isn't. It's causing a revolution in bird biology.'") *Id.*

[371]Scientists and observers of the animal kingdom identify three types of monogamy. The first is sexual monogamy. This is the practice of having sex with only one mate at a time. Second is social monogamy. Animals form pairs to mate and raise offspring, but may still "wander" on the side. Last is genetic monogamy, where DNA tests confirm that a female's offspring were sired by only one father. Even among those animals who do practice monogamy and mate for life, few and far between are those animals who practice total genetic monogamy or sexual monogamy. *See* BARASH & LIPTON, THE MYTH OF MONOGAMY, *supra* note 368, *quoted in* John Henshaw, *Why Polygamy Is Illegal When Monogamy Is Not Part of Natural Law*, *available at* http://www.thefreeresource.com/polygamy-why-its-illegal-when-monogamy-not-part-of-natural-law.

[372] BARASH & LIPTON, THE MYTH OF MONOGAMY, *supra* note 370, at 68.

marriage to the American landscape. Many Native American tribes—thought, based on the latest research, to start inhabiting the North American continent from Asia about 15,000 years ago—were practicing polygyny and, in some cases, polyandry long before the Latter Day Saints (LDS; Mormons).[373] While not each tribe—there were more than 500 in what is now the continental United States—some, like the Alaskan Eskimos, practiced both plural marriage systems. The Dogrib and Yellow Knives (in Canada) practiced polygyny; the Shoshonean practiced polygyny, polyandry, and "brittle monogamy," because they frequently changed spouses; the Cheyenne were also known to practice polygyny.[374] In fact, according to one study of the Western North American Indian Data Set, in only 28 of the 172 societies examined in the study, or 16 percent, was plural marriage reported to be absent or very rare.[375]

And so it is hard to attack plural marriage as being unnatural, uncommon, untraditional, new, rare, or anti-religious. Going back to our bundling paradigm, all the goods and goals of marriage we identified, the meeting of the minds and the accompanying self-identification, the societal understanding, the sharing of assets and of care, etc., can be attained in a marriage to one person, and again (a little differently

---

[373] Al Carrol, *Peopling North America, in* NATIVE AMERICA: FROM PREHISTORY TO FIRST CONTACT 5 (Rodney P. Carlisle & J. Geoffrey Golson eds., 2007); Jack D. Forbes, *What is Marriage? A Native American View*, NEWS FROM INDIAN COUNTRY, May 3, 2004, *available at* http:// www.westgatehouse.com/ art161.html; KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 88.

[374] KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 88.

[375] *See* Jorgensen 1980: SO291; Borgerhoff Mulder, Nunn, and Towner 2006: 61.

perhaps, as each new marriage will reflect a new union, with its own generally similar but idiosyncratically different standards, but with the same core purposes, in another marriage with another person sometime later down the line.[376] Each new unit can have its own crystallizing moment; each can be formally achieved with the proper solemnity.[377] We already recognize that ability in the permission granted to a person to remarry in the event of a death or divorce; saying that this is only so because it is not concurrent is to use circular logic, tautologically defining the commitment needed in marriage as only able to be done in a monogamous setting precisely because we only grant its availability in a monogamous setting. The argument here is that, unlike the name 'marriage,' and like procreation, numerosity restrictions are not a core element of the marital package, and we can certainly envision a world of marriage where they were not a part of the bundle.

Before we can do that though, we need to acknowledge two things. The first is that for marriage traditionalists, too much change too fast, even if deserved, will be met with much more resistance than slow and steady change. If family law is a game of inches, and if we want to keep the ground that we have gained, then allowing plural marriage is an excellent next step in the easy and enduring march forward; arguing for a little more inclusiveness is much better and more easily swallowed than advocating for

[376] Some of the religious statements about the goods of marriage quoted above, such as the 'Sermon In Praise of A Wife,' were even made in contemplation of there being more than one.
[377] Perhaps more defining moments will lead to even more self-actualization.

the abolishment of the institution. The second thing we need to acknowledge is that part of what has led to the success of the gay marriage movement is the fact that there are so many people behind it, some with very different agendas, all of whom are all willing to take a stand.[378] These two points are related, because in picking the next battle on the family law frontier, we need to find an issue that is both easy enough to actually implement and demonstrably important enough to a wide enough group of people that a critical mass will agree. Plural marriage, wedded as it is to both tradition and modernity is, as we will demonstrate in the next chapter, just that issue.

[378] *See* Erick Eckholm, *Push Expands for Legalizing Same-Sex Marriage*, N.Y. TIMES, November 12, 2012, *available at* http://www.nytimes.com/2012/11/13/us/advocates-of-gay-marriage-extend-their-campaign.html?pagewanted=all&_r=0.

Chapter 3: The Realities of Monogamy and the Push for Plur Marriage

Perhaps it is because the only times the Supreme Court ever considered plural marriage were in reference to Mormon polygamy,[379] when many Americans hear about plural marriage, or even try to picture relationships of more than two, they typically

[379] *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890) (rejecting a First Amendment habeas challenge to convictions for polygamists' attempt to register to vote and oath that they were not polygamists); Murphy v. Ramsey, 114 U.S. 15 (1885) (rejecting procedural challenges to the application of the Edmonds Act which denied polygamists the right to vote, even if they were only engaged in plural cohabitation); Reynolds v. United States, 98 U.S. 145 (1878) (affirming the criminal conviction of a Mormon for practicing polygamy and rejecting the argument that Congress's prohibition of polygamy violated the defendant's rights under the Free Exercise Clause); *see also* Potter v. Murray City, 760 F.2d 1065, 1069-70 (10th Cir. 1985) (rejecting a free exercise and privacy rights challenge to a police officer's termination for polygamy, on the grounds that *Reynolds* is still good law and that "protect[ing] the monogamous marriage relationship" is a compelling state interest); *cf.* Romer v. Evans, 517 U.S. 620, 634 (1996) ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable." (internal citations omitted)); *id.* at 649-50 (Scalia, J., dissenting) (noting that "[t]o the extent, if any, that [*Davis*] permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has, of course, been overruled by later cases. But the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law." (internal citation omitted)). *But see* Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting) (predicting that under the reasoning of the majority opinion "in time *Reynolds* will be overturned"); *see also* Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 Ga. St. U. L. Rev. 691, 737-57 (2001) [hereinafter Sealing, *Polygamists Out of the Closet*] (arguing that laws forbidding polygamous marriage are unconstitutional under the Free Exercise Clause because marriage is a fundamental right and therefore religious polygamy is a hybrid situation requiring strict scrutiny under Dep't of Human Resources v. Smith, 494 U.S. 872, 881 (1990), or because current anti-polygamy statutes and state constitutional provisions were enacted out of antipathy to a particular religion and substantially burden a central tenet of that religion while furthering no compelling governmental interest, under Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993)). *See* Emens, *Monogamy's Law*, *supra* note 7, at 376.

think of traditional polygyny—one man in a hierarchical relationship to several wives.[380] But there is another model—called "polyamory" by its increasingly vocal practitioners—which, in principle, eschews hierarchy for egalitarianism and encompasses various models of intimate relationships of more than two people.[381] Under some state laws, these people are already treated as polygamists.[382] For our purposes, polyamory refers to ethical non-monogamy, the practice of committed, marriage-like extra-dyadic relationships among consenting adults,[383] many of whom would like to one day be able to get married.[384] In theory, the equality-based nature of these relationships should somewhat ameliorate the concerns of those who fear patriarchal polygyny. It is possible though that resistance to the idea of polyamorous relationships may also stem from other concerns, about practical inefficiency of such relationships, negative physical or

---

[380] The elision of polygamy and polygyny is exemplified, with some acknowledgement of the confusion, by the Oxford English Dictionary definition of "polygamy": "Marriage with several, or more than one, at once; plurality of spouses; the practice or custom according to which one man has several wives (distinctively called polygyny), or one woman several husbands (polyandry), at the same time. Most commonly used of the former." OXFORD ENGLISH DICTIONARY 1382 (1993), *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 302.

[381] *See* Emens, *Monogamy's Law*, *supra* note 7, at 279. Also note, however, that some state laws already treat these individuals as polygamists. *See generally*, Utah laws, *supra* note 9.

[382] As noted above, footnote 9, Under Utah laws, for instance, polyamorous relationships qualify as cohabitation and thus are treated as polygamy or bigamy.

[383] *See, e.g.*, LANA TIBBETTS, COMMITMENT IN MONOGAMOUS AND POLYAMOROUS RELATIONSHIPS 1 (2001), *available at* http://www.picucci.net/Star/Relationships/polypaper.html.

[384] *See* Mark Stricherz, *Polyamorist Group Wants Legal Recognition for Multiple Marriages*, THE COLO. OBSERVER, March 21, 2013, *available at* http://thecoloradoobserver.com/2013/03/polyamorist-group-wants-legal-recognition-for-multiple-marriages/. *See also* the results of the Loving More study, *supra* note 10, *available at* http://www.lovemore.com/polyamory-research/2012-lovingmore-polyamory-research/2012-lovingmore-polyamory-survey/.

psychological effects, the equality or sufficiency of love among multiple partners, or associations with other taboos such as incest or homosexuality.[385]

This chapter will re-examine some of our underlying national notions of relationships, and compare them with our louder-speaking actions. Having established that we as Americans might not be as monogamous as we profess, it will turn to an examination of what plural marriage advocates claim that plural marriage is actually about. As it turns out, the ideals of plural marriage as a family system might in fact align quite nicely with the ideals we all claim to profess, without having to be tied to a falsely correlated principle of monogamy. Finally, the chapter turns to the feminist critique of marriage generally in order to offer a fuller picture of what feminism has to say to the practice of plural marriage in particular. In doing so, it addresses the assumption that some have put forward that plural marriage might be harmful to women, arguing that there is nothing inherently problematic with adult consensual

[385] Elizabeth F. Emens argues that a key reason for the opposition to polyamory is, somewhat paradoxically, the pervasive or potential failure of monogamy. "This argument draws lessons from the theory and politics of homosexuality, which demonstrate that the 'universalizing' possibilities of a particular minority practice may drive allies away, rather than creating the conditions for solidarity through common ground. Many people engage in non-monogamous behavior; many more have nonmonogamous fantasy lives . . . . Paradoxically, this mainstream impulse to nonmonogamy helps to explain the position of multiparty relationships beyond the pale of the marriage debates. Rather than prompting outsiders to identify with polyamorists, the potential of nearly everyone to imagine him or herself engaging in non-monogamous behavior leads outsiders to steel themselves against polyamory and to eschew the idea of legitimizing such relationships through law. This I call the paradox of prevalence." Emens, *Monogamy's Law*, *supra* note 7, at 284.

egalitarian forms of polygamy, especially when compared to what many see as the "patriarchal" system of traditional marriage dominated by men.

A. The Ideal Versus The Reality of Monogamy

Despite the demonstrated prevalence of plural marriage across time and space, Western societal norms still do strongly urge people toward monogamy, and the legal system contributes to that pressure in various ways—from bigamy laws, marriage laws, and custody cases, to workplace discrimination, and zoning laws.[386] In addition, proscriptions against promiscuity,[387] adultery,[388] polygamy,[389] and even singlehood,[390]

---

[386] *See* Emens, *Monogamy's Law*, *supra* note 7, at 284.

[387] *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 302 (1992) (discussing promiscuity in homosexual men pejoratively and noting American disapproval of promiscuity); Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 160-61 (1993) (discussing the role of disapproval of sexual promiscuity in successful petitions for forced sterilization of women). At least ten states and the District of Columbia penalize fornication. See D.C. CODE § 22-1602 (2001); IDAHO CODE ANN. § 18-6603 (2003); 720 ILL. COMP. STAT. 5/11-8 (2002); MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2000); MINN. STAT. ANN. § 609.34 (West 2003); MISS. CODE ANN. § 97-29-1 (2003); N.C. GEN. STAT. § 14-184 (2003); N.D. CENT. CODE § 12.1-20-08 (2003); S.C. CODE ANN. § 16-15-60 (2002); UTAH CODE ANN. § 76-7-104 (2002); VA. CODE ANN. § 18.2-344 (2003). These laws are occasionally enforced in certain contexts. *See, e.g.*, Juhi Mehta, Note, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Problem of Teen Pregnancy*, 5 CARDOZO WOMEN'S L.J. 121 (1998). Some believe that the presence of these laws on the books sends an important message of disapproval. *See, e.g.*, Traci Shallbetter Stratton, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 797 (1998) ("Keeping fornication statutes on the books and informing the public of their existence might not prevent fornication, but it will send a much needed message of social disapproval, driving this immoral conduct underground.").

[388] At least twenty-three states and the District of Columbia still have laws criminalizing adultery in some form. *See* ALA. CODE § 13A-13-2 (2003); ARIZ. REV. STAT. ANN. § 13-1408 (2003); COLO. REV. STAT. § 18-6-501 (2003); D.C. CODE § 22-201 (2001); FLA. STAT. ANN. § 798.01 (West 2000); GA. CODE ANN. § 16-6-19 (1990); IDAHO CODE ANN. § 18-6601 (2003); 720 ILL. COMP. STAT. ANN. 5/11-7(a) (West 2002); KAN. STAT. ANN. § 21-3507(1) (2002); MD. CODE ANN., crim. § 10-501 (2002); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2000); MICH. COMP. LAWS ANN. § 750.30 (West 2003); MINN. STAT. ANN. § 609.36 (West 2004); MISS. CODE ANN. § 97-29-1 (1999); N.H. REV. STAT. ANN. § 645:3 (1996); N.Y. PENAL LAW § 2.55.17 (McKinney 2004); N.C. GEN. STAT. § 14-184 (2002); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA.

reinforce the idea of two and only two. Explicit court statements, as in the Tenth Circuit's assertion in *Potter v. Murray City*,[391] that "[m]onogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built,"[392] and

---

STAT. ANN. tit. 21, § 871 (West 2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (2003); UTAH CODE ANN. § 76-7-103(1) (West 1999); VA. CODE ANN. § 18.2-18.365 (1996); W. VA. CODE ANN. § 61-8-3 (West 2000); *see also* John F. Kelly, *Virginia Adultery Case Roils Divorce Industry: Conviction Draws Attention to Little Used Law*, WASH. POST, Dec. 1, 2003, at B1, B8 [hereinafter Kelly, *Virginia Adultery Case Roils Divorce Industry*]. Prosecutions for adultery are rare. *See, e.g.*, Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 45 n.5, 53 nn.54-57 (1991). *But see* Kelly, *Virginia Adultery Case Roils Divorce Industry*, *supra*. They are, however, vigorously pursued in specialized contexts such as the military. *See* Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469-70, 476-77 (1998); James M. Winner, *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1073-74 (1998) [hereinafter Winner, *Beds With Sheets But No Covers*].

[389] Forty-nine states and the District of Columbia have statutes criminalizing polygamy. *See* ALA. CODE § 13A-13-1 (1994); ALASKA STAT. § 11.51.140 (1983); ARIZ. REV. STAT. ANN. § 13-3606 (2001); ARK. CODE ANN. § 5-26-201 (2000); CAL. PENAL CODE § 281 (West 1999); COLO. REV. STAT. ANN. § 18-6-201 (West 2003); CONN. GEN. STAT. ANN. § 53a-190 (West 2001); DEL. CODE ANN. tit. 11, § 1001 (2001); D.C. CODE § 22-501 (2001); FLA. STAT. ANN. § 826.01 (West 2000); GA. CODE ANN. § 16-6-20 (1990); IDAHO CODE ANN. § 18-1101 (1997); 720 ILL. COMP. STAT. ANN. 5/11-12 (West 2002); IND. CODE ANN. § 35-46-1-2 (West 1998); IOWA CODE ANN. § 726.1 (West 2003); KAN. STAT. ANN. § 21-3601 (1995); KY. REV. STAT. ANN. § 530.010 (West 1999); LA. REV. STAT. ANN. § 14:76 (1986); ME. REV. STAT. ANN. tit 17-A, § 551 (1983); MD. CODE ANN., crim. § 10-502 (West 2002); MASS. GEN. LAWS ANN. ch. 207, § 4 (West 1998); MICH. COMP. LAWS ANN. § 551.5 (West 1998); MINN. STAT. ANN. § 609.355 (West 2003); MISS. CODE ANN. § 97-29-13 (1999); MO. ANN. STAT. § 568.010 (West 2000); MONT. CODE ANN. § 45-5-611 (2003); NEB. REV. STAT. § 28-701 (1995); NEV. REV. STAT. ANN. § 201.160 (West 2002); N.H. REV. STAT. ANN. § 639:1 (1996); N.J. STAT. ANN. § 2C:24-1 (West 1995); N.M. STAT. ANN. § 30-10-1 (West 1978); N.Y. PENAL LAW § 255.15 (McKinney 2000); N.C. GEN. STAT. § 14-183 (2000); N.D. CENT. CODE § 12.1-20-13 (1997); OHIO REV. CODE ANN. § 2919.01 (West 1997); OKLA. STAT. ANN. tit. 21, § 881 (West 2002); OR. REV. STAT. § 163.515 (2001); 18 PA. CONS. STAT. ANN. § 4301 (West 1983); R.I. GEN. LAWS § 11-6-1 (2002); S.C. CODE ANN. § 16-15-10 (2003); S.D. CODIFIED LAWS § 22-22-15 (2003); TENN. CODE ANN. § 39-15-301 (2003); TEX. PENAL CODE ANN. § 25.01 (West 2003); UTAH CODE ANN. § 76-7-101 (West 1999); VA. CODE ANN. § 20-38.1 (2001); VT. STAT. ANN. tit. 13, § 206 (1998); WASH. REV. CODE ANN. § 9A.64.010 (West 2000); W. VA. CODE ANN. § 61-8-1 (West 2000); WIS. STAT. ANN. § 944.05 (West 1996); WYO. STAT. ANN. § 6-4-401 (West 2003).

[390] *See, e.g.*, Arthur B. Shostak, *Singlehood*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 355, 365-66 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987); Shari Motro, *Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, at WK15.

[391] *Potter*, 760 F.2d at 1065 (upholding the termination of a police officer for bigamy).

[392] *Id.* at 1070.

implicit court assumptions as in the case of *Goodridge v. Department of Public Health*,[393] where the Supreme Judicial Court of Massachusetts expressly emphasized this aspect of the protected relationships in an opinion that used the word "exclusive" six times to describe relationship commitments,[394] further contribute to the idea that we are an exclusively monogamous nation.

Condemnation of divorce in American society, both historical and even extant in the current push-back against the divorce revolution, along with popular romantic terms like "soulmate" and "one-and-only," point towards the idea of an even stricter ideal model of monogamy in modern society—an idea that Elizabeth Emens has called the fantasy of "supermonogamy."[395] Supermonogamy is the presumption that one and only one "right" partner exists for each person.[396] In this view though, ironically, many

---

[393] *Goodridge*, 798 N.E.2d at 941 (holding that the prohibition on same-sex civil marriage violates the state constitution).

[394] *See generally id.* at 948 (celebrating "[t]he exclusive commitment of two individuals to each other"); Emens, *Monogamy's Law*, *supra* note 7, at 291.

[395] Emens, *Monogamy's Law*, *supra* note 7, at 291. For references to this idea in popular high culture, see ANNE BRADSTREET, *To My Dear and Loving Husband*, *in* THE COMPLETE WORKS OF ANNE BRADSTREET 180 (Joseph R. McElrath, Jr. & Allan P. Robb eds., 1981) (1678).

[396] The idea of supermonogamy is perhaps most vividly portrayed in a classical story, Aristophanes' tale of originary beings from Plato's Symposium. *See* PLATO, SYMPOSIUM 25-31 (Alexander Nehamas & Paul Woodruff trans., Hackett 1989) ("[I]n the beginning . . . [,] [t]here were three kinds of human beings . . . male and female . . . [,] [and] a third, a combination of those two. . . ." These beings were "completely round, with . . . four hands each, as many legs as hands, and two faces, exactly alike, on a rounded neck . . . . There were two sets of sexual organs . . . ."Offended by these beings' ambitions to attack the gods, Zeus split them in two to diminish their strength. The result was pitiable. The beings ran around looking for their other halves, which they clung to, "wanting to grow together" again. "In that condition they would die from hunger and general idleness, because they would not do anything apart from each other," so Zeus took pity on them and moved their genitals around to the front. This allowed them consummation which in turn allowed them to "stop embracing, return to their jobs, and look after their other needs in life." *But see* Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of*

divorces are in some ways likely a product of our cultural assumptions about marriage. As David Cohn writes:

> We teach our young that to be married is automatically to be happy. We believe that everybody is, ought to be, or can be made happy; that all are "entitled" to happiness as to fresh air . . . . But simultaneously, in our anarchy of impermanence, we believe that if we are not happy in one marriage we shall surely be happy in another.[397]

It is interesting to note that, in several ways, the American legal system has already opened up a few back doors to polygamous relationships. Many states, including Louisiana—the very state that pioneered covenant marriage in order to protect and save the institution—also has one of the most vigorous putative marriage regimes in the country. A putative spouse doctrine allows retrospective recognition of the marital status even of a bigamous spouse when one or both partners had relied, in good faith, on

---

Ancient Greek Norms to Modern Sexual Controversies, 80 VA. L. REV. 1515, 1517-18 (1994). Nussbaum writes:

> On October 15, 1993, I found myself on the witness stand in a courtroom in Denver, Colorado, telling Colorado District Judge H. Jeffrey Bayless about Plato's Symposium. Because I had a very short time to testify as an expert witness, I focused above all on the speech of Aristophanes, which I had elsewhere argued to be one of the speeches in which Plato expresses views that he wishes his reader to take especially seriously. I told the court the story of how human beings were once round and whole--but now, cut in half for their overambitiousness, they feel a sense of lost wholeness and run about searching for their 'other half.' There are, Aristophanes tells us, three types of search, corresponding to three original species of human beings. There are males whose other half is male, females whose other half is female, and people whose other half is of the opposite sex. The speech describes the feelings of intimacy and joy with which the lost other halves greet one another, and describes the activity of sexual intercourse as a joyful attempt to be restored to the lost unity of their original natures. This is so no less for the same-sex than for the opposite-sex couples: in all cases, lovemaking expresses a deep inner need coming from nature, and in all cases the couples, so uniting, have the potential to make a valuable civic contribution.

Id.

[397] *See* David L. Cohn, *Are Americans Polygamous?*, A. MONTHLY, Aug. 1947, at 30, 32.

the validity of a void marriage.[398] It is entirely possible for even a covenant-married man to form a new relationship on the side, and when he dies the putative spouse doctrine will ensure that both of his wives are in for a surprise—they have to share.[399] Just imagine for a second the competing claims of a married spouse, a common law married spouse, a party to a civil union, a *Marvin* cohabitant and a putative spouse after an intestate death in a state that recognized all these forms. Worried about this possibility, on May 28, 2008, the Liberty Counsel, in a brief to the California Supreme Court, argued that

> [t]he California same-sex marriage ruling has created a system in which a same-sex couple (or even an opposite-sex couple) could be married, in a domestic partnership, and in a separate civil union all at the same time . . . . [A] person could have the rights, benefits and obligations of marriage with one same-sex partner in a California domestic partnership and/or a California marriage, and all the rights, benefits and obligations of a civil union with a different partner, especially since California has no residency requirement for marriage licenses. As a result, three or more people could claim community property rights in the same piece of property, parental rights over children, and the rights to alimony, child support, death benefits, insurance proceeds and employee benefits belonging to one of the other parties . . . . Domestic partnerships are available to same-sex couples over the age of 18 and to opposite-sex couples if at least one person is age 62 or older . . . . [A]n unmarried person over the age of 18 and an unmarried person over the [age of] 18 who are not otherwise disqualified are capable of consenting to and consummating a marriage . . . . [D]omestic partnerships are not marriages. Therefore, a person who is part of a . . . domestic partnership is "unmarried" and able to enter into

---

[398] *See* Leslie Joan Harris, June Carbone & Lee E. Teitelbaum, Family Law 255-258 (4th ed. 2010).

[399] This has happened in Louisiana. *See* In re Succession of Jones, 08-1088 (La. App. 3 Cir. March 4, 2009); 6 So. 3d 331, *quoted in* Halley, *Behind the Law of Marriage*, *supra* note 330, at 58.

> marriage with another person over the age of 18 . . . . [A] person can enter into a domestic partnership if he or she is not married to someone else or is not a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity. While this would mean that [people] could not enter into a domestic partnership after they are already married, it does not prevent them from getting married after entering into a domestic partnership . . . . [C]ouples who are part of domestic partnerships or civil unions in other states would be able to get married in California. This would mean that [if] Parties A and B . . . are in a Vermont civil union (or New Jersey or Connecticut civil union), and Parties C and D are also in a civil union, and Parties E and F are also in a civil union, then A and C could come to California to get married, and at the same time B and F could get married, and D and E could get married, all at the same time . . . . Therefore, the California same sex marriage ruling legitimizes polygamy and polyamory.[400]

According to some then, the end has already begun, and we are well on our way to plural marriage.[401]

The question of whether or not we should be monogamous is very hard to answer. Evolutionary scientists have offered explanations for why humans may pair up in order to promote the survival of their individual gene pools.[402] The basic story of

---

[400] Petition for Rehearing & Motion for Stay, *In re* Marriage Cases, S14799, *available at* http://www.lc.org/media/9980/attachments/motion_stay_casct052908.pdf.

[401] The idea is not so farfetched. One municipality in London has already considered extending domestic partnerships to more than two at a time. *See* Jan Battles, *Cork Opens Door to Gay Couples*, SUNDAY TIMES, Feb. 6, 2000 (describing how Cork considered domestic partnership bill that would recognize affiliations with more than two partners). Canada considered something very similar in the 'Beyond Conjugality' Report. *See* L. COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), *available at* http://ssrn.com/abstract=1720747.

[402] *See, e.g.*, SARAH HARDY, MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION (1999); DESMOND MORRIS, THE NAKED APE: A ZOOLOGIST'S STUDY OF THE HUMAN ANIMAL (1967) [hereinafter MORRIS, THE NAKED APE]; MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE (1993) [hereinafter RIDLEY, THE RED QUEEN]; ROBERT WRIGHT, THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY (1994) [hereinafter WRIGHT, THE MORAL ANIMAL].

adaptive monogamy is quality over quantity.[403] Due to the relatively lengthy human gestation period and childhood, women want the support and protection of men during this vulnerable time;[404] pairing with one provider helps females ensure the health, safety, and development of their offspring.[405] Thus, it is advantageous for females "to develop a pairing tendency."[406] Males might be monogamous because it is more democratic and leads to better cooperation among males,[407] or because they too may want to protect their offspring,[408] or in order to ensure that no other male is impregnating the female and thereby diverting her resources,[409] or simply in order to be more sexually successful with females who presumptively prefer males that will pair-bond.[410] To be sure though, there are equally compelling counter-narratives about the evolutionary superiority of plural marriage, particularly polygyny,[411] for the development of the species. Over-reliance on the science pointing towards monogamy then would seem to be agenda driven. Once again, for the purposes of this discussion, we will seek to avoid theory and look at actual practice in order to see if we really are or really want to be an exclusively

---

[403] Emens, *Monogamy's Law*, *supra* note 7, at 294.
[404] *See* MORRIS, THE NAKED APE, *supra* note 401, at 63, *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 294.
[405] WRIGHT, THE MORAL ANIMAL, *supra* note 401, at 58-59.
[406] *See* MORRIS, THE NAKED APE, *supra* note 401, at 64.
[407] RIDLEY, THE RED QUEEN, *supra* note 401, at 199.
[408] *Id.* at 214.
[409] *Id.* at 213-14.
[410] WRIGHT, THE MORAL ANIMAL, *supra* note 401, at 63.
[411] *See* Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 807-13 (2000) (reviewing the scientific accounts that men are inclined to spread their seed as far and wide as possible in order to ensure that they reproduce).

monogamous nation. Good law follows reality rather than forces it; whether we should be is less important than whether we actually are.

The evidence against the assertion that we are, in fact, a monogamous nation starts with the evidence against that ideal that some wistfully hold to be even higher than monogamy—for example, the concept of supermonogamy, or the one-and-only-one soulmate.

As noted above,[412] increasingly high divorce rates and the prevalence of remarriage indicate, at the very least, a form of serial marriage, or what some have called "polygamy on the installment plan."[413] As one modern family law scholar put it, Americans believe in a "fundamental right to marry, and marry, and marry."[414] A recent study showed that for Americans 25 and older, 52 percent of men and 44 percent of women were remarried.[415] In classical monogamy, women and men meet early in their

---

[412] See supra footnotes 81-82 and accompanying text.

[413] *See* Jessica Martin, *Can U.S. Law Handle Polygamy*, STATES NEWS SERV., June 21, 2011, *available at* http://www.highbeam.com/doc/1G1-259353349.html (quoting Adrienne Davis, the William M. Van Cleve Professor of Law at Washington University in St. Louis).

[414] Mary Ann Glendon, *The New Marriage and the New Property*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL AND ETHICAL CHANGE 59, 63 (John M. Eekelaar & Sanford N. Fetz eds., 1980).

[415] U.S. CENSUS BUREAU, SUMMARY OF STATISTICS ON MARRIAGE, DIVORCE AND REMARRIAGE AFTER DIVORCE (2007), *available at* http://www.remarriage.com/Remarriage-Facts/remarriage-after-divorce.html.

Additional interesting numbers include the fact that 42% of adults have a step-relationship—either a stepparent, a step or half sibling, or a stepchild. This translates to 95.5 million adults. 13% of adults are stepparents (29-30 million); 15% of men are stepdads (16.5 million) and 12% of women are stepmoms (14 million). 10% of women in the US have had three or more marriages, divorces, or cohabiting partners . . . by age 35 (the next highest industrialized nation is Sweden at 4.5%). *See* K. Parker, *A Portrait of*

lives, marry as virgins, forgo all other sexual relationships, and remain sexually fidelitous until both are dead. Serial marriage differs from classical monogamy in that most contemporary serial monogamists do not expect to have a sole sexual partner during their lifespan, do not expect virginity at marriage, and consider divorce as a viable option to end unbearable relationships. This cultural dynamic can—and often does—leave children from prior families economically and emotionally disadvantaged in favor of subsequent ones[416] and, because men tend more than women to procreate with each new marriage, 'serial polygamy' has generated dynamics not unlike those feared from its contemporaneous variation.[417]

The child welfare arguments currently made against polyamory were also made against no-fault divorce half a century ago[418] and, in fact, nowadays no-fault divorce is being used by pro-polygamists to argue for more rights and more legal recognition and

---

Stepfamilies, PEW RESEARCH CTR. (2011), *available at* http://pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/.

[416] When the Family Research Council's Marriage & Religion Research Institute (MARRI) released its second annual Index of Family Belonging and Rejection in 2011, they found that "States with higher scores on the Index have lower child poverty rates, and states that score low have high child poverty rate . . . . A father is motivated to work harder to support a child when he is the biological parent of the child and lives with the child and mother." Jennifer LecLaire, *Survey Pinpoints Root of Broken Families*, CHILDHOOD POVERTY CHARISMA NEWS, Nov. 18, 2011, *available at* http://www.charismanews.com/culture/32380-survey-pinpoints-root-of-broken-families-childhood-poverty.

[417] *Id.*

[418] *See* 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), *cited in Davis*, 133 U.S. at n.245.

protection.[419] In other words, the 'harms' that we often speak of when contemplating plural marriage are not uniquely generated by, or even demonstrably more prevalent in, contemporaneous plural marriages; competition among interconnected families for emotional and economic resources has long been found in the serial version of plural relationships as well.

Arguments that serial marriage may be seen as a form of plural marriage, or at least as representing some of the same theoretical problems that contemporaneous plural marriages might face, have even made it to court.[420] Regardless of whether it is or is not like its contemporaneous form, even serial polygamy belies the fantasy of one man and one woman forever bound in blissful supermonogamy. It should also be noted that serial plural marriage can often lead to contemporaneous parental non-monogamy from the perspective of the children, in the creation and forming of blended families by cumulative relationship-building.[421]

---

[419] R. Scott Lloyd, *BYU Professor Speaks on LDS Polygamy*, DESERET NEWS, May 24, 2009, *available at* http://www.deseretnews.com/article/705306225/BYU-professor-speaks-on-LDS-polygamy.html?pg=all.

[420] *See, e.g.*, *Potter*, 585 F. Supp. at 1142 n.7 (noting that plaintiff, fired from his job as a police officer for practicing polygamy, had sought the admission during discovery that "the high rate of divorce in the United States has often turned today's American familial relationships into a form of serial polygamy"), *aff'd*, 760 F.2d 1065 (10th Cir. 1985) (affirming district court's rejection of plaintiff's free exercise and privacy-based challenge to his termination); David G. Maillu, *The Whiteman's Polygamy*, *in* OUR KIND OF POLYGAMY 29 (1988).

[421] Emens, *Monogamy's Law*, *supra* note 7, at 298.

In that same vein, another important number to consider is the number of people that are currently practicing what some have called 'de facto polygamy.'[422] As noted above, individuals have a constitutional right to divorce and remarry as many times as they desire, regardless of whether they are supporting prior families.[423] They also have the unlimited right to be intimate with whomever they want[424] and even to reproduce outside of marriage, regardless of any concerns about their children becoming burdens to the welfare system.[425] Aside from the countless people who cohabit with, and sometimes reproduce with, multiple people over the course of their lives (these are not really analogous to plural marriages, as these individuals do not have or necessarily want the same commitment and identification as a unit) there are many long-term polyamorous units who make the most of this system, and, although they may have semi-public commitment ceremonies and internally consider themselves 'married,' are careful not to hold themselves out as married in any official way.[426] By behaving in this manner, they get to avoid prosecution and live their lives in a state of de facto plural marriage.

---

[422] *See* AUDREY CHAPMAN, MAN SHARING (1986).

[423] *Compare Zablocki*, 434 U.S. at 375-77 (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, in his classic article, *The Freedom of Intimate Association*, *supra* note 138, at 667, found there is a constitutional right to remarry implied in *Zablocki*. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2046 (2010) [hereinafter Davis, *Regulating Polygamy*].

[424] Subject, obviously, to some limitations, such as non-consenting partners.

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

[426] *See* Elaine Cook, *Commitment in Polyamory*, ELEC. J. HUM. SEXUALITY 8 (2005).

According to one study in Newsweek, there are approximately half a million such people living in the United States.[427]

Both de facto plural marriage and serial marriage enjoy strong legal protection.[428] Since Lawrence v Texas in 2003,[429] which made consensual private sexual activity by adults completely legal, most states have purged their codes of laws regulating cohabitation, sodomy, and fornication between unmarried adults.[430] People are free to live in committed sexual relationships with as many or as few people as they would like.

The next hard fact that we have to look at in terms of defining our society as really or only nominally monogamous is the prevalence of adultery. Although it is hard to get good numbers because of the nature of the question, studies consistently say that the numbers are quite high. Estimates of how many people have committed adultery at one time or another range from 20 percent to 75 percent of the American adult population.[431] We are no longer even shocked when we discover that our leaders have

---

[427] *See* Jessica Bennett, *Only You.*, *supra* note 361.

[428] *See Zablocki*, 434 U.S. at 375–77 (holding unconstitutional statute forbidding individuals with child custody obligations from marrying without court approval). *See also* State v. Oakley, 635 N.W.2d 760; Devon A. Corneal, *Limiting the Right to Procreate: State v. Oakley and the Need for Strict Scrutiny of Probation Conditions*, 33.2 SETON HALL L. REV. (2003), *available at* http://erepository.law.shu.edu/shlr/vol33/iss2/5 (discussing the possible exception in probation conditions).

[429] *Lawrence*, 539 U.S. at 558.

[430] Ethan Bronner, *Adultery, An Ancient Crime That Remains on Many Books*, N.Y. TIMES, November 14, 2012, *available at* http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html?_r=0.

[431] *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L., 45, 55 (1991) (noting that "[h]alf of all husbands report having committed adultery" and that "[s]omewhere between a third to forty percent of all wives say they have been unfaithful"); *see also* David L. Weis,

been unfaithful to their partners.[432] Though the failures of monogamy are far from universal, they are, at the very least, not uncommon—and while adultery is still a crime in 23 states (in most it is a misdemeanor, while in Idaho, Massachusetts, Michigan, Oklahoma, and Wisconsin it is a felony), in the wake of Lawrence, most courts have decided to give adultery a rather wide berth.[433] From a functional perspective, our firm belief in easy access to divorce and our ambivalence towards cracking down on adultery indicate that, even for many of the people who may profess the one-and-only-one ideal, there are plenty of other considerations involved in the decision of whether or not to be with one and only one person forever, or even ever. It is not, then, so absurd to consider the possibility of alternative structures, especially if those structures include some of the

---

Adult Heterosexuality, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF SEXOLOGY 1498, 1508 (Robert T. Francoeur ed., 1997), *available at* http://www2.hu-berlin.de/sexology/ ("Researchers [of adultery in America] have reported lifetime prevalence rates from as low as 20 percent . . . to nearly 75 percent . . . ." The American data on adultery are consistent with those of other major western nations. Dr. Judith Mackay, Senior Policy Advisor for the World Health Organization, reports that "40% of sexually active 16-45 year old Germans admit to having been sexually unfaithful, compared with 50% of Americans, 42% of British, 40% of Mexicans, 36% of the French, and 22% of the Spanish."). Bear in mind that these figures reflect only those subjects who admit to infidelity. *See* Judith Mackay, *Global Sex: Sexuality and Sexual Practices Around the World*, FIFTH CONGRESS OF THE EUROPEAN FEDERATION OF SEXOLOGY (2000), *available at* http://www2.hu-berlin.de/sexology/, *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 376. Adultery has also been part of popular culture for a very long time; we even study it. Homer's *Iliad* and *Odyssey* both revolve around adultery and potential adultery; *see also* Tolstoy's *Anna Karenina*, Hawthorne's *The Scarlet Letter*, and the list goes on and on.

[432] *See List of Federal Political Sex Scandals*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_federal_political_sex_scandals_in_the_United_States, for just a partial list of sex scandals involving American federal politicians.

[433] *See* Lisa Keen, *Petraeus Scandal Conjured Recent LGBT Legal Skirmishes*, WINDY CITY TIMES, Nov. 21, 2012, at 4, *available at* http://www.windycitymediagroup.com/images/publications/wct/2012-11-21/current.pdf.

core elements of the monogamous ideal that we all claim to profess—long-term commitment, unified identity, and love—just without the monogamy.

We now reach, perhaps, the most compelling number in this argument, which is the estimated number of people in the United States who, despite its illegality, are already currently practicing and living in committed plural marriages—the kind of marriages that would be held in court to violate the laws against bigamy. Although, as in the case of adultery, it is hard to get a good number because those who do reveal themselves risk criminal prosecution, estimates range from between thirty thousand and a hundred thousand families, each with at least three people, and usually with many more individuals, in their unit.[434] Combining all of these numbers paints a picture of a society that is, in practice, quite comfortable with practical non-monogamy;[435] this should be especially so when it is committed and involves both love and responsibility.

B. Plural Marriage as a Family System

It is important here to once again stop and differentiate between what plural marriage is and what it is not. Plural marriage is not 'swinging,' where people simply go

---

[434] *See* 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, 132 (2004) [hereinafter Ward, *I Now Pronounce You Husband and Wives*].

[435] I am certainly not arguing that adultery is to be encouraged. I think that David Barash said it well when he wrote: "There is no question about monogamy's being natural. It isn't. But at the same time, there is no reason to conclude that adultery is unavoidable, or that it is good. 'Smallpox is natural,' wrote Ogden Nash. 'Vaccine ain't.' Animals, most likely, can't help "doing what comes naturally." But humans can. A strong case can even be made that we are never so human as when we behave contrary to our natural inclinations, those most in tune with our biological impulses." David P. Barash, *Deflating the Myth of Monogamy*, THE CHRONICLE OF HIGHER EDUC. (2001).

from one sexual partner to another.[436] That, as we have mentioned, is already legal, but is not at all like marriage. The group we are discussing here is looking for something much different. In fact, according to many practitioners, polyamory is not about sex, but about real, committed love.[437] University of Nevada anthropologist and polygamy expert William Jankowiak notes that—regarding people involved in plural marriage in the United States—based on his many years of research in the field, they are not selling a sexual system, but are promoting family and traditional family values.[438]

As Martha Ertman points out, just like not every heterosexual dyadic marriage is about, or even necessarily involves, sexual activity, polyamory, "although it literally means 'many' and 'love,' does not impose additional conditions such as sexual relations."[439] The only criteria are people who organize their intimate lives together and are bonded by love, regardless of the extent of the arrangement's sexual elements.[440]

---

[436] *See* Paula C. Rust, *Monogamy and Polyamory: Relationship Issues for Bisexuals*, *in* BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 127, 139 (Beth A. Firestein ed., 1996).

[437] Christian Klesse, *Polyamory and its 'Others': Contesting the Terms of Non-Monogamy*, 9.5 SEXUALITIES 565, 565-83 (2006). The term polyamory came into general use during the 1990s, first appeared in a footnote in legal scholarship in 1997, *see* Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 371 n.161 (1997), and first appeared in an article in 2000. *See* Martha Ertman, *Contract Sports*, 48 CLEV. ST. L. REV. 31, 31 (2000).

[438] William Jankowiak & Emilie Allen, *Adoring the Father: Religion and Charisma in an American Polygamous Community*, *in* ANTHROPOLOGY AND THEOLOGY: GOD, ICONS, AND GOD-TALK 293-313 (Walter Randolph Adams & Frank Salamone eds., 2000), *quoted in* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 112.

[439] Ertman, *Marriage as a Trade*, *supra* note 324, at 124-25.

[440] *Id. See also* Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. UNIV. L. REV. 439, 454 (2003) [hereinafter Strassberg, *The Challenge of Post-Modern Polygamy*] (asserting that "the fundamental value of polyamory is relationship, particularly loving relationships," and

Loving More, a national polyamory support organization, which reports a rate of 1,000 hits per day on its website and boasts a circulation of 10,000 readers for its eponymous magazine,[441] defines "Poly" as:

> 1: many or several 2: Short for Polyamory 3:The relationship orientation of people who love and want to be intimate with more than one person at a time 4: A relationship that is a non-monogamous relationship 5: A person that is either in or at least interested in a multi-partnered relationship and family.[442]

They further define "Poly-Family" as:

> 1: a group polyamorous people all the people living in or sharing life experiences in the same home or household 2: a social unit consisting of multiple romantically involved adults (may or may not all be sexually/romantically involved with each other) (emphasis added) 3: when children are present the term includes others adults, besides blood or birth parents, who are responsibly involved with the child or children, most adult take an active role in child rearing 4: a group of people related by common commune, tribe, clan, lineage, ancestry, relatives, commitment or marriage 5: a sharing of living expenses and property.[443]

In its Frequently Asked Question section, in response to the question ('What's the point of Polyamory—sex with lots of people?') the website notes that

> [t]he point is love, romance, intimacy and affection with more than one person, openly and ethically by mutual agreement all around. Polyamory is about sex to the same degree that any romantic relationship is about sex. For some, sex is a driving factor in relationships. For others, romance

---

that "[t]he focus of polyamory is on 'having and maintaining loving relationships that may or may not be sexual . . . .'"). *Id.*

[441] Loving More is the oldest magazine in the world dedicated exclusively to responsible multi-partner relationships. *See* LOVING MORE, http://www.lovemore.com/aboutus/ (last visited May 12, 2013).

[442] *Terms*, LOVING MORE, http://www.lovemore.com/polyamory/terms/ (last visited May 12, 2013).

[443] *Id.*

> and emotional or spiritual connection are more important. The term "polyamorous" does mean that the focus is on loving relationships.[444]

Traditionally, bans on plural marriage hinge on two considerations: an exclusivity axis and a numerosity axis. Criminal law is instructive here: exclusivity has to do with having sexual relations with someone outside of the marital union. In the legal realm, adultery statutes target violations of the exclusivity norm.[445] "Numerosity" has to do with the number of people in the marital relationship in the first place—bigamy statutes target violations of these norms.[446] In our unbundled paradigm then, the plural model of marriage defended here is an exclusive model analytically distinct from monogamous

---

[444] *FAQs*, LOVING MORE, http://www.lovemore.com/faq/ (last visited May 12, 2013).

[445] Emens, *Monogamy's Law*, *supra* note 7, at 308. At least twenty-three states and the District of Columbia still have laws criminalizing adultery in some form. *See* ALA. CODE § 13A-13-2 (2003); ARIZ. REV. STAT. ANN. § 13-1408 (West 2003); COLO. REV. STAT. § 18-6-501 (2003); D.C. CODE ANN. § 22-201 (2001); FLA. STAT. ANN. § 798.01 (West 2000); GA. CODE ANN. §16-6-19 (1990); IDAHO CODE § 18-6601 (2003); 720 ILL. COMP. STAT. ANN. 5/11-7(a) (West 2002); KAN. STAT. ANN. § 21-3507(1) (2002); MD. CODE ANN., crim. § 10-501 (2002); MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2000); MICH. COMP. LAWS ANN. § 750.30 (West 2003); MINN. STAT. ANN. § 609.36 (West 2004); MISS. CODE ANN. § 97-29-1 (1999); N.H. REV. STAT. ANN. § 645:3 (1996); N.Y. PENAL LAW § 2.55.17 (McKinney 2004); N.C. GEN. STAT. § 14-184 (2002); N.D. CENT. CODE § 12.1-20-09 (1997); OKLA. STAT. ANN. tit. 21, § 871 (West 2002); R.I. GEN. LAWS § 11-6-2 (2002); S.C. CODE ANN. § 16-15-60 (2003); UTAH CODE ANN. § 76-7-103(1) (1999); VA. CODE ANN. § 18.2-365 (1996); W. VA. CODE ANN. § 61-8-3 (2000); *see also* Kelly, *Virginia Adultery Case Roils Divorce Industry*, *supra* note 387, at B8. Prosecutions for adultery are rare. *See, e.g.*, Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 45 n.5, 53 nn.54-57 (1991); *But see* Kelly, *Virginia Adultery Case Roils Divorce Industry*, *supra*. They are, however, vigorously pursued in specialized contexts such as the military. *See* Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 469-70, 476-77 (1998); Winner, *Beds With Sheets But No Covers*, *supra* note 387, at 1073-74.

[446] Emens, *Monogamy's Law*, *supra* note 7, at 308. While both adultery and bigamy laws require the party at issue to be married, some bigamy laws do not require an additional marriage or even attempted marriage. In five states, the crime of bigamy covers mere extramarital cohabitation by a married person. *See* COLO. REV. STAT. § 18-6-201 (2003); GA. CODE ANN. § 16-6-20 (2003); R.I. GEN. LAWS § 11-6-1 (2002); TEX. PENAL CODE ANN. § 25.01 (Vernon 2003); UTAH CODE ANN. § 76-7-101 (1999).

marital relationships, primarily in the number of the participants, not in the nature of their commitment.

It is also important here to note that while polygyny does not include all of polyamory, polyamory does include even healthy polygynous lifestyles (provided, at least, that they involve consenting adults and are not abusive or exploitative). As such, the polyamorous movement has many strange bedfellows that do necessarily even define themselves as being 'polyamorous.' The dominant domestic voices urging not only decriminalization but also full legal recognition of plural marriage remain religious ones.[447] 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.[448] 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, however, rejected the ban as breaking with Church founder Joseph Smith and his 1848 Declarations and Covenants and created fundamentalist offshoots of Mormonism that continued to embrace polygamy and to practice it underground.[449] These non-LDS sects of Mormonism organized their faith around plural "celestial marriage," or "the Principle,"

---

[447] Davis, *Regulating Polygamy*, *supra* note 422, at 1969-70.

[448] *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 111-12 (2002).

[449] Davis, *Regulating Polygamy*, *supra* note 422, at 1970.

arguing that it was at the core of their religious faith, structure of government, and constitutional freedom.[450] While less vocal and visible than Mormon polygamists, other religious groups also endorse polygamy as mandated—or permitted—by their faith. These include some evangelical Christians, members of the African Hebrew Israelites of Jerusalem, and Muslims, affiliated both with the Nation of Islam and also Sunni sects.[451] The Hmong from Laos immigrated to the United States shortly after South Vietnam fell to North Vietnam in the mid-1970s; allied with the U.S. during the Vietnam War, the Hmong engaged in combat against the North Vietnamese army before coming to these shores. For the most part, they practice a traditional form of spirituality called shamanism, and it is now estimated that several thousand Hmong are living in

---

[450] *See* Scott Anderson, *The Polygamists: An Exclusive Look Inside the FLDS*, NAT'L GEOGRAPHIC, Feb. 2010, at 34, 46-47, *available at* http://ngm.nationalgeographic.com/2010/02/polygamists/anderson-text.

[451] *See* Kay S. Hymowitz, *I Wed Thee . . . and Thee . . . and Thee*, WALL ST. J., Oct. 18, 2004, *available at* http://online.wsj.com/article/SB109805785552147645.html. *See also* Benyamin Cohen, *The Prince and I*, AMERICAN JEWISH LIFE, March/April 2007, *available at* http://www.ajlmagazine.com/content/032007/blackhebrews.html (discussing African Hebrew polygamists in Southwest Atlanta, Georgia); Engy Abdelkader, *American Muslim Sister-Wives? Polygamy in the American Muslim Community*, HUFFINGTON POST RELIGION BLOG, (October 17, 2011, 10:07 AM), http://www.huffingtonpost.com/engy-abdelkader/american-muslim-sisterwiv_b_1001163.html; Andrea Useem, *What To Expect When You're Expecting a Co-Wife*, ON FAITH- RELIGION BLOG OF THE WASH. POST, (July 24, 2007, 12:12 PM), http://www.slate.com/articles/life/faithbased/2007/07/what_to_expect_when_youre_expecting_a_co wife.2.html (noting that prominent American Imam Siraj Wahhaj, who was the first Muslim cleric to ever offer the invocation at the U.S. House of Representatives, was quoted in Paul Barrett's 2007 book as saying that he performs polygamous unions at his Al-Taqwa mosque in Brooklyn, N.Y. "If a man can have a hundred girlfriends, and it's legal, I don't say you can't have more than one wife."). *See* PAUL BARRETT, AMERICAN ISLAM (2007).

polygamous marriages in the United States, especially in Minnesota, where they originally settled.[452]

What many of these groups pushing for plural marriage acceptance have in common with their religiously neutral counterparts, however, is that, far from assuming that plural marriage weakens the family unit, modern day incarnations of more traditional polygamist movements, along with modern polyamorous groups, even tend to believe that it has exactly the opposite effect.[453] Some groups in the United States have urged polygamy as a way of actually strengthening and preserving the 'traditional' family. In the African American community in Philadelphia, for instance, "distorted gender ratios, lack of economic options, and sexual norms have reduced black marriage to a statistical oddity. The result: 67.1% of black children are born outside of marriage and 34.5% grow up in poverty."[454] As an outcome of this reality, rising numbers of people in Philadelphia's African American community have been embracing polygamy in

---

[452] MIRIAM ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 166 (2008) [hereinafter ZEITZEN, POLYGAMY].

[453] This is aside from the fundamentalist belief that plural marriage leads to salvation. *See* VAL WALDECK, *MORMONS: WHAT DO THEY BELIEVE?* (Kindle ed. 2011).

[454] Davis, *Regulating Polygamy*, *supra* note 422, at 1970 (quoting U.S. CENSUS BUREAU, 2007 AMERICAN COMMUNITY SURVEY tbl. B13002B (2007), *available at* https://www.socialexplorer.com/pub/ReportData/metabrowser.aspx?survey=ACS2010_5yr&ds=ACS10_5yr&header=True.

recent years,[455] mostly in an attempt to foster a black communal identity, and to provide black husbands and fathers for black women and children.[456]

Some see the African American move to polygamy as a less than ideal option. Adrienne Wing, for instance, suggests that, in light of the widespread imprisonment and impoverishment of African-American men, some African-American women might just prefer polygynous marriages to not finding an appealing husband at all.[457] And while there may be some truth to this and, in fact, this may be somewhat analogous to ancient societies where polygyny was practiced in times of need, such as after a war that

---

[455] Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn Toward Polygamy*, NAT'L PUB. RADIO (May 28, 2008), http://www.npr.org/templates/story/story.php?storyId=90886407. And it is not just Philadelphia either; *see* Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES, March 23, 2007, *available at* http:// www.nytimes.com/ 2007/ 03/ 23/ nyregion/ 23polygamy.html? pagewanted = all.

[456] *See* EMPRESS TSAHAI, POLYGAMY AS A CHOICE FOR THE BLACK FAMILY (2002), *available at* http://www.rastafarispeaks.com/newspapers/articles/polygamy2002.html.

[457] Adrienne 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, 858 (2001)

> (In my view, African Americans today face conditions in which de facto polygamy can flourish. A disproportionate number of our men are unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage. More of our young women have obtained higher educations than the young men. Socially, we as Black women, like most women, have been reared to want men of an equal or higher social status. We have also been socialized to prefer our own men, to men from other racial/ethnic groups. A wealth of well employed and educated Black women seek a small pool of "suitable" men. The net result is that the few men have a surplus of women from which to select. They can be either de facto polygamists or womanizers. They can have children with multiple women and support none of them. Since the Civil Rights movement, more black men than women have taken advantage of the opportunity to date or marry outside the race, an act that could have resulted in a lynching in the past. The net result is that only 39% of Black women are married, compared to 60% of white women, and 67% of Black children are born out-of-wedlock compared to 25% of white babies. In the U.S. Constitution, Blacks were counted as three-fifths of a person for representation purposes. Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man.).

left many women husbandless,[458] lest anyone think that this is just an argument from necessity or only an arrangement conditioned on pragmatism, at least some of the people in those relationships themselves disagree. Take Zaki, for instance, a polygamous man who describes that "[t]here are a lot of blessings in [his polygamous relationship] because you're helping legitimize and build a family that's rooted in values and commitment. And the children that come out of those types of relationships only become a benefit to society at large."[459] Patricia Dixon-Spear, a professor in the African American Studies Department at Georgia State University, believes that this is important to the African American community from a both a cultural and a historical perspective, and says that women, especially in the African American community, will achieve greater equality in the United States only if both plural marriage and monogamy live side-by-side.[460] She writes that, from a traditional African perspective, "Because the Greco-Roman and European-American forms of patriarchy are often used as the basis of feminist analysis, the social structures and practices of peoples in other cultures throughout the world are often inadequately examined.[461]

C. Feminism and Plural Marriage: A Fuller Picture

---

[458] Gamal A. Badawi, Polygamy in Islamic Law (1976); *see also* Zeitzen, Polygamy, *supra* note 449.
[459] *See id.*
[460] Patricia Dixon-Spear, We Want for Our Sisters What We Want for Ourselves: African American Women Who Practice Polygyny by Consent xxxi (2009).
[461] *Id.*

Meanwhile, even outside of the black community, some radical feminists agree, at least with the argument about equality, and are urging polygamy as a potential weapon in dyadic marriage's ongoing battle of the sexes.[462] Adrienne Davis notes that, 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.[463] 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. Polyamory presents another option.[464] It can generate stronger partnership models with greater role specification within marriage, create a cooperative environment with a greater number of adults committed to balancing work/family obligations, and can thereby allow more leisure time for each spouse.[465] In this view, polygamy arguably has the potential to "queer" marriage and help women break out of the stereotypical

---

[462] Victoria Robinson, *My Baby Just Cares For Me: Feminism, Heterosexuality and Non-Monogamy*, 6.2 J. GENDER STUDIES 143, 143-57 (1997) [hereinafter Robinson, *My Baby Just Cares For Me*].

[463] *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 47-48, 57, 66-72, 272 (2000) (describing studies and statistics on "the leisure gap"). *See also* Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSP. 3, 7–8 (2007) (describing 2005 survey showing sixteen hours per week of housework for women versus less than eleven hours for men—a thirty percent gap), *quoted in* Davis, *Regulating Polygamy*, *supra* note 422, at 1972 n.46.

[464] Elisabeth Sheff, *Strategies in Polyamorous Parenting*, *in* UNDERSTANDING NON-MONOGAMIES 169, 169-81 (Meg Barker & Darren Langdridge eds., 2010) [hereinafter Sheff, *Strategies in Polyamorous Parenting*]; *see also* Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity, and Power*, 34.3 J. CONTEMP. ETHNOGRAPHY 251, 251-83 (2005) [hereinafter Sheff, *Polyamorous Women*].

[465] Sheff, *Polyamorous Families*, *supra* note 181.

gender roles that may be holding them back.[466] The feminist argument also brings us back full circle to fundamentalist polygamous Mormonism. While the gender-based hierarchy of traditional Mormon polygyny might, at first glance, make it seem incompatible with the typical liberal polyamorous dedication to principles of equality and individual growth,[467] not everyone agrees that this is so. Elizabeth Joseph is a lawyer from Big Water, Utah. In 1991, she wrote an article in the New York Times describing life with her polygamous husband Alex and his eight other wives.[468] She writes:

> Polygamy, or plural marriage, as practiced by my family is a paradox. At first blush, it sounds like an ideal situation for the man and an oppressive one for the women. For me, the opposite is true . . . . While polygamists believe that the Old Testament mandates the practice of plural marriage, compelling social reasons make the life style attractive to the modern career woman . . . . Pick up any women's magazine and you will find article after article about the problems of successfully juggling career, motherhood, and marriage. It is a complex act that many women struggle to manage daily . . . . In a monogamous context, the only solutions are compromises. The kids need to learn to fix their own breakfast, your husband needs to get used to occasional microwave dinners, you need to divert more of your income to ensure that your pre-schooler is in a good day care environment.[469]

---

[466] Davis, *Regulating Polygamy*, *supra* note 422, at 1973.

[467] *See* Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 355 (2003) [hereinafter Strassberg, *The Crime of Polygamy*] (noting that some poly commentators exclude polygyny "from the polyamory umbrella due to its sexism and heterosexism").

[468] Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31, [hereinafter Joseph, *My Husband's Nine Wives*], *available at* http://engl110fall11.wikispaces.com/file/view/My+Husband's+Nine+Wives.pdf.

[469] *Id.*

Polygamy, on the other hand, provides "a whole solution," in that, "it enables women, who live in a society full of obstacles, to fully meet their career, mothering and marriage obligations."[470]

To be sure, Elizabeth Joseph's voice is not the only one coming out of the polygamous Mormon society; there are many other accounts that tell the tale of a strongly male-dominated patriarchal system.[471] But economists and legal scholars have also weighed in with the claim that plural marriage may benefit women. Gary Becker has argued that polygyny benefits women because their potential income is greater than it would be under monogamy,[472] while Carol Rose and others have proposed that polygynous marriage could give women more market choice, so that no woman has to

---

[470] *Id.*

[471] *See, e.g.*, Bergmann, supra note 113; Iversen, supra note 44, at 518 (observing that "[o]ne cannot truly apply the term 'feminist' to the Mormon plural wives because feminism and patriarchal religion are incompatible"); Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 283 (1998); *cf.* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 47-49 (2001) (describing the popularity of comparisons between polygamy and slavery in nineteenth century novels and political rhetoric). This criticism overlaps with the argument that polygamy necessarily leads to despotism rather than democracy. *See, e.g.*, Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997) [hereinafter Strassberg, *Distinctions*]; Udell, *supra*, at 283.

[472] *See* Gary S. Becker, *Polygamy and Monogamy in Marriage Markets*, *in* A TREATISE ON THE FAMILY 80, 81-104 (1991). *See also* 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. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 106-07, n.27 (2006) [hereinafter Sigman, *Everything Lawyers Know About Polygamy Is Wrong*] ("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) [hereinafter Duncan, *The Positive Effects of Legalizing Polygamy*].

marry a "loutish" (lazy) man.[473] Echoing some of what Joseph describes when she talks about her cozy living arrangements with her co-wife, Delinda,[474] Bonnie Honig has urged that the institution of polygamy can sometimes create conditions for solidarity among women, whereas monogamy "isolates women from each other and privatizes them."[475]

Some see the societal decision to remove the choice of polygamy from women as overreaching and paternalistic. Both in nineteenth century America and today, some adult women prefer polygamy.[476] Some prefer it for reasons that are strictly religious, e.g., to be saved from damnation or obtain privilege of celestial eternity, whereas others are more pragmatic, e.g., to obtain the support of sororal networks or provide for children.[477] For a society that prides itself on its liberty guarantees though, prohibiting plural marriage infantilizes men and women, declaring them incapable of providing consent and foreclosing true choice. As Ronald C. Den Otter, a political science

---

[473] *See, e.g.*, Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 432 (1992) (pointing out that, under a system of one-man/one-woman marriage, some women will end up with "loutish" husbands who do not share in household duties, and observing that "even though they phrased it somewhat differently, some nineteenth-century Mormons thought that the [men's] greater propensity for loutishness was a pretty good reason for plural marriage, where the more cooperative [men] got lots of wives and the less cooperative ones presumably got none"); *see also* Julie Dunfey, *Living the Principle of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century*, 10 FEMINIST STUD. 523, 529 (1984) (reporting nineteenth-century Mormon women's praise of polygyny's potential for pairing the few "good men" with the many "good women"), *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 376.

[474] Joseph, *My Husband's Nine Wives*, *supra* note 467, at A31. In the evenings they tend to eat a simple dinner because, "We'd rather relax and commiserate over the pressures of our work day than chew up our energy cooking and doing a ton of dishes."

[475] Bonnie Honig, *Complicating Culture*, BOSTON REV., Oct/Nov. 1997, at 30, 31.

[476] Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, *supra* note 471, at 166.

[477] *Id.*, *quoted in* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 160.

professor at California Polytechnic State University put it: "In a liberal society, there is a presumption in favor of letting people decide for themselves what kind of romantic or familial relationships they want to have, even if those relationships are unconventional or hard to fathom."[478]

At the end of the day, rejecting plural marriage because of feminism is overly simplistic and such arguments may actually cut both ways.[479] Particularly in polyamorous relationships (as opposed, perhaps, to traditional polygynous ones)[480] some female participants specifically embrace the practice of non-monogamy as part of a feminist commitment to self-possession.[481] They actually see traditional dyadic marriage

---

[478] Ronald C. Den Otter, Is There Really Any Good Argument Against Plural Marriage? (2009).

[479] *See, e.g.*, Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10 Feminist Stud. 505, 518-19 (1984) (describing how Mormon polygyny is both feminist and anti-feminist).

[480] Although, to be honest, even in traditional Mormonism, female cooperation extends even to courtship, where a wife, along with her husband, will actively woo a prospective new wife for the family. During the wedding, all the wives join hands with the couple, thus sealing their relationship with each other for an eternity. FLDS weddings are described by Bennion:

> Women voice satisfaction in the "Law of Sarah" ceremony, which covenants women to each other for eternity. Ideally, the first wife agrees to link the second wife not only to her husband but also to herself in this life and the next. Through this eternal bond, women are encouraged to work together economically, socially and spiritually and, in some rare cases, sexually. These bonds are enhanced through the common feature of women courting other women as future co-wives.

Janet Bennion, *The Many Faces of Polygamy: An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West*, *in* Modern Polygamy in the United States: Historical, Cultural and Legal Issues 173 (Cardell Jacobson & Laura Burto eds., 2011).

[481] Refocusing the family away from monogamous couples is not a new idea. Martha Fineman has persuasively contended that the sexual dyad is extraordinarily fragile, so that families could be and should be organized around other social relationships, such as relations of dependency. *See* Fineman, The Neutered Mother, *supra* note 12.

as problematic.[482] Through this lens, what both the feminist and black-nationalist endorsements of polygamy share is a fascinating combination of pragmatism and identitarian idealism.[483] Echoing our earlier assertion that identity formation is important and could be achieved in non-monogamy, in this understanding, the formation of identity is seen to be crucial in a plural marriage setting, not despite the fact that it is plural, but precisely because it is plural.

Regardless, feminist objections cannot entirely ground the opposition to multiparty marriage any more so than they would incline someone to oppose marriage altogether on the ground that its traditional form does sometimes oppress women.[484] Note, for example, that nearly all reported incidents of marital domestic violence and abuse take place in ostensibly monogamous homes (since other kinds of marriage are illegal, and even if there is abuse, individuals in non-monogamous marriages are unlikely

---

[482] This aspect of polyamory builds in part on a feminist understanding of monogamy as a historical mechanism for the control of women's reproductive and other labor. *See, e.g.*, DEBORAH M. ANAPOL, 5 POLYAMORY, THE NEW LOVE WITHOUT LIMITS 47 (1997) ("Monogamous marriage as we know it today is based on patterns established in Biblical times governing men's ownership of women. In Biblical days the law prescribed that women be stoned to death for taking a lover, but men were allowed as many secondary wives or concubines as they could afford. For most of recorded history, the absolute authority of the husband over his wife has been taken for granted and male violence against disobedient wives has been considered natural and right."); *see also* Robinson, *My Baby Just Cares for Me*, *supra* note 461, at 144 (arguing that "institutionalized monogamy has not served women's best interests. It privileges the interests of both men and capitalism, operating as it does through the mechanisms of exclusivity, possessiveness and jealousy, all filtered through the rose-tinted lens of romance.").

[483] *Id.*

[484] Or legally negate them; *see* William P. LaPiana, *Modern Coverture: Old Wine in Old Bottles*, 16 N.Y.L. SCH. J. HUM. RTS. 181 (1999).

to report it).[485] There are, in fact, no statistics showing that these instances are more likely to occur in a plural marriage setting[486] and, in fact, one recent study suggests that, much like in any other form of relationship, abuses in polygynous societies are the result of "particularly dysfunctional" polygynist families rather than problems inherent to polygyny. [487] In addition, as noted above, plural marriage might offer more protections and bargaining power than traditional dyadic marriage, and so if we are looking for the kinds of harms that plural marriage might generate, this sort of feminist opposition to marriage in general would not necessarily justify even as negative of a response to plural marriage as it does for the plain dyadic structure. There is no reason to assume that plural marriage will cause any more harm to women than marriage does in general, and there is the possibility that, at least for some women who choose it, plural marriage could provide a pathway to a more rewarding life.

---

[485] The Centers for Disease Control and Prevention (CDC) found in a national survey that 34 percent of adults in the United States had witnessed a man beating his wife or girlfriend, and that 14 percent of women report that they have experienced violence from a husband or boyfriend. More than 1 million women seek medical assistance each year for injuries caused by battering. (Federal Bureau of Investigation; U.S. Department of Justice National Crime Victimization Survey (NCVS); Horton, 1995. "Family and Intimate Violence"); Three to four million women in the United States are beaten in their homes each year by their husbands, ex-husbands, or male lovers. "Women and Violence," Hearings before the U.S. Senate Judiciary Committee, August 29 and December 11, 1990, Senate Hearing 101-939, pt. 1, p. 12.; One woman is beaten by her husband or partner every 15 seconds in the United States. (Uniform Crime Reports, Federal Bureau of Investigation, 1991). Statistics and information available online at: http://www.clarkprosecutor.org/html/domviol/facts.htm.

[486] *See Abuse Not Unique to Polygamy, B.C. Court Told*, The Canadian Press, December 15, 2010, *available at* http://www.cbc.ca/news/canada/british-columbia/story/2010/12/15/bc-polygamy-hearing.html.

[487] Irwin Altman & Joseph Ginat, Polygamous Families in Contemporary Society (1996), *quoted in* Strassberg, *The Crime of Polygamy*, *supra* note 466, at 398.

If the harms people are worried about are not harms against women, then what are they? The next chapter will ask whether, perhaps, when people talk about the third party harms inherent in plural marriage, they are really referring to the potential generation of third-party harm to children.

Chapter 4: Children of Plural Marriages; A First Empirical Look

While public opinion actually seems to be moving in the direction of favoring consensual adult relationships regardless of numerosity,[488] courts both domestic and abroad are still somewhat worried that when we discuss plural marriage what we are really concerned about is third party harm, specifically harm to children. Leaving aside both the constitutional and regulatory questions involved in legalizing plural marriage, this chapter will begin by addressing some of the common assumptions and misconceptions regarding plural marriage and children from both a legal and social perspective, then present the first empirical study rebutting some of those common claims. This study, as of yet unpublished,[489] is the first attempt at constructing an actual data set for both legal and social-scientific reference in regard to the best interest

---

[488] *See, e.g.*, Paul Harris, *Forget Monogamy and Swinging: We are Seriously Polyamorous*, Observer, Nov. 13, 2005, at 21 (distinguishing polyamory from other non-monogamous sexual behavior); Stanley Kurtz, *Here Come the Brides*, Weekly Standard, Dec. 26, 2005, at 19 (discussing a multi-partner arrangement reported from the Netherlands); Alex Morris, *The Cuddle Puddle of Stuyvesant High School*, N.Y. Magazine, Feb. 6, 2006, http:// newyorkmetro.com/news/features/15589/ (last visited Mar. 11, 2006) (describing non-monogamous teenage behavior); Trevor Stokes, *Love Thy Neighbor? For The Fans of Polyamory, They Count the Ways*, Albany Times Union, Feb. 16, 2006, at A4 (explaining a polyamorous network*). See also Is Monogamy Dead?*, Park City Flipside, Jan. 26-Feb. 9, 2006 (issue dedicated to various forms of non-monogamous relationship styles and practices).

[489] The actual study and an analysis by this author and the author of the study, Dr. Elisabeth Sheff, are forthcoming in Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families; A First Empirical Look*, 4 J. Soc. Deviance 150, 150-243 (2013) [hereinafter Goldfeder & Sheff, *Children of Polyamorous Families*].

of the child, as opposed to allowing courts and counselors to continue relying on hearsay or outdated assumptions.

A. Background Information

In November of 2011, the British Columbia Supreme Court joined the ranks of those who have been actively reconsidering plural marriage as a legitimate familial option.[490] The case involved the polygamous community of Bountiful, B.C., whose members belong to the Fundamentalist Church of Jesus Christ of Latter-Day Saints. In 2007, two successive special prosecutors recommended that the question of whether the ban on polygamy would stand up to a constitutional challenge be considered through a reference question to the B.C. Court of Appeal.[491] In 2008, however, a third special prosecutor went ahead with a criminal prosecution, and Bountiful leaders Winston Blackmore and James Oler were each charged with one count of polygamy. Mr. Blackmore and Mr. Oler petitioned the court, arguing that the province had engaged in "special prosecutor shopping," and the charges against the two men were eventually thrown out. In October, 2009, however, the province itself decided to pursue a reference

[490] Criminal Code of Canada, B.C.S.C. § 293 (2011).

[491] Wendy Stueck, *B.C. Supreme Court Judge to Rule on Landmark Polygamy Case*, THE GLOBE & MAIL, Nov 22, 2011 [hereinafter Stueck, *B.C. Supreme Court Judge to Rule on Landmark Polygamy Case*], *available at* http://www.theglobeandmail.com/news/national/bc-supreme-court-judge-to-rule-on-landmark-polygamy-case/article4184093/. In Canadian law, a reference question is a submission by the federal or a provincial government to the courts asking for an advisory opinion on a major legal issue. Reference questions typically concern the constitutionality of the legislation in question.

through the B.C. Supreme Court.[492] The governments of Canada and B.C. argued that the ban on polygamy should be upheld, while court-appointed amicus curiae, George Macintosh, argued that the ban is unconstitutional and should be struck down.[493]

In his introduction to his now famous 'Canadian Polygamy Decision,'[494] upholding the longstanding Canadian ban on plural marriage, Chief Justice Robert Bauman framed the issue as a matter of harm:

> I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.[495]

Later on in that decision, he enumerated some of those alleged harms:

> The harms against children include: the negative impacts on their development caused by discord, violence and exploitation in the marital home; competition between mothers and siblings for the limited attention of the father; diminishment of the democratic citizenship capabilities of children as a result of being raised by mothers deprived of their basic rights; impoverishment; and, violation of their fundamental dignity.[496]

While that case has garnered significant interest both in the United States of America,[497] where the issue of plural marriage is, as mentioned, slowly garnering attention, and

---

[492] *Id.*
[493] *Id.*
[494] Criminal Code of Canada, B.C.S.C. § 293 (2011).
[495] *Id.*
[496] *Id.*
[497] *See* Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377 (2012); Marie Ashe, *Women's Wrongs, Religions' Rights: Women, Free Exercise, and Establishment in American Law*, 21 TEMP. POL. & CIV. RTS. L. REV. 163, 214 (2011).

abroad,[498] it is important to contextualize its meaning in the broader discussion of legalizing plural marriage. First of all, as described in that case, the polygamous community in Bountiful had been accused of engaging in exploitative relationships, sometimes with underage girls.[499] No one, especially not this author, is arguing that that should be legal.

The second important point to make is that the very tone of the opinion is quite noticeably different than that of the somewhat similar United States Supreme Court Case of *Reynolds v. United States*,[500] in which the U.S. Supreme Court likewise upheld the relevant anti-polygamy law against the claim of religious liberty. The British Columbia opinion is replete with open acknowledgments of the tentative nature of the findings on which its judgment would have to rely. As opposed to *Reynolds*'[501] overly confident assertions, the B.C. Court addresses the "harms" that stem from polygamous communities not as a given, but as a question to be explored. Absent are the harsh moral judgments and rigid condemnations. It is for this reason that this case represents a much more reasonable test case to respond to than *Reynolds*. If and when plural marriage comes back to the U.S. Supreme Court, it is likely that the analysis will much

[498] *See* Angela Campbell, *Wives' Tales on Research in Bountiful*, 17 IUS GENTIUM 247, 247-67 (2012).
[499] *See* Stueck, *B.C. Supreme Court Judge to Rule on Landmark Polygamy Case*, *supra* note 490.
[500] *Reynolds*, 98 U.S. 145.
[501] "These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land." *Id.*

more closely resemble the British Columbia case of last year than it would the Reynolds case of 1878.

The third preliminary issue to take note of is that there are a number of factual indicators that suggest that many of the arguments put forward in both *Reynolds* and the more recent Canadian case, at least as applied to polyamory and other forms of egalitarian non-monogamy more generally—as opposed to strict patriarchal polygyny—are either inapplicable or built on false assumptions.

Finally, scholars of plural marriage have already begun to address all kinds of interesting and legitimate constitutional questions that the continued criminalization of the practice raises, specifically concerns about the free exercise of religion and the limits of individual rights, especially in regard to slippery-slope arguments.[502] Rather than restating all of that very well trodden ground,[503] for the purposes of this discussion it suffices to say that this author finds it hard to believe that, in today's world, plural

---

[502] *See* Judith Stacey & Tey Meadow, *New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States*, 37.2 POLITICS & SOCIETY 167, 167-202 (2009); *see also* Edward Ashbee, *Polyamory, Social Conservatism and the Same-Sex Marriage Debate in the US*, 27.2 POLITICS 101, 101-107 (2007); Ann E. Tweedy, *Polyamory As A Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1461-1513 (2011).

[503] *See* Martha Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, COLUM. J. GENDER & L. (2010); Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L L. 382 (2009) [hereinafter Smearman, *Second Wives' Club*]; Kristin Eliasberg, *Sodomy Flaw: How the Courts Have Distorted the History of Anti-Sodomy Laws in America*, SLATE, March 25, 2003, *available at* http:// www.slate.com/ articles/ news_and_politics/ jurisprudence/ 2003/ 03/ sodomy_flaw.html; Ward, *I Now Pronounce You Husband and Wives*, *supra* note 433, at 131; Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, *supra* note 469.

marriage—at least religiously motivated plural marriage—would not be found to be under Constitutional protection.

Aside from all of the case law cited above establishing marriage as a fundamental right, religiously motivated plural marriage also deserves First Amendment free exercise protection. This is especially true after Church of the *Lukumi Babalu Aye v. City of Hialeah*,[504] a case which held that prohibitions that are not of general applicability, but rather are aimed at a specific religious practice because they are born of antipathy to the underlying religion, are invalid.[505] Rereading the thinly veiled racist implications of *Reynolds*[506] along with the more explicit statements in *Davis v. Beason*[507] (where Mormonism was defined as a "cultus"),[508] it certainly seems to be the case in regard to

---

[504] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[505] *Id.* at 546-47.

[506] *Reynolds*, 98 U.S. at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

[507] *Davis*, 133 U.S. 333 (1890).

[508] *Id.* at 342. The Court further condemned Mormonism, and not just polygamy, by noting that '[Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.' *Id.* Lawrence Foster believes that the existence of polygamy posed a cultural threat to many Americans because it was so vastly different from the Victorian family ideal, primarily monogamy and sexual restraint, which had been established in the country.

> Throughout this period, a new genre of anti-polygamy novels and 'true stories of life under polygamy' developed, primarily by people who had never been near Utah . . . . This anti-polygamy literature is very similar to anti-Catholic and anti-foreign writings of the antebellum period. It relies heavily on stereotyped characters and seems to constitute . . . Victorian pornography.

discussions of Mormonism and polygamy that there was an antipathy to the underlying religion.[509] Furthermore, the prohibition against polygamy, a practice that, for believers, is required of those who desire to ascend to heaven under original Mormon teachings, represents a substantial burden on religion.[510] Even according to Justice Scalia's controversial "hybrid rule,"[511] which asserts that the only cases in which a generally applicable law violates the First Amendment are situations in which another constitutional protection is also involved,[512] because marriage is a fundamental right, this would be a First Amendment problem. And under the strict scrutiny requirements of Employment Division v. Smith,[513] the bans against religious polygamy at least are likely to be found unconstitutional.[514]

Some, like Sarah Barringer Gordon, note that the debate about plural marriage has followed the gay-marriage debates constitutionally, in that it has shifted from a focus on the First Amendment, which includes the free exercise and establishment

---

Lawrence Foster, Religion and Sexuality: Three American Communal Experiments of the Nineteenth Century 221 (1981).

[509] In regard to the alleged compelling state interest, the various anti-polygamy statutes and constitutional provisions attack only the religiously based practice of polygamy but ignore a host of threats to the traditional monogamous family unit as the basic building block of society, such as no-fault divorce and unmarried cohabitation. *See* Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 736.

[510] *See id.* at 695.

[511] *Smith*, 494 U.S. 872 (1990).

[512] *Id.*

[513] *Id.*

[514] *See generally* Sealing, *Polygamists Out of the Closet*, *supra* note 377.

clauses, to the Fourteenth Amendment, which provides for equal protection under the law, and thus provides a firmer basis for constitutional rights as applied to marriage.[515]

It is also worth noting that, in a world moving rapidly towards legalized same-sex marriage,[516] it becomes increasingly nonsensical to argue that forms of plural marriage should be heterosexual in nature only. Assuming that plural marriage could involve multiple members of both sexes, some of the harms that have traditionally been linked to plural marriage, such as the abuse, commodification, exploitation, and social isolation of women, as well as the concept of the impoverished 'lost boys' who cannot find any spouses, are inherently no longer problematic in polyamorous relationships founded on greater gender equity.[517] In this article then, we will limit ourselves to addressing the fallacious conceptions that might still apply to polyamorous families in order to demonstrate their legal and social viability.

Regarding some of the broader issues that might, in fact, carry over from polygamy, various scholarly articles have already been written more than ably

---

[515] Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28.1 J. S. CT. HIST. 14-29 (2003). There may also be claims under the Free Speech and Freedom of Association clauses of the First Amendment. *See* Complaint for Declaratory, Injunctive, and Other Relief, Brown v. Herbert, *available at* http://jonathanturley.files.wordpress.com/2011/07/brown-complaint.pdf.

[516] As of the writing of this dissertation, nine states and the District of Columbia have legalized same-sex marriage, while both politicians and the public opinion seems to slowly be coming around that way as well. *See* Jonathan Capeheart, *'Sorry' Bill Clinton Didn't Say More About DOMA*, WASH. POST, March 8, 2013, *available at* http://www.washingtonpost.com/blogs/post-partisan/wp/2013/03/08/sorry-bill-clinton-didnt-say-more-about-doma/. The Supreme Court has just heard oral arguments on the striking down of DOMA and California's Proposition 8, banning gay marriage in that state.

[517] Sheff, *Polyamorous Women, supra* note 463. *See also* Elisabeth Sheff, *Poly-Hegemonic Masculinities*, 9.5 SEXUALITIES 621, 621-42 (2006).

addressing and responding to the claim that polyamory can, in theory, lead to a diminishment of the democratic citizenship capabilities of children who grow up in those households.[518] Suffice it to say, it is clear that polyamory, in reality, poses no such threats—while some practitioners may value communal living on a small scale, evidence shows that those who identify as polyamorous are not ideologically homogeneous[519] and, in actual practice, show little tendency to band together to create exclusive and truly independent polities.[520]

What has not been written, however, is a definitive rebuttal of the claims made that polyamorous marriage is somehow intrinsically damaging or harmful to children; that is to say that it is inherently more damaging or potentially more harmful than any other legal kind of family structure. For obvious reasons, statistics pertaining to children in polyamorous, polygynous, or polygamous families are quite difficult to attain; aside from the generic difficulties in gaining access to and interviewing willing parents and

---

[518] *See* Strassberg, *The Challenge of Post-Modern Polygamy*, *supra* note 439, at 483-86.

[519] According to a survey conducted by Robyn Trask, the executive director of Loving More, the national polyamorous magazine, in which 1,000 self-identifying polyamorists participated, polyamorists represent quite a religiously diverse but highly educated group. 28 percent identified as Christian, 9 percent were Eastern Religions, 30 percent were pagan, 29 percent were atheist and/ or agnostic, and 4 percent were other. An overwhelming majority of this sample group— 87 percent— had been raised Christian and only 11 percent had been brought up as either atheist or agnostic. 4 percent had a high school diploma, 26 percent had some college education, 30 percent had a college degree and 40 percent had been to graduate school or had earned a graduate degree. *See* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 80.

[520] Maura Strassberg, *Distinguishing Polygamy and Polyamory Under the Criminal Law*, *in* EXPLODING THE NUCLEAR FAMILY IDEAL (Daniela Cutas & Sarah Chan eds., 2012), *available at* http://www.bloomsburyacademic.com/view/Families-Beyond-the-Nuclear-Ideal/chapter-ba-9781780930114-chapter-011.xml.

children, plural marriage remains a crime in all fifty states. Still, Elisabeth Sheff's study presents the first attempt at constructing an actual data set for both legal and social scientific reference, as opposed to allowing courts and counselors to continue relying on hearsay and outdated assumptions.

It can be argued that one study should not be enough to conclusively change a well-established assumption. This is true. In regard to the alleged harms to children that polyamory might create, however, the truth is that these are not well-established assumptions, but just abstract postulates. And so, before getting to the study, we will begin by reviewing some of the classic and theoretically applicable arguments regarding the purported reasons that plural marriage is bad for children and, in turn, offer some (equally tentative) logical and legal responses. We will then transition from the theoretical to the practical findings section, using the study not as conclusive evidence that previously proven assumptions were wrong, but as corroborative evidence that those first premises were not ever, in fact, correct.

Toward the end of the British Columbia case, Tim Dickson, a lawyer for the amicus curiae appointed by Chief Justice Bauman to argue that the Canadian ban against plural marriage be struck down, asked Professor John Witte Jr., Director of the Center for the Study of Law and Religion at Emory University, whether his arguments against plural marriage (in this case polygamy) were based on objective truth, i.e. if

plural marriage was inherently harmful, or whether they were only based on his understanding of the facts as known at the time.[521] "No," said Witte. "Not every case exhibits harms." With all due respect, these, then, are the heretofore-unknown cases that do not exhibit harm. But first, some previously held assumptions and their appropriate responses.

B. Assumptions and Responses

As Professor Witte noted in his testimony and as the Court accepted, much of the discussion revolving around the harms associated with plural marriage—both for spouses and for children—assume that there will be "negative impacts on their development caused by discord, violence and exploitation in the marital home, . . . deprivation of basic rights[,] impoverishment, and violation of fundamental dignity."[522] Those are indeed the most commonly made claims. We will address these concerns first.

With regard to the ways in which marital multiplicity affects economic and emotional child support, it is unclear whether polygamy generates more costs for children than the standard alternatives.[523] In 2006, the Centers for Disease Control &

---

[521] *See* Daphne Bramham, *Tradition of Monogamous Marriage Traced in Polygamy Hearing*, VANCOUVER SUN, January 11, 2011, *available at* http://stoppolygamyincanada.wordpress.com/2011/01/11/tradition-of-monogamous-marriage-traced-in-polygamy-hearing-by-daphne-bramham/.

[522] Criminal Code of Canada, B.C.S.C. § 293 (2011).

[523] Davis, *Regulating Polygamy*, *supra* note 422, at 2028.

Prevention reported that 38.5% of children were born to unmarried women.[524] While some of these mothers will subsequently marry, others, particularly poor women, will not. Instead, some of the fathers of their children will subsequently father children with other women, leading to multiple (nonmarital) families, what some have called "de facto polygamy," but we labeled above 'serial polygamy.'

Despite their potential emotional and economic costs to children, however, serial marriage is not even questionable—it is perfectly legal. Individuals have a constitutional right to divorce and remarry as many times as they desire, regardless of whether they are supporting prior families.[525] Nor can the state limit people's right to reproduce outside of marriage based on burdens to the welfare system.[526] Hence, apart from the fact that the question of "affordability" has already been declared constitutionally irrelevant, practically speaking,[527] both serial marriage and what we called de facto polygamy (people living in committed polyamorous relationships in legal cohabitation without state sanctioning for marriage) 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 not worth taking into account, only that polygamy is not necessarily distinct in this

---

[524] 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, *quoted in* Davis, *Regulating Polygamy*, *supra* note 422, at 2028.

[525] *See Zablocki*, 434 U.S. at n.39.

[526] See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151 (2006).

[527] While some states do have 'family cap laws' for welfare reform, the issues of monogamous marriage, plural marriage, or no marriage at all, is irrelevant. *Id.*

regard. Upon close examination, the harms associated with polyamory are generic familial harms, while the benefits the practice might offer are distinctly polyamorous in nature.

Another related concern about the potentially polyamorous family's children involves the possibility of dissolution or, more specifically, how custody would be determined upon divorce with multiple adults having legitimate claims. The fact of the matter, however, is that family law is already grappling with parental multiplicity—dyadic parenthood has been in the process of splintering along several axes for quite some time.[528] First, no-fault divorce, non-marital childbearing, and changing cultural norms have combined to drastically increase the number of remarriages and blended families.[529] After any of the roughly 46,523 divorces in America in an average week, [530] the custodial parent may then remarry, and the child may form strong ties to the new stepparent. A third marriage and second stepparent may also follow. Hence, in serial monogamy, several adults may "parent" a child who does not share a biological relationship, any of whom may legitimately seek custody or visitation rights at

[528] *See* Davis, *Regulating Polygamy*, *supra* note 422, at 2030.

[529] *Id.*

[530] McKinley Irvin, *32 Shocking Divorce Statistics,* FAMILY LAW BLOG (October 30, 2012), http://www.mckinleyirvin.com/blog/divorce/32-shocking-divorce-statistics/ (based on statistics from the U.S. Census Bureau).

dissolution.[531] Grandparents and other extended family members have also increasingly made claims for visitation, if not outright parenthood. [532]

A second situation that creates multiple-parenthood stems from the rise in assisted reproduction among both gay and heterosexual couples.[533] 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 courts are increasingly confronting them in regard to lesbian couples and sperm donors, gay men and surrogates or egg donors.[534] In *LaChapelle v. Mitten*,[535] for instance, a Minnesota court recognized the parental rights

---

[531] Davis, *Regulating Polygamy*, *supra* note 422, at 2030. *See also* Carter v. Brodrick, 644 P.2d 850, 853–56 (Alaska 1983) (construing statute broadly to enable stepparent visitation rights).

[532] *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues* 34 FAM. L.Q. 607, 608 (2001) (citing Troxel v. Granville, 530 U.S. 57, 63-64 (2000)), where Justice O'Connor draws from the U.S. Dep't of Commerce, Bureau of Census, Current Population Reports, Marital Status and Living Arrangements: March 1998, remarking that 5.6 percent of children in America live with their grandparents rather than their parents, *quoted in* Jami L. Crews, *When Mommy's A Minor: Balancing the Rights of Grandparents Raising Grandchildren Against Minors' Parental Rights*, 28 L. & PSYCHOL. REV. 133, 148 (2004). By the 2000 Census, that number had gone up to 7 percent. *Id.* at 134.

[533] Will Boggs, *Assisted Reproduction Rates Increasing Worldwide*, REUTER'S HEALTH, June 4, 2009, *available at* http://www.reuters.com/article/2009/06/04/us-assisted-reproduction-idUSTRE5536KG20090604.

[534] Davis, *Regulating Polygamy*, *supra* note 422, at 2030. *See also* Elizabeth A. Delaney, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991).

[535] LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000). *See also* C. v. G. & E., 225 N.Y.L.J., No. 9, at 29 (col. 4) (N.Y. Cnty. Sup. Ct. Jan 12, 2001) (finding that a gay couple who contracted with a surrogate could petition for a second-parent adoption of the child by the non-biological father, presumably without necessarily terminating the biological mother's rights to the child; Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994); *see also* Kevin Gray, *Florida Judge Approves Birth Certificate Listing Three Parents*, REUTERS, Feb. 7, 2013 [hereinafter Gray, *Florida Judge Approves Birth Certificate*],

of a biological mother, her lesbian partner, and the sperm donor. In 2007, a Pennsylvania court said almost exactly the same thing, and went so far as to hold all three parents liable for child support payments.[536] Just a couple of months prior to the time of this writing, a Florida court followed suit, granting biological parental status and rights to a lesbian couple and sperm donor, with all three listed on the birth certificate.[537]

Finally, traditional adoption too has generated great parental complexity, particularly in states that have implemented open adoption as a norm.[538]

---

available at http://ca.news.yahoo.com/florida-judge-approves-birth-certificate-listing-three-parents-233555185.html.

[536] *See* Elizabeth Marquardt, *When 3 Really Is a Crowd*, N. Y. TIMES, July 16, 2007, *available at* http://www.nytimes.com/2007/07/16/opinion/16marquardt.html?_r=0 (describing Jacob v. Shultz-Jacob 923 A.2d 473 (Penn. Super. 2007).

[537] *See* Gray, *Florida Judge Approves Birth Certificate*, *supra* note 532. The idea of assigning children three legal parents is not limited to North America. In 2005, expert commissions in Australia and New Zealand proposed that sperm or egg donors be allowed to "opt in" as a child's third parent. That same year, scientists in Britain received state permission to create an embryo from the DNA of three adults, raising the real possibility that they all could be granted equal legal claims to the child if the embryo developed to term.

[538] Naomi Cahn, *Perfect Substitutes or the Real Things?*, 52 DUKE L. J. 1077 (2003) (tracing and contextualizing the social and legal history of adoption law). *See also* Spencer v. Franks, 195 A. 306, 308 (Md. 1937) (issuing an adoption decree giving birth parents permission to "occasionally see the child"); *In re* F., 406 A.2d 986, 989 (N.J. Super. Ct. Ch. Div. 1979) (granting two children the right to visit their birth father after adoption); *In re* McDevitt, 162 N.Y.S. 1032, 1033 (Sup. Ct. 1917) (describing postadoption visitation agreement between birth mother and paternal aunt); Rodgers v. Williamson, 489 S.W.2d 558, 560 (Tex. 1973) (discussing adoption decree permitting a father's visitation with his son after stepparent adoption); *see also* WILLIAM MEEZAN & JOAN F. SHIREMAN, CARE AND COMMITMENT 220 (asserting that such open adoptions will become more frequent as foster parents continue to adopt older children); Stuart L. Deutsch & Carol Amadio, *Open Adoption: Allowing Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59, 83-85 (1984) (describing established procedures in Illinois for open adoptions of foster children), *cited in* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. Rev. 997, 1061, n.77 (1995) [hereinafter Appell, *Blending Families Through Adoption*].

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 generate "third party" parental claims—serial polygamy, the increasing number and variety of reprotech families, grandparents, and adoption. Family law is, itself, in transition and courts are already developing norms to allocate parental rights among multiple claimants.[539] Again, the harms here are not polyamorous in nature, but are simply those harms associated with the formation of the modern family.

In sum, going back to our bundling and unbundling scheme, family law has already disaggregated marriage from parenting, especially exclusively dyadic biological parenting.[540] We have a separate law of parenthood, and it is generating norms to

---

[539] *See, e.g.*, STACY FURUKAWA, U.S. DEP'T OF COMMERCE, SERIES P70, NO. 38, THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991, 3-4 (1994) (reporting that only 50.8% of all children live in nuclear families composed of only two parents and their biological children, 22.0% live with two-parent families in which one or both parents are not their biological parents, 24.0% live in one-parent families, and 1.7% live with their grandparents rather than their parents); *see also* Katharine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984), *quoted in* Appell, *Blending Families Through Adoption*, *supra* note 537, at 1061 n.69. *See also* Martha L. Minow, *Redefining Families: Who's in and Who's Out?*, 62 U. COLO. L. REV. 269 (1991).

[540] *See* John Lawrence Hill, *What Does It Mean to Be A "Parent"? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 376 (1991); Stanley v. Illinois, 405 U.S. 645 (1972) (the first of four Supreme Court cases to address the right of an unmarried father to establish or maintain a legally recognized relationship with his child, involved a challenge to the constitutionality of an Illinois statute that conclusively presumed every unwed father unfit to care for his children. Appellant Stanley had lived with his children and their mother for eighteen years without benefit of marriage. Upon the mother's death, the State declared the children its wards and assumed responsibility for their care and custody

grapple with parental multiplicity both during and after the duration of the parental relationship.[541] Open-ended intimate multiplicity already exists. Even if one was to argue that we might fairly be concerned about its harms, costs, and regulatory challenges, plural marriage is not a necessary condition for these already occurring concerns. Formal, contemporaneous polygamy, serial monogamy, and de facto polygamy all share some of the vulnerabilities and uncertainties with regard to struggles for financial and,

---

without affording Stanley a hearing or establishing his unfitness. The effect of the state rule was to deny Stanley status as the legally recognized parent of the children. The Supreme Court rejected this statutory scheme because it violated both procedural due process and equal protection guarantees. Implicit in the Court's decision was the view that Stanley was indeed a "parent" for constitutional purposes, notwithstanding the State's more restrictive legislative definition. According to the Court, therefore, under the Constitution, a state may not make marriage a sine qua non for ascription of paternal rights." *See also* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); *see also* Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497 (1993); Kris Franklin, *A Family Like Any Other Family: Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1990) (examining the differences between the nuclear family and its alternatives and asserting that the nuclear family does not accurately reflect the realities of our society and that what constitutes "the family" has become a hotly contested political issue); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651 (2008) (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).

[541] *See* Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223, 230 (1994). *See also* Teresa Stanton Collett, *Benefits, Nonmarital Status, and the Homosexual Agenda,* 11 WIDENER J. PUB. L. 379, 380-97 (2002) (listing marital benefits and obligations); MICHAEL S. WALD, SAME-SEX COUPLES: MARRIAGE, FAMILIES, AND CHILDREN (1999), *available at* http://www.buddybuddy.com/wald-1.html. *See also* Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228 (1997). Supporters of pluralistic family configurations maintain that moral discourse about the family has not disappeared. Rather, it has diverged from a focus on "fault, sexuality, and patriarchal privileges" within families comprising of two married parents of opposite sex and their biological offspring, shifting to a consideration of "fairness, equity, and caregiving" within "kinships of responsibility." *Id.* at 228-29; *see* Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 587 (1996); *see also* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) (favoring "respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members"), *quoted in* DiFonzo, *Unbundling Marriage*, *supra* note 14, at 70.

particularly, emotional resources among families. Despite ongoing controversy, we don't ban de facto polygamy.[542] And, with the advent of no-fault divorce, serial monogamy is the norm.[543] Family law has already developed robust norms to grapple with the implications and effects of "serial" open-ended multiplicity with regard to children. [544]

Child endangerment concerns often surround the practice of plural marriage, and those concerns are typically advanced as the interests that justify criminalizing the

---

[542] Michele 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) (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"). *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 . . . .").

[543] Davis, *Regulating Polygamy*, *supra* note 422, at 2031. *See, e.g.*, *Potter*, 585 F. Supp. at 1142, n.7 (D. Utah 1984) (noting that plaintiff, fired from his job as a police officer for practicing polygamy, had sought the admission during discovery that "the high rate of divorce in the United States has often turned today's American familial relationships into a form of serial polygamy"), *aff'd*, 760 F.2d 1065 (10th Cir. 1985) (affirming district court's rejection of plaintiff's free exercise and privacy-based challenge to his termination); DAVID G. MAILLU, THE WHITEMAN'S POLYGAMY, IN OUR KIND OF POLYGAMY 29 (1988), *quoted in* Emens, *Monogamy's Law*, *supra* note 7, at 376. *See also Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not A Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 544 (2002).

[544] Davis, *Regulating Polygamy*, *supra* note 422, at 2031. *See generally* J. Thomas Oldham, *A.L.I. Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 831. *See also* Marvin M. Moore, *The Significance of a Divorced Father's Remarriage in Adjudicating A Motion to Modify His Child Support Obligations*, 18 CAP. U. L. REV. 483 (1989); Jennifer E. Horne, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2074 (1993); Edward R. Anderson & Shannon M. Greene, *Beyond Divorce: Research on Children in Repartnered and Remarried Families*, 51 FAM. CT. REV. 119 (2013).

practice.[545] Nevertheless, the fact remains that bigamy is a separate and distinct offense from child endangerment crimes, as bigamy only requires being simultaneously "married" to multiple people. The fact that bigamy is seldom prosecuted in the absence of a child endangerment charge suggests that polyamory, in-and-of itself, is not a crime that law enforcement officials typically consider to be sufficiently important to waste resources investigating and prosecuting.[546] Furthermore, as both Sheff's study and other research illustrates, polygamy and child welfare concerns do not always go hand-in-hand. As mentioned previously, one recent study of 27 polygamous families concluded that these abuses are the result of "particularly dysfunctional" polygynist families rather than

---

[545] *See* Joanna L. Grossman & Lawrence M. Friedman, *Sister Wives: Will Reality Show Stars Face Prosecution for Polygamy in Utah?*, FINDLAW'S WRIT, Oct. 4, 2010, http://writ.news.findlaw.com/grossman/20101004.html (stating Brown family does not appear to violate other criminal laws often violated by polygamists, such as child marriage, rape, or sex with minors, meaning state will have to determine whether to prosecute Brown family for polygamy "in its purest form"); *'Sister Wives' Bigamy Prosecution Would Be Rare*, FOX NEWS, Oct. 8, 2010, http://www.foxnews.com/entertainment/2010/10/08/sister-wives-bigamy-case-stats-dont-lie/ (stating review of Utah bigamy prosecutions revealed no recent prosecutions for bigamy that were unaccompanied by some form of child endangerment crime because of lack of resources to prosecute all polygamists solely for crime of bigamy); Ben Winslow, *Utah Co. Prosecutors Want to See 'Big Picture' of Prosecuting Reality TV Polygamists*, FOX 13 NEWS, Sept. 28, 2010, http://www.fox13now.com/news/local/kstu-sister-wives-stars-investigated-bigamy, 0,6323096.story (citing information from Utah Attorney General's Office indicating that Office does not typically prosecute polygamy alone because of lack of resources and instead opt to prosecute polygamy only when accompanied by other crimes such as underage marriages), *quoted in* Kaitlin R. McGinnis, *Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?*, 19 VILL. SPORTS & ENT. L.J. 249, 280 (2012). *See also* Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 810 (2009); Julie Cart, *Utah Paying a High Price for Polygamy*, LOS ANGELES TIMES, September 9, 2001, *available at* http://www.rickross.com/reference/polygamy/polygamy69.html.

[546] *See generally* Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, Feb. 28, 1999, http://www.nytimes.com/1999/02/28/magazine/the-persistence-of-polygamy.html (providing that no one has been prosecuted for polygamy alone in Utah in almost fifty years).

problems inherent to polygyny.[547] Another study conducted by anthropologist Janet Bennion concluded that it is not polygamy, per se, that is the problem leading to abuse, even in fundamentalist communities. Instead, it is the combination of specific circumstances combined with polygamy that lead to the potential exploitation. Other contributing factors, Bennion writes, can include: "(1), father absence or low father parental investment, (2), isolated rural environment or circumscription, (3) absence of a strong female network (4), overcrowding in the household, and (5), male supremacist ideology."[548] Condemning every practicing polygynist to prevent the abuses of some may be counterintuitive. Some law enforcement officials agree; one FBI agent familiar with polygynous sects was recently quoted as saying that, "At least 99% of all polygamists are peaceful, law-abiding people, no threat to anybody. It's unfortunate that they're stigmatized by a band of renegades."[549] As Professor Jesse Embry of Brigham Young University found after years of studying the Mormon community, it is neither polygamy nor monogamy that dictates harmonious marital relationships. Rather, individual personalities have much more influence. The abilities of the participants to get along

---

[547] Irwin Altman & Joseph Ginat, Polygamous Families in Contemporary Society (1996), *quoted in* Strassberg, *The Crime of Polygamy*, *supra* note 466, at 398.

[548] Janet Bennion, Women of Principle: Female Networking in Contemporary Mormon Polygamy (1998).

[549] Bella Stumbo, *No Tidy Stereotype; Polygamists: Tale of Two Families*, L.A. Times, May 13, 1988, Part 1, at 1, *quoted in* Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 337.

and treat one another fairly are far more crucial to marital satisfaction than the form the marriage takes.[550]

Consequently, as Emily Duncan has noted, the state must advance some other legitimate interest in order to justify criminalizing bigamy post-Lawrence because, like homosexual conduct, the practice of polygamy is arguably a "personal relationship that . . . is within the liberty of persons to choose without being punished as criminal."[551] Until that time, however, especially if we are still really concerned about abuse, then any rational policy in this area should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous families to emerge from the shadows, and openly protecting and assisting the women and children who live in them to have better lives, should they end up needing such protection and assistance.[552]

---

[550] *See* JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES (1987).

[551] Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 316. *See Lawrence*, 539 U.S. 558, 567 (2003). There is additional Supreme Court precedent here as well, including Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977). *See* Kaitlin R. McGinnis, Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?, 19 VILL. SPORTS & ENT. L.J. 249 (2012). Moore involved a zoning ordinance that limited occupancy of dwellings to members of a single family. Appellant Moore was charged with violating the ordinance because she lived in a home with her son and two grandsons, an arrangement which did not meet the ordinance's definition of "family." Moore argued that the ordinance violated her substantive due process rights under the Fourteenth Amendment, and a plurality of the Court agreed. Specifically, the Court stated, "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." *Id.* at 506. Consequently, although not as on point as *Lawrence*, Moore is another opinion that suggests that family and other personal relationships should be free from government intrusion absent a state interest sufficient to meet the Court's level of scrutiny. *Moore*, 431 U.S. at 279.

[552] Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 316.

Some jurisdictions are already starting to agree that plural marriage does not harm children. In an important shift from the not too distant past, some courts have recently held that participation in polygamous arrangements does not bar adoption or child custody.[553] In 1955, the Utah Supreme Court upheld a finding of child neglect and the removal of several children from their parents' home based solely on the parents' unlawful polygamous marriage.[554] In 1987, however, that same court ruled that a divorced mother's polygamous remarriage could not be used as the primary ground for granting her ex-husband's request for custody of the couple's children.[555] Most recently, in 1991, the Utah Supreme Court held that polygamy, standing alone, is insufficient to automatically disqualify polygamists as adoptive parents.[556] These developments suggest

---

[553] *See* Amy Fry, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Its Abuses*, 54 ST. LOUIS U. L.J. 967, 992 (2010).

[554] *In re* Black, 283 P.2d 887, 912-13 (1955). *See id.* at 901 (proposing that there is enough harm for the court to remove the children based solely on the fact that polygamy was practiced in their presence and that they were encouraged to believe and engage in plural marriage.).

[555] Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987) (holding that "a parent's extra-marital sexual relationship alone is insufficient to justify a change in custody," and therefore, evidence the mother is practicing polygamy is insufficient on its own to support the lower court's finding.) *Id.* at 627. Instead, the court found "polygamous practices should only be considered as one among many other factors regarding [a child's] best interests." *Id.*

[556] *See* Matter of Adoption of W.A.T., 808 P.2d 1083 (Utah 1991). ("The fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists. It is true that bigamy is a crime in Utah and that one of the petitioners here is concededly a bigamist. The same portion of the criminal code ("Offenses Against the Family") which makes bigamy a crime, however, also criminalizes adultery, fornication, nonsupport of children, surrogate parenthood contracts, and unauthorized abortions."). *See generally* UTAH CODE ANN. §§ 76–7–101, 101-325. Innumerable other acts are of course defined as crimes by other portions of the criminal code. It is not the role of trial courts to make threshold exclusions dismissing without consideration, for example, the adoption petitions of all convicted felons, all persons engaging in fornication or adultery, or other persons engaged in other illegal activities. There is likewise no legitimate basis for the courts to disqualify all bigamists (polygamists) as potential adopters. *Id.* at 1085.

that while polygamy is still socially and legally marginalized, it does not bear so much of its former stigma, particularly as it relates to the welfare of children. [557]

Before we move on to discuss actual cases of children raised in polyamorous families, we wish to acknowledge that, far from being a neutral issue, the polyamorous movement argues that "multiple parenting" is actually potentially beneficial to children in a number of ways.[558] Children of the unions are guaranteed to have care and supervision provided by multiple adults, and with so many spouses, there tends to be a very specialized division of labor among spouses.[559] Polyamory creates a new form of extended family that can allow children to be cared for at home by some parents while other parents pursue a career or simply support the family financially. Whereas a single adult or even two adults with little or no time to themselves can "burn out," multiple adults can meet the endless needs of children without becoming frustrated or

---

[557] *See also In re* Texas Dept. of Fam. & Protective Serv., 255 S.W.3d 613 (Tex. 2008), where the court agreed with the appellate court finding that the Texas statute required a showing of "imminent" harm to determine whether children were in danger and needed to be removed, and that the fact that the mothers were practicing polygamy did not constitute that kind of harm. *See also* GLENDON, THE TRANSFORMATION OF FAMILY LAW, *supra* note 6, at 39; Ralph Slovenko, *The De Facto Criminalization of Bigamy*, 17 J. FAM. L. 297 (1978); R. Michael Otto, Note, *Wait 'Til Your Mothers Get Home: Assessing The Rights of Polygamists As Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881.

[558] *See* ELAINE S. COOK, COMMITMENT IN POLYAMOROUS RELATIONSHIPS 58 (2005)

> (All of those who commented on children thought that polyamory was beneficial for the children. Other adults can help raise the kids. If the other adults are local, "The kids are never on the shorts for somebody who can pay attention to them." The kids have more role models. The parents suggested I interview both the child and her older stepsister, but I told them that that would have to wait for a different study. This is that study.).

[559] *See* Scott Anderson, *The Polygamists: An Exclusive Look Inside the FLDS*, NAT'L GEOGRAPHIC, Feb. 2010, at 50.

insensitive.[560] Children can benefit from having multiple loving parents who can offer not only more quality time, but a greater range of interests and energy levels to match the child's own unique and growing personality.[561] In addition, because of the polyamorous focus on openness and honesty in regard to feelings,[562] children in polyamorous homes can develop a greater than usual propensity for emotional intimacy.[563] As the next section demonstrates, Sheff's research supports these polyamorous community contentions.

Thus far, the academic and legal custody discussions about children in polyamorous relationships have relied almost exclusively on evidence from a few potentially non-representative polygynous relationships and scholarly speculation regarding the experiences of children in polyamorous families. While there has been some work done on parenting in poly relationships more generally,[564] as of yet nothing has been published that directly speaks to the alleged harms that children may experience based solely on the fact that their parents are polyamorous.

---

[560] *See* Deborah Anapol, *The Upside of Polyamory*, PSYCH. TODAY, December 22, 2010, *available at* http://www.psychologytoday.com/blog/love-without-limits/201012/the-upside-polyamory.

[561] T.L. Williams, *Polyamory vs. Swinging . . What's the Difference?*, LALA LAND (June 27, 2011, 5:30 PM), http://ladaewillims.blogspot.com/2011/06/polyamory-vs-swinging-whats-difference.html.

[562] Kenneth R. Haslam, M.D., *The 12 Pillars of Polyamory*, POLYAMOROUS PERCOLATIONS, May 15, 2008 (adapted from a lecture given to Polyamorous NYC on 19 March 2008), *available at* http://www.polyamoryonline.org/articles/12pillars.html.

[563] Maria Pallotta-Chiarolli, Peter Haydon & Anne Hunter, *These Are Our Children: Polyamorous Parenting*, LGBT-PARENT FAMILIES 117, 117-131 (2013).

[564] *See generally* Maria Pallotta-Chiarolli, *Polyparents Having Children, Raising Children, Schooling Children*, 7.1 LESBIAN & GAY PSYCH. REV. 48, 48-53 (2012); MEG BARKER & DARREN LANGDRIDGE, UNDERSTANDING NON-MONOGAMIES (2010).

It is particularly important to look for empirical evidence in the case of children, as opposed to adults, because, as a free society, we value the idea of liberty and adult consent. Children, however, do not have the legal capacity to consent, and so, in the absence of empirical evidence showing that the practice is really not harmful, it would be harder to support plural marriage. Hopefully, supplying that empirical evidence will add significant weight to the discussion.

C. The Polyamorous Families Study

In this section of the chapter, we will briefly explore the research and findings of Dr. Elisabeth Sheff, in what she has called the Polyamorous Family Study, a 15-year longitudinal, ethnographic study of polyamorous people and their children. Sheff documented the experiences of 22 children in polyamorous families who participated in the study, and collected data through three waves of in-depth interviews and participant observation with polyamorists.[565]

---

[565] The initial wave of data collection (1996 - 2003) focused on adults in polyamorous relationships, some of whom had children. The second wave of data collection (2007 - 2008) concentrated on polyamorous adults who were members of families with children, and the third wave of data collection (2009 - 2012) focused on children in polyamorous families and their relevant adults. The total sample for all three waves of data collection came to 131 interviewees—22 of whom were children between the ages of five and 17—and roughly 500 people involved in participant observation. Participants selected their own pseudonyms. Data analysis involved a modified form of grounded theory, (*see* Kathy Charmaz, *Grounded Theory: Objectivist and Constructivist Methods*, *in* HANDBOOK OF QUALITATIVE RESEARCH 509, 509-35 (N.K. Denzin & Y. S. Lincoln eds., 2d ed. 2000), a method that has proven particularly useful in other family studies. *See* Ralph LaRossa, *Grounded Theory Methods and Qualitative Family Research*, 67 J. MARRIAGE & FAM. 837, 837-57 (2005) (employing inductive data gathering methods); *see also* JOHN LOFLAND & LYNN LOFLAND, OBSERVATION AND ANALYSIS (1995). For constant comparative methods, see BARNEY GLASER & ANSLEM STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR

While the results of this study are not statistically generalizable to the entire population of polyamorists in North America, Sheff has every confidence that they accurately portray the familial conditions of polyamorous families in the United States. Although no one else has talked directly to the children, Sheff's findings also correlate with others' findings on children in polyamorous or open-marriage families in the United States,[566] as well as in Australia.[567]

In keeping with the research done on families of other sexual minorities,[568] there was no way to draw a statistically representative sample of an unknown universe populated by closeted figures bent on avoiding the potential impacts of stigma. It is also important here to note that respondent bias similarly affects the generalizability of the results, in that the people who are most functional and feel that they have nothing to hide are most likely to volunteer for research in general, and family research in particular is weighted towards families that see themselves as healthy, and are not abusing their spouses or molesting their children. Given the sampling limitations, it is possible that Sheff's findings tend to emphasize the more optimistic elements of

---

Qualitative Research (1967). For more details on the study itself and how it was conducted, see Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

[566] Larry Constantine & Joan Constantine, Group Marriage: A Study of Contemporary Multilateral Marriage (1973).

[567] Maria Pallotta-Chiarolli, Border Sexualities, Border Families in Schools (2010); Meg Barker & Darren Langdridge, *Developing a Responsible Foster Care Praxis: Poly as a Framework for Examining Power and Propriety in Family Contexts*, *in* Understanding Non-Monogamies (2010).

[568] Christopher Carrington, No Place Like Home: Relationships and Family Life Among Lesbians and Gay Men (1999); Katherine Weston, Families We Choose: Lesbians, Gays, and Kinship (1999).

polyamorous families because they are where respondents have chosen to focus their comments.[569]

Still, even adjusting for these factors and concerns, it is abundantly clear that, for many polyamorous families, they, in theory, can—and some, in fact, do—provide positive and enriching environments for children without causing them any harm. At a minimum, these children are not definitionally pathological, or at least no more pathological than families with monogamous, serially monogamous, de facto polygamous, or polygamous members.[570]

Contrary to the image that many Americans may have of the typical plural marriage family units as consisting of either foreigner immigrants, uneducated hippies, poor or desperate women, or religious fanatics living somewhere in rural isolation, respondents of the Polyamorous Family Study tended to be white, very highly educated, middle or upper-middle class people living in urban or suburban areas of large cities and

---

[569] *See* MARIA PALOTTA-CHIAROLLI, BORDER SEXUALITIES, BORDER FAMILIES IN SCHOOLS 214 (2010) (discussing how some of her respondents were invested in portraying their polyamorous families as "perfect.").

[570] For more on the children in these other populations, see Donna K. Ginther & Robert A. Pollak, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41.4 DEMOGRAPHY 671, 671-96 (2004). *See also* Judith S. Wallerstein & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1996); Barbara Bilge & Gladis Kaufman, *Children of Divorce and One-Parent Families: Cross-Cultural Perspectives*, FAM. RELATIONS 59, 59-71 (1983).

working in professional occupations such as information technology, mental and physical health care services, and education.[571]

For the most part, the respondent children, especially the younger ones, did not face overt stigmatism, as they did not have to manage coming out to strangers, classmates, coaches, or teachers. As far as sexual minority families go, poly families are not nearly as visible or recognizable as the far better known lesbian or gay families.[572] As has been stressed, the contemporary popularity of divorce in the United States makes it commonplace for children to have multiple parents, which not only grays the theoretical plane, but also practically helps children from poly families with several parental figures to blend in, because step-parents and step-siblings are already standard social fare.

Unless poly family members intentionally highlight and explain their family structure, they are rarely called upon to provide an explanation for their multiple adults. If they choose to come out, they do so selectively, revealing family details only to those they know and trust, or to those who ask politely in low-risk or need-to-know situations.[573]

---

[571] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

[572] For a closer look at those communities, see Victoria Clarke, Celia Kitzinger & Jonathan Potter, *Kids Are Just Cruel Anyway: Lesbian and Gay Parents' Talk About Homophobic Bullying*, 43.4 BRITISH J. SOC. PSYCHOL. 531, 531-50 (2004). *See also* ROBERT OSCAR LOPEZ, THE WITHERSPOON INSTITUTE, GROWING UP WITH TWO MOMS; THE UNTOLD CHILDREN'S VIEW (2012), *available at* http://www.thepublicdiscourse.com/2012/08/6065/.

[573] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

In Sheff's professional view, overall the children seemed remarkably well-adjusted, articulate, intelligent, and self-confident.[574] While they dealt with the usual issues of childhood—from the frustration of having to share toys to the adolescent awkwardness of middle-school social machinations—these respondents appeared to be thriving with the abundant resources and adult attention their families provided.[575]

This finding corroborates the conclusions of a sub-study of children in a larger study of group-marriage households that took place in 1973. That study described the children they observed as being "very much in contact with themselves, with a highly positive image of themselves as valuable persons combined with a realistic perception of their own abilities. They accepted and valued differences in other people. In short, most of them are confident, healthy, in-touch kids." [576]

D. Children's Perceptions

In regard to what the children thought of their interesting family structure, Sheff found that most of the younger children (between five and eight years old) tended to view all adults through a similar lens of the adult's utility in the child's life. Ideas of partners and partners' partners were reserved for adult understanding, and the kids defined all adults by how they interacted with and attended to the child her/himself,

---

[574] *Id.*

[575] *Id.*

[576] Larry Constantine & Joan Constantine, Group Marriage: Marriages of Three or More People, How and Why They Work 155 (1973).

i.e., whether they were fun to play with, whether they helped them with homework, etc. True to the developmental stage in which children of this age are self-centered,[577] kids in this category were not very aware of adult relationships and tended, instead, to view and interact with adults on the basis of what the adult brought to their lives.

As they neared the 'tween' stage, however, some of them began to notice how their families and parents differed from the parents and families of their peers, and some were even bothered enough to ask their parents why their family looked different. In keeping with polyamorous relationship principles, parents tended to be honest and give age-appropriate information when their children broached the potentially sensitive and potentially awkward topic.[578]

Like other teenagers, respondents between the ages of 13 and 17 were quite focused on self-differentiation, both from their families and from society at large. Some distanced themselves from the familial lifestyle that they had grown up with, asserting that they themselves would never want to be polyamorous. None, however, claimed that their upbringing negatively affected them. As one girl noted in her interview: "There is no way I would ever be poly. No way. It's too much drama, too much work. Its fine for them, I don't think it hurt me at all."[579] Other teen respondents processed their families

---

[577] *See generally* ERIK ERIKSON, CHILDHOOD AND SOCIETY (1950).

[578] *See* Sheff, *Strategies in Polyamorous Parenting*, *supra* note 463.

[579] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 205 (Interview by Elisabeth Sheff with 'Jocelyn').

differences as a way of distinguishing themselves from society at large and affirming a more nuanced identity. Without necessarily embracing it, while some kids in school were from religious families, or were racial or ethnic minorities, and still other kids were vegetarians or vegans, or Goth, or jocks, these children were from a polyamorous household and, in that sense, being members of a polyamorous family was just one facet of a complex and diverse life.[580] Note again that, in this situation, polyamory provided a sense of familial identity associated with the relationship unit that was helpful in knowing, defining, and expressing the self, not only for the original participants, but also for these children.

Children who participated in the Polyamorous Family Study identified a number of advantages to living in a poly family, including practical, emotional, and personal benefits.[581] The truth, however, is that practical advantages were so intertwined with emotional and personal advantages that many respondents' discussions blurred the distinctions between these categories.[582]

The most common practical advantage that children in polyamorous families mentioned during interviews was the all-important 'ride availability.' Tweens and younger teens were especially likely to mention being able to call numerous people for

---

[580] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 206 (Interview by Elisabeth Sheff with 'Mina').
[581] *Id.*
[582] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

rides as one of the primary advantages to living in a poly family. Other important practical advantages, as could be expected when you think about more adults and more availability, included more money for everyone as a result of pooled resources and more help with academic and free-time activities from a wide range of people with a diverse set of skills and interests. In the study, adults and children alike identified the increase in resources that resulted from multiple adults pooling their time, money, and energy as advantageous to the entire family.[583]

In general, polyamorists emphasize honesty and communication when describing their relationships,[584] and the evidence shows that many of the adults also purposefully extend this philosophy into their individual parenting styles.[585] Some children of polyamorous families appreciated parental honesty and openness and cast it as an advantage that they had in their upbringing that others did not. Some linked this honesty to a relaxed home atmosphere and parental open-mindedness about their own personal choices, and cast this as yet another poly advantage.[586] Others felt that it led to a deeper, closer, parent-child relationship than the relationships that they (as teens)

---

[583] Sheff, *Strategies in Polyamorous Parenting*, *supra* note 463.

[584] Christian Klesse, *Polyamory and its 'Others': Contesting the Terms of Non-Monogamy*, 9.5 SEXUALITIES 9 565, 565-83(2006). *See also* Jin Haritaworn, Chin-ju Lin & Christian Klesse, *Poly/logue: A Critical Introduction to Polyamory*, 9.5 SEXUALITIES 515 (2006).

[585] Sheff, *Strategies in Polyamorous Parenting*, *supra* note 463.

[586] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 203 (Interview by Elisabeth Sheff with 'Marcus').

observed between their peers and their peers' parents.[587] In this way, polyamorous families seem especially advantageous for children who value closeness and emotional intimacy with their parents.[588]

Some of the children interviewed explained how more numerous authority figures provided them with a greater diversity of parental options, avenues for support, models of discipline, and a profusion of role models.[589] Importantly, these additional role models were not limited to the additional 'parental' figures; the children also appreciated the older 'siblings' that their parents' partners sometimes came with, finding those relationships to be useful, fulfilling, and enriching.[590] This is not unlike the relationships sometimes found in other, more traditional blended family structures,[591] just with a few additional players.

Some children in the study whose families experienced divorce talked about their parents' ability to maintain social contact and remain friends even afterward.[592] Despite the fact that children in other families who divorce may also experience good

---

[587] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 211 (Interview by Elisabeth Sheff with 'Kethry').

[588] *Id.*

[589] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 215 (Interview by Elisabeth Sheff with 'Cole').

[590] *Id.*

[591] *See* Susan D. Stewart, Brave New Stepfamilies: Diverse Paths Toward Stepfamily Living (2007).

[592] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 211 (Interview by Elisabeth Sheff with 'Kethry').

cooperative parenting after a divorce,[593] according to the children interviewed, in their experiences, their friends and their friends' divorced parents struggled far more than they did.

To be fair, while children in polyamorous families did identify numerous advantages to their family life, they also recognized some disadvantages to life with polyamorous parents. Some noted the tremendous distress they felt at the loss of beloved people who exited the family once their relationships with the children's parents' became problematic.[594] Some respondents mentioned missing not only the poly members of their families, but also the 'step-sibling' members who exited. Still others were not particularly bothered by the departures, and almost philosophically recognized that these things happen in life.[595] Again, it is important here to note that these responses were not unlike those from children in more typical blended family structures.[596]

---

[593] *See* Edward Kruk, *Promoting Co-Operative Parenting After Separation: A Therapeutic/Interventionist Model of Family Mediation*, 15.3 J. FAM. THERAPY 235, 235-61 (1993). *See also* Lawrence A. Kurdek, *A 1-Year Follow-Up Study of Children's Divorce Adjustment, Custodial Mothers' Divorce Adjustment, and Postdivorce Parenting*, J. APPLIED DEVELOPMENTAL PSYCHOL. 315, 315-28 (1988).

[594] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 215 (Interview by Elisabeth Sheff with 'Cole').

[595] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 214 (Interview by Elisabeth Sheff with 'Zane').

[596] *See* CONSTANCE AHRONS, WE'RE STILL FAMILY: WHAT GROWN CHILDREN HAVE TO SAY ABOUT THEIR PARENTS' DIVORCE (2004). *See also* Michael J. Markoff, *Stepfamily Law: Review and Proposals for Change*, 18 SUFFOLK U. L. REV. 701 (1984); Alison Harvison Young, *This Child Does Have 2 (Or More) Fathers—Step-Parents and Support Obligations*, 45 MCGILL L.J. 107 (2000).

Returning to the idea of social stigma, some of the older children in poly families did feel somewhat touched by the issue, but it was usually rather minimal. Race, class, and educational privileges shielded many of the children who took part in the Polyamorous Families Study from some of the pernicious effects of prejudice. One girl, who originally felt judged by her peers upon entering high school, reported that she was fine after eight weeks into the school year during which she switched out to a different school where, as she put it:

> [N]o one judges me. Now at my high school there are several kids who are adopted, so their families are just as complicated as mine so I blend right in. Also some of my classmates' parents are divorced, but it does not stand out. Some of the other kids at my school have two moms and two dads as well, people of all family types and all sexual orientations as well. It is a very welcoming and open place, there is no weirdness with me having four parents.[597]

From the study, this second reaction seems typical of the children of polyamorous families' experiences.[598]

In some of the families that Sheff interviewed, children complained of some of the disadvantages related to the crowded nature of their family lives.[599] The negative effects of crowding appear to become increasingly acute as children age, and the teenagers seemed especially dismayed by their lack of privacy and space. Complaints about mild

---

[597] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 211 (Interview by Elisabeth Sheff with 'Kethry').

[598] Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

[599] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 214, 227 (Interview by Elisabeth Sheff with 'Zane' and 'Melissa').

overcrowding and lack of personal space, however, including having to share a bedroom, or a bathroom, or a phone line with a sibling, were extremely typical, not only of blended families experiences, but also of families with teenage children generally.[600] This is not to say that there are not times when overcrowding in the familial household is a real problem, it is just that nothing in this study rose to anything even remotely near that level.[601]

Some children, especially older ones, expressed frustration at the degree of supervision they received as a result of living in a polyamorous family with numerous adults in their lives.[602] Not only did such surveillance hamper their plans to sneak out at night or skip school, but tweens and teens found that it was extremely difficult to maintain a coherent lie when dealing with multiple parents. As one girl, Cassie, put it:

> Sometimes it was a huge drag—I couldn't get away with anything. I mean, anything! The 'rents [her mother, father, and their partners] were always around, so if I tried to ditch school or pretend I went to practice [for the high school color guard] but went to hang out with my friends instead, someone would always find out . . . . And they would talk to each other, so if I couldn't keep my story straight they would figure it out pretty quick. So yeah, that part sucked, but in other ways it was good to have so many people around, it kept me from getting into more trouble in high school.[603]

---

[600] *See generally* Gill Gorell Barnes, *Stepfamilies*, 4 ADVANCES IN PSYCHIATRIC TREATMENT 10, 10-16 (1998).

[601] *See* Walter R. Gove, Michael Hughes & Omer R. Galle, *Overcrowding in the Home: An Empirical Investigation of its Possible Pathological Consequences*, AM. SOC. REV. 59, 59-80 (1979) (discussing overcrowding and when it is an issue).

[602] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 203, 230 (Interview by Elisabeth Sheff with 'Marcus' and 'Cassie').

[603] *Id.*

At the end of the day, multiple adults providing supervision for children makes it more difficult for those children to do the kinds of things children like to do when adults are not actively watching them. Cassie found the amount of adult attention she received to be both advantageous and disadvantageous. In her interview, she was one of the respondents who mentioned that she liked it when there was always someone to pick her up or make her dinner, but did not like the degree of supervision that kept her from "getting away with anything."[604]

Moving back to the intricacies of the poly-sibling relationships, a necessary part of the equation, routine family challenges like jealousy were brought up in the conversations that Sheff had with the children, especially when a newcomer's parent was seen to be replacing another parent.[605] Once again, however, these experiences mirrored the experiences of other blended families with half and stepsiblings in serial monogamous families and other mixed parentage arrangements.[606] In all of these cases, siblings felt some tension over the varying degrees of effort and number of resources each parent was willing to contribute to the family.

---

[604] *Id.*

[605] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 214 (Interview by Elisabeth Sheff with 'Zane').

[606] *See generally* Joan Pulakos, *Correlations Between Family Environment and Relationships of Young Adult Siblings*, 67.3f PSYCHOL. REP. 1283, 1283-86 (1990). *See also* Melinda E. Baham et al., *Sibling Relationships in Blended Families*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES: POLICY AND PRACTICE IN LEGAL, RESEARCH, AND CLINICAL SPHERES 175, 175-207 (2008); William Jankowiak & Monique Diderich, *Sibling Solidarity in a Polygamous Community in the USA: Unpacking Inclusive Fitness*, 21.2 EVOLUTION & HUM. BEHAV. 125, 125-39 (2000).

One pair of poly-siblings, Ben and Melissa, described an interesting situation: independent of their parents' relationships, the two of them were just beginning to explore their feelings for each other when their parents announced that the families would be moving in together. Without explicitly discussing their potentially shifting familial relationships, Melissa and Ben tacitly agreed that the relationship was too close to sibling status for comfort and chose not to pursue their crush.[607] While Melissa assured Sheff that they could joke about it now and it was "not a big deal," Ben, at the very least, expressed some ambivalence, and both he and Melissa seemed slightly uncomfortable discussing the topic.[608] Again, however, it is important to note that the potential for stepsibling romance is not a distinctly poly-problem and, in fact, is not unheard of in any blended family context.[609]

Having laid out the main findings of the study, including, from the children's perspectives, both the perceived advantages and disadvantages of growing up in a polyamorous family, we can now turn to ask what conclusions we can draw from here about the advisability of legalizing and formalizing these units as marital relationships. Again, it was particularly important to look carefully at the children and all aspects of

---

[607] *See* Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 488, at 234 (Interview by Elisabeth Sheff with 'Ben' and 'Melissa').

[608] *Id.*

[609] *See* Susan Bartell, PsyD., *Sexually Involved Stepsiblings*, BONUS FAMILIES, http://www.bonusfamilies.com/articles/bonus-experts.php?id=131. *See also* JEANNE BELOVITCH, MAKING REMARRIAGE WORK (1987); TASHA R. HOWE, MARRIAGES AND FAMILIES IN THE 21ST CENTURY: A BIOECOLOGICAL APPROACH (2011).

their experience, because, of all of the participants involved in plural marriage families, it is the children who do not have the capacity to consent. But if there are no harms or added harms (other than those inherent in any family), then our argument for plural marriage to be legalized can proceed.

E. Conclusions

Even a cursory look at the children of polyamorous families in America proves revealing for several reasons. Of the harms that have been traditionally ascribed to the children of plural marriage—namely negative impact on development caused by discord; violence; exploitation; competition between spouses and children for attention—the study found exactly none.[610] Even correcting for observer bias, a finding of none is something. What the study did instead encounter was a sense of honesty that permeates the familial relationship and encourages closeness and open acceptance; a group of well-adjusted, thoughtful children of different age groups; and a plethora of economic and emotional child support that was both comforting for children in their times of need and helpful in the most humdrum and pragmatic ways. In addition, as expected, the abundant resources and the attention of a group of adults with varied skill sets provided a profusion of role models for children to depend on and emulate.

[610] For more details and excerpts from interviews, see Goldfeder & Sheff, *Children of Polyamorous Families*, *supra* note 486.

'It takes a whole village to raise a child.' At least that's how the old Igbo saying goes. In many ways polyamory provides that village, allowing a child to be a social being interacting in a safe space with people who are not his or her parents, people who have different outlooks and approaches but a shared sense of responsibility and attachment. While one could argue that the same kinds of benefits are available to children of more traditional blended families—remarried parents with additional parental figures, for example—polyamory has the added potential benefit of providing it all under one roof, and without a prior dissolution of some sort, this minimizing the destabilizing effect that adoption or divorce, oftentimes with its shuffling back and forth between households, tends to have on children.[611] That sense of commitment to care giving and stability would likely only be increased if plural marriage was made legal and the relationship commitments of those involved could be officially cemented.[612]

In terms of the harms that were reported, there was no real sense of social stigma that the children encountered, which is further (albeit anecdotal) proof that the time

[611] *See* J. Rainer Twiford, *Joint Custody: A Blind Leap of Faith?*, 4.2 BEHAV. SCI. & L. 157, 157-68 (1986).

[612] *See* RAUCH, GAY Marriage, *supra* note 78, at 33 ("Marriage, compared with cohabitation, brings much more stability and security in that married couples suffer legal consequences by separating, while cohabitation entails no legal ramifications upon separation. A husband is much less likely to walk away when times get tough than a boyfriend or domestic partner.") *Id.* at 37-38, *quoted in* Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 55 (2010).

has come for the law to recognize what the people already have: family structures differ, and people should be allowed to do what works for their own unit.[613]

As noted, some of the children did report jealousy among blended families, and there was the one instance where a potential relationship between the children was circumscribed by the parents' decision to move in together. Jealousy, though, is common amongst children of any familial structure,[614] and especially within the context of a blended family.[615] As Lindsay M. Monte notes in her article, Blended but Not the Bradys: Navigating Unmarried Multiple Partner Fertility,[616] the lack of an official marriage might contribute to these tensions. And, as anyone familiar with the Brady Bunch show, or even just the second Brady Bunch movie, 'A Very Brady Sequel' (1996), even when there is an officially licensed monogamous marriage, the children of blended families often complain of overcrowding and sometimes do experience various levels of intimate attraction towards each other. Especially among adolescents, research has shown that it is not uncommon for opposite-sex stepsiblings to be sexually involved

---

[613] *See* Janet Bennion, Polygamy in Primetime: Media, Gender, and Politics in Mormon Fundamentalism (2011). Project MUSE, http://muse.jhu.edu/>. *See also* Schilling, *Love, American Style supra* note 11; *see also* Phillips & Dooley, *Modern Polygamist Family*, *supra* note 11.

[614] See Dunn, 1988,; Voling, McElwain & Miller, 2002).

[615] Dawn Braithwaite et al., *Becoming a Family: Developmental Processes Represented in Blended Family Discourse*, 29.3 J. Applied Comm. Res. 221, 221-47 (2001).

[616] Lindsay M. Monte, *Blended But Not The Bradys: Navigating Unmarried Multiple Partner Fertility*, *in* Unmarried Couples With Children 183-203 (2007).

with one another.[617] In fact, although all states have laws governing sexual relations between blood relatives, in recognition of this fact, most states do not have any regulations regarding sexual relations between members of blended families.[618]

In regard to the sense of distress that some children felt at the loss of treasured relationships when one or more adults left, divorced parents involved in shifting monogamous relationships have similar issues when people they are dating build relationships with their children and then leave, but these departures might not happen quite as often.[619] There are no statistics yet on the longevity of polyamorous relationships, but initial data indicates substantial partner turnover among some sample members.[620] Again, if entry and exit norms were made more firm, even these harms would likely somewhat dissipate as parties made those identifying commitments to each other and to the unit.

Clearly, polyamorous families do pose some significant risks to children—as do monogamous families, serially monogamous families, blended families, and de facto polygamous families. Children remain vulnerable to the pain of losing treasured relationships, familial crowding, complex relationships, and stigma even in the most

---

[617] Alan Richardson, *Rethinking Romantic Incest: Human Universals, Literary Representation, and the Biology of Mind*, 31.3 New Literary History 553, 553-72 (2000).

[618] Frank D. Cox, Human Intimacy: Marriage, the Family, and its Meaning 514 (2005) (internal quotation omitted).

[619] Andrew J. Cherlin, The Marriage-go-Round: The State of Marriage and the Family in America Today (2010).

[620] *See* Sheff, *Strategies in Polyamorous Parenting*, *supra* note 463.

traditional units that are based on sexually fidelitous dyads. These harms are not unique to polyamorous families at all and, in fact, have accompanied families for centuries, even expanding with the increase in divorce rates. The most common complaint, also not specifically unique to the children of polyamorous households, but possibly more palpable—that of 'too much supervision'—is hardly a serious one, and certainly not an argument worthy of justifying continued criminalization of a practice.

In short, while the harms that children in polyamorous families actually experience are really just general familial harms, the benefits that accrue are specifically polyamorous. Particularly in areas like inner city Philadephia, where plural marriage by necessity is prevalently practiced, it is hard to imagine punishing the children and denying them a strong familial structure by continuing to make polygamy a crime.[621]

The next step towards plural marriage then might be to contemplate how to best address legal questions of multiple adults as contemporaneous intimates.[622] Continuing in our vein of privileging form over function and recognizing what already exists, the next chapter will present an innovative approach towards going about that process. The first step, however, must be to address the myths and misinformation that have plagued the system for too long. Plural marriage might not be for everyone, and no one is

[621] See *supra* note 452 for a discussion on inner-city Philadelphia and its recent embrace of plural marriage.

[622] For more on that, see Davis, *Regulating Polygamy*, *supra* note 420; Ertman, *Marriage As a Trade*, *supra* note 324, at 125; Strassberg, *The Challenge of Post-Modern Polygamy*, *supra* note 439, at 439.

arguing that it should be the norm. But for some families and for some children, having a plural marriage support system in place to provide more love, support, and yes, sometimes just more rides, is definitely in the best interests of the child. And, as in most legal determinations, that should be the standard that matters.[623]

Turning towards the technicalities though, from a legal perspective, after *Lawrence v. Texas,*[624] polygamy statues that criminalize the private conduct of adults may be in violation of Due Process guarantees of the Fourteenth Amendment, and by singling out polygamists amongst all those who decide to have children with multiple partners, also the Equal Protection Clause. After *Windsor*,[625] the denial of marriage equality to these same adults may even be in violation of the Fifth Amendment. Seeing as there is definitely not harm in *every* case, there is probably not a compelling state interest that is narrowly tailored enough to pass constitutional muster under the Free Exercise Clause of the First Amendment. We turn now, then, to the question of how to legalize plural marriage.

---

[623] JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE xiii (1996). In fact, when discussing the case of Jacob v. Shultz-Jacob, the 2007 Pennsylvania case with three legal biological parents, Professor Arthur Leonard writes that in deciding where children would go in the event of the breakup of this family, the standard to be used, even for a triad, is always the best interests of the child. *See* Abigail Ruth, *Pennsylvania Court Finds Three Adults Can Have Parental Rights*, LANCASTER (May 01, 2007, 8:13 PM), http://culturecampaign.blogspot.com/2007/05/pennsylvania-court-finds-three-adults.html.

[624] 539 U.S. 558, 560, 123 S. Ct. 2472, 2474, 156 L. Ed. 2d 508 (2003)

[625] 133 S. Ct. 2675

Chapter 5: Legalizing Plural Marriage

Legalizing plural marriage would definitely have the potential to change, in some ways, how society works and functions. But, as Philip Kilbride notes, if the United States never changed its laws, even laws affecting major institutions, life would look very different than it does today. Only men would vote, and women would have few, if any, legal rights. Blacks would be enslaved, and there wouldn't be a Bill of Rights.[626] Atlantic Monthly contributor Andrew Sullivan sharpened this point, noting:

> [I]f marriage were the same today as it has been for 2,000 years, it would be possible to marry a 12-year-old you had never met, to own a wife as property and dispose of her at will, or to imprison a person who married someone of a different race. And it would be impossible to get a divorce.[627]

To put it simply, if the plural marriage movement is successful, it would not be the first time in this country's history that marriage laws were changed so they are more fair, equitable, and fitting to the times in which people live. The fact that it has not happened yet should not be seen as dispositive evidence of the fact that it could or should never happen—these things tend to take time. It took over a century after the Civil War for 1967's Supreme Court ruling in Loving v. Virginia to note that Virginia's ban on interracial marriage was unconstitutional,[628] and same-sex marriage has been an

---

[626] Kilbride et al., Plural Marriage for Our Times, *supra* note 357, at 149-50.

[627] Andrew Sullivan, *State of the Union*, The New Republic, May 8, 2000, *available at* http://www.newrepublic.com/article/politics/state-the-union-0.

[628] *Loving*, 388 U.S. 1 (1967).

issue for over forty years, at least since 1972's *Baker v. Nelson*.[629] Perhaps legalizing plural marriage can be the next link in the chain of family law evolution. This chapter argues that it can, in fact, be done, and quite easily in the sense that plural marriages can be accommodated in our legal and cultural systems without doing violence to any of the essential elements of the current and accepted marital bundle.

A. Decriminalizing, Defining, and Structuring Plural Marriage

So how do we go about legalizing it? First we need to decriminalize it. Several immediate changes in the law would be required in order to secure and protect plural marriage rights, predominantly in state laws defining marriage, specifying legal barriers to valid marriage, and in anti-bigamy criminal statutes.[630] It would also require changing or overruling the state constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah, which, to this day, contain provisions stating that polygamy is prohibited.[631]

---

[629] Baker v. Nelson, 409 U.S. 810 (1972).

[630] Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 40 (2010) [hereinafter Klein, *Plural Marriage and Community Property Law*].

[631] *See* ARIZ. CONST. art. XX, para.2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1; *see also* Romer v. Evans, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting). However, even those states whose constitutions prohibit polygamy have the power to change this. *See, e.g.*, Barlow v. Blackburn, 798 P.2d 1360 (Ariz. Ct. App. 1990) (holding that the antipolygamy clause in the state constitution was not void under equal footing doctrine, U.S. CONST. art. 4, § 3, cl. 1, on the theory that it was included solely to satisfy the requirements of the Enabling Act so that Arizona could gain statehood; whatever the limitations imposed by the Enabling Act, Arizona has had full power since statehood to repeal the antipolygamy clause). It would likely also require the overturning of DOMA, under review by the Supreme Court as of the time of this writing.

Changing the legal definition of marriage is actually fairly straightforward. California Family Code Section 300,[632] for example, defines marriage as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." Should same-sex marriage rights be restored in California,[633] the words 'a man and a woman' could simply be deleted and replaced with the word 'adults.' Alternatively, the definition could be combined with section 297, defining domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[634] Merging them would yield a working definition of marriage as: "a personal relation arising out of a civil contract between adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, to which the consent of the parties capable of making that contract is necessary."[635]

Civil laws and criminal laws relating to impediments to marriage could easily be amended and would not have to be repealed. As we shall see, updated bigamy statutes

---

[632] CAL. FAM. CODE § 300(a).

[633] On June 26, 2013, in *Hollingsworth v. Perry*, the United States Supreme Court ruled that proponents of initaitves such as Proposition 8 did not possess legal standing in their own right to defend the resulting law in federal court. The Ninth Circuit lifted their stay on the district court's ruling and same-sex marriage in California has resumed.

[634] CAL. FAM. CODE § 297(a).

[635] Klein, *Plural Marriage and Community Property Law*, *supra* note 627, at 41.

might just list an exception for plural marriages that have been handled properly, with notification and consent."[636]

Next, we would need to establish what structural model of plural marriage we are talking about. There are two main types of polyamorous relationship structures—the all-with-all model (the group model), in which all the members of a marriage are joined together in one unit, and the dyadic network model, wherein the bigamy laws are simply revised so that a person is free to be concurrently married to more than one person at a time, provided that it is done with notice, consent, etc. The updated crime of bigamy, then, might be doing so (i.e. entering into another marriage) without proper legal notice.

Proponents of the group model point to the fact that this arrangement, in some ways, is easiest to govern, because we already have a well-developed body of law from which to draw in business association law. The group marriage would be a licensed entity, with articles of incorporation specifying the terms of the arrangement and provisions for how to let new members in and how to divide property upon dissolution. The group marital entity could, itself, possess or inherit property and enter into contracts, while also inheriting almost everything that a dyadic married unit could, with

[636]For an example of a typical anti-bigamy statute, see CAL. FAM. CODE § 2201(a), which provides that "[a] subsequent marriage contracted by a person during the life of a former husband or wife of the person, with a person other than the former husband or wife, is illegal and void from the beginning," unless the former marriage has been annulled or dissolved or the former spouse is legally presumed dead." This law might be amended to add an additional exception for valid plural marriages registered with the state. *See* Klein, *Plural Marriage and Community Property Law*, *supra* note 627, at 41. The same is true of criminal law statutes.

decision-making power carried out in an egalitarian corporate structure. Martha Ertman, for one, makes a strong case for why this should be so.[637]

This chapter, however, argues that simplicity is almost always better, and in so many ways the dyadic network structure would just be simpler. For one thing, in terms of inclusion, dyadic networks can correctly represent any situation associated with the all-with-all paradigm as well as many situations with which the all-with-all paradigm cannot deal.[638] A group dyadic network would just take the form of a complete graph, in which every person is (pair-wise) married to every other person. A dyadic network is more inclusive and, at the same time, more flexible in that it can also represent situations in which some persons are (pair-wise) married to some members of the dyadic network, but not to all of them, i.e. A married to B and C, but B and C unmarried to each other. This is important because in the push to legalize plural marriage, inclusion of all is not only ideal, but necessary—as noted above, the largest push is still coming from religious sects of Mormons and Muslims, all of whom are polygynous and whose belief systems would not be well-represented in the all-with-all structure.

In addition, under the "all-with-all" marriage paradigm, when irreconcilable differences arise, there can be no alternative to a complete separation — one person cannot divorce another without ending the entire marriage agreement for everyone

[637] Ertman, *Marriage As A Trade*, *supra* note 324, at 129.
[638] *Polyamory*, WIKIA, http://bisexuality.wikia.com/wiki/Polyamory.

involved. Dyadic networks, on the other hand, can compartmentalize relationship ruptures, limiting and containing damage both to the unit and to the children involved.[639] A complete dyadic network of A, B, and C, for instance—what polyamorists call a 'triangle'—would simply become a 'V' when any two members divorced. Ertman has figured out a way around that problem by relying on the laws for Limited Liability Corporations (LLCs), which provide for both dissociation (the exit of one member) and dissolution (the end of the entity).[640] In addition, unlike some other corporate structures,[641] LLCs already may be used for a non-business purpose.[642] Still, there remains no way of getting around the problem of the corporate representation being under-inclusive.

From a simplicity perspective, dyadic networks would represent the path of least resistance toward a change in legal marriage structure. Marriage would remain, at its core, a dyadic relationship—a relationship between two persons—thus minimizing the amount of change to the existing legal structure. The marriage contract would be almost exactly the same as the marital bundle currently offered, minus the element of exclusivity. In other words, marriage would remain a two-party endeavor, but parties

---

[639] *Id.*

[640] Ertman, *Marriage As A Trade*, *supra* note 324, at 129.

[641] *See* REV. UNIF. PARTNERSHIP ACT § 202, 6 U.L.A. 27 (1997) (permitting use of partnership only by an "association of two or more persons to carry on as co-owners a business for profit").

[642] *See* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 4:10, nn.5-6 (2d ed. 2004) (discussing purpose limitations in LLC statutes).

would be permitted to enter into more than one such type of contract.

Throughout this chapter, we have tried to look at reality on the ground in order to determine what the law should be. The functional approach says that, if we can look at what people are already doing and what systems they have implemented, then all we need to do is connect the dots. As it turns outs, legalizing plural marriage is easier than it might sound.

To review, there are currently between 30,000 and 100,000 families in America that are already living in plural marriage arrangements, plus some half a million other polyamorists. Some, such as the fundamentalist Mormons, are legally married to just one wife and have only "celestial marriages" with their other spouses. Others, however, yearn for some form of greater state recognition, along with the stability, and benefits of marriage. Again, many, alongside Martha Ertman, have pointed out that business associations currently offer the flexibility that family law still lacks.[643] Business association statues also provide easy and convenient off-the-rack rules regarding such issues as formation, governance, and exit that also exist in domestic relationships.[644]

---

[643] *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1779 (2005) (arguing that marriage law, like business association law, is evolving away from state control); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 353 (2007) (suggesting a domestic partnership model based on business partnership law for family relationships).

[644] Davis, *Regulating Polygamy*, *supra* note 422, at 1955 (arguing for partnership model for polygamous relationships).

Furthermore, the agency and opportunism problems that business association statutes deal with resemble those that often arise in the context of domestic relationships. Thus, it is not surprising that commentators have turned to business associations law as the relief from the existing legal constraints on same-sex marriage and other non-traditional domestic relationships.[645] Scholars have also embraced a general analogy between marriage and partnership in tax, estate, and divorce law, particularly in areas where it serves to further women's autonomy.[646]

Despite the fact that converting entirely to a business model might be the wrong direction to go, for the above-mentioned reasons, along with other generalized concerns about the applicability of business law forms to close personal relationships,[647] it would be wise to pay heed to these calls for analogy, and not simply dismiss them outright. There are pros and cons to using the business associations analogy for establishing marital forms. On the one hand, business relationships, like marriage, may be founded significantly on trust and altruism. For both domestic and business associations, the

---

[645] *Id.*

[646] *See* Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994). Katherine Wells Meighan has proposed that contributions to one spouse's education be accounted for at divorce under a corporate finance model. Katherine Wells Meighan, *For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 GEO. MASON L. REV. 193 (1997); *cf.* A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts*?, 78 B.U. L. REV. 961 (1998) (applying corporate model to marital debt); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (asserting that traditional Chinese family law functioned similarly to modern American corporate law).

[647] *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

availability of multiple standard forms helps clarify the parties' relationships and thereby increases contracting opportunities.[648] Marriage law, like business association law, can economize on contracting costs, which can be significant in a long-term relationship. Standard forms assist interpretation of the parties' contracts.[649]

On the other hand, on the comments to the ALI Principles, noted family law scholar and Chief Reporter Ira Ellman hammered home the importance of construing marriage as a status in-and-of itself, not just another in a string of associations.[650] This is particularly true for our definition of marriage as a central aspect of identity. Perhaps, then, it might be best to look internally at the current marriage scheme itself for the right business terms to appropriate, instead of reaching outside of the marital regime and plugging things back in.

Again, the key to success is gradual change and natural evolution. We turn now to basic contract law.

B. The Solution to the Plural Marriage Problem: The Plural Prenup

[648] *See* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 24-38 (2010); Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309, 317-21 (2005).
[649] *Id.* at 319.
[650] In the comments to the A.L.I. Principles, Ira Ellman hammered home the importance of construing marriage as a status in and of itself.

Many engaged couples fail to realize that, even without a prenuptial agreement, any two people who marry enter into a marital contract. [651] This, usually unwritten implicit contract, is typically formatted by the state and imposed by the law without any input from the marrying couple. The contract includes such mundane provisions as, for example, the idea that "each [party] owes the other financial support."[652]

Now of course, as noted, marriage is also more than a contract. In 1888, the United States Supreme Court officially affirmed this status in *Maynard v. Hill*, noting in its opinion that marriage

> is not so much the result of private agreement, as of public ordination. In every enlightened government, it is preeminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.[653]

But it is important for our purposes to remember that whatever else marriage is, it is also, at its core, a contract.

Our current marriage scheme, with its accompanying contract, carries with it a set of powerful default rules that give it its underlying structure, shape, and importance. Default rules are rules that govern in the absence of parties' specifying their own

---

[651] Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers, and the Law 243 (1981).
[652] A.B.A., Your Legal Guide to Marriage and Other Relationships 15-16 (1989).
[653] *Maynard*, 125 U.S. at 213 (quoting Noel v. Ewing, 9 Ind. 37, 50 (1857)).

rules.[654] As a matter of legal ideals, the design of any given set of default rules should turn on the underlying legal and policy goals. Majoritarian defaults are based on outcomes that law determines most people would prefer.[655] Unlike immutable rules, however, which are mandatory, default rules, can be avoided by negotiating, bargaining, and drafting around them. The underlying theory is that parties can and will bargain around default rules when it is in their interest to do so; having them in place simply reduces transaction costs for most people and helps facilitate arrangements. Default rules are crucial in family law, because in the absence of prenuptial agreements, or, on some occasions, postnuptial ones, marital default rules generally govern intimate relationship contracts.[656]

---

[654] 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). 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. *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).

[655] 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).

[656] Andrew Blair-Stanek, *Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints*, 24 TOURO L. REV. 31, 71 (2008).

While the states usually dictate the particular default terms of the marriage contract,[657] in recent years they have been increasingly open to letting parties contract around them, using their own terms.[658] Thus, allowing for plural marriage would not mean unbundling and removing or changing any of the immutable laws, such as the laws against coercion or unconscionability.[659] It would simply mean allowing the parties the opportunity to negotiate around one particular default term: the default assumption of exclusive monogamy.

While this may seem like a somewhat far-reaching idea at first, let us simply continue connecting the dots and see where we end up.

In truth, this concept is not too radical an extension for American courts at all. American courts have been enforcing prenuptial agreements in steadily greater number since the 1970 landmark case of *Posner v. Posner*,[660] which held that premarital contracts do not contravene public policy.[661] Since then, the American Law Institute has

---

[657] *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 146 (1993).

[658] Singer, *The Privatization of Family Law*, *supra* note 156, at 1443 (discussing the transformation in family law from public to private ordering of behavior). *See also* Matthew P. Bergman, *Status, Contract, and History: A Dialectical View*, 13 CARDOZO L. REV. 171, 172 (1991) ("During periods of social change, status . . . will give way to contract.").

[659] "[A] premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement." UNIF. PREMARITAL AGREEMENT ACT § 2 (1983). The UPAA also draws upon contract and commercial law for the standard of unconscionability. *Id.* § 6 cmt.

[660] Posner v. Posner, 233 So. 2d 381, 385 (Fla. 1970).

[661] *Id.*

proposed the Uniform Premarital Agreement Act ("UPAA"),[662] which twenty-seven of the states have enacted since 1983.[663] This statute gives presumptive validity to all premarital agreements so long as they fully disclose each party's assets and do not contravene public policy.[664] Moreover, the courts of those states whose legislatures have not passed the UPAA now overwhelmingly enforce premarital agreements much like any other contracts.[665]

The UPAA defines a premarital agreement as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage."[666] This definition, however, does not reflect the inordinate power of the premarital agreement, which permits prospective spouses to regulate their rights and responsibilities not only during divorce or death, but also during marriage.[667] The legal shift allowing this greater marital contracting capability has spawned a wide array of legally enforceable

---

[662] UNIF. PREMARITAL AGREEMENT ACT § 1-11, 9C U.L.A. 39 (1983).

[663] *See Legislative Fact Sheet, available at* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Premarital%20Agreement%20Act.

[664] UNIF. PREMARITAL AGREEMENT ACT § 6(a)-(b), 9C U.L.A. 48-49 (2001).

[665] *See* Brooks v. Brooks, 733 P.2d 1044, 1049-51 (Alaska 1987) (listing reasons modern courts prefer to enforce premarital agreements). *See also* Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990).

[666] UNIF. PREMARITAL AGREEMENT ACT § 1 (1983).

[667] First, a prenuptial agreement may shield wealth acquired by one spouse before marriage from the other. *See, e.g.*, Osborne v. Osborne, 428 N.E.2d 810, 813 (1981); DeLorean v. DeLorean, 511 A.2d 1257, 1259 (N.J. 1986). Second, a prenuptial agreement may stipulate a division of property that is acquired during marriage. *See, e.g.*, Ferry v. Ferry, 586 S.W.2d 782, 783 (Mo. Ct. App. 1979); Gant v. Gant, 329 S.E.2d 106, 109 & n.1 (W. Va. 1985). Third, the contract may predetermine the amount and timing of support one spouse will pay to the other after separation or divorce. *See, e.g.*, Lewis v. Lewis, 748 P.2d 1362, 1364 (Hawaii 1988); Volid v. Volid, 286 N.E.2d 42, 43-44 (1972). Finally, some commentators have advocated the use of prenuptial agreements to structure the terms of the ongoing relationship. *See* L. WEITZMAN, THE MARRIAGE CONTRACT 225-54 (1981); Shultz, *Contractual Ordering of Marriage*, *supra* note 48, at 219-23.

agreements between prospective spouses—agreements which have covered many aspects of married life ranging from random spousal drug testing,[668] to proper amounts of football watching,[669] to the preferred brand of gas to be put in the car.[670] Premarital agreements can impact how property is held during the marriage and its effect on third persons, such as creditors.[671] Perhaps most importantly for a discussion of monogamy versus non-monogamy, the California case of *Whorton v. Dillingham* held that a premarital agreement was enforceable even though the parties' sexual relationship was an express part of the consideration, so long as it was not based on "illicit meretricious consideration."[672]

Premarital agreements are becoming increasingly popular and more mainstream. One report estimated that the number of prenuptial agreements used annually tripled

---

[668] Sandy Cohen, *Untying the Knot, Celeb-Style*, VENTURA COUNTY STAR, Dec. 20, 2005, Life, Arts & Living, at 1 (listing actual premarital agreement terms including financial penalties for failing random drug tests, impoliteness to in-laws, or more than one football game per Sunday).

[669] *Id.*

[670] *See* Gary Belsky, *Living by the Rules*, MONEY, May 1, 1996 [hereinafter Belsky, *Living by the Rules*].

[671] They can do this by opting out of their state's default property distribution scheme. *See, e.g.*, Christine Davis, Note, *Til Debt Do Us Part: Premarital Contracting Around Community Property Law—An Evaluation of Schlaefer v. Financial Management Service, Inc.*, 32 ARIZ. ST. L.J. 1051, 1055-57 (2000) (describing the effects on creditors of a prospective spouse's decision to opt out of a default community property regime through a premarital agreement); Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67_MISS. L.J. 115 (1997) (examining both default property distribution regimes in the United States).

[672] Whorton v. Dillingham, 248 Cal. Rptr. 405, 407 (Ct. App. 1988). Again, it is not illegal for a group of people to live together and contract about their living arrangements and responsibilities, or to have any sexual relationship that they want. If there was enough of a contract without the sexual implications, a court would likely decide that the sexual aspects were irrelevant.

between 1978 and 1988, and has steadily increased ever since.[673] Of marrying couples, approximately 5 percent (about 50,000) sign prenuptial agreements each year.[674] Furthermore, an estimated 20 percent of remarriages feature a prenuptial agreement.[675]

In 2002, the American Law Institute (ALI) published Principles of the Law of Family Dissolution: Analysis and Recommendations (ALI Principles), their first comprehensives work in the area of family law. Chapter 7 of ALI Principles justifies the concept of antenuptial agreements on multiple grounds. First, "[a]llowing parties to make agreements respecting the rights and obligations that will arise from marriage . . . has special appeal in the United States which, as a general matter, highly values contractual freedom."[676] More functionally, Chapter 7 suggests that the agreements may increase certainty about the future, causing parties to make better decisions about their relationships by putting them through the process of planning for contingencies.[677]

Section 7.04's procedural requirements for antenuptial agreements depart from the simple voluntariness standard of both the UPAA[678] and traditional contract

---

[673] *See* Pam Slater, *Prelude to Partnership*, SACRAMENTO BEE, June 13, 1996, at C1.
[674] *See* Belsky, *Living by the Rules*, *supra* note 667, at 102.
[675] Cecile C. Weich, *Love on the Dotted Line: Craft a Prenuptial Agreement Carefully to Withstand Any Future Challenges*, A.B.A. J. 50 (1994).
[676] UNIF. PREMARITAL AGREEMENT ACT § 7.02 cmt.B.
[677] *See Marriage As Contract and Marriage As Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2084 (2003) [hereinafter *Marriage As Contract and Marriage As Partnership*].
[678] *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1).

law.[679] Section 7.04 requires that the agreement be in writing and signed by both parties,[680] and places the burden on the party seeking enforcement to show that the objecting party's consent was informed and free from duress.[681] However, a rebuttable presumption of informed consent and freedom from duress is created by the existence of three conditions: (i) the antenuptial agreement was executed at least thirty days prior to the marriage; (ii) the parties were advised to obtain independent legal counsel and had reasonable opportunity to do so; and (iii) if each party did not have independent legal counsel, the agreement stated clearly, in ordinary language, the nature of the rights affected by the contract and advised that the parties may have adverse interests with respect to the agreement.[682] As a policy then, it is recommended that any dyadic network prenuptial agreement closely follow those conditions. To be clear, the contract should be in writing; allow for at least a month of contemplation by both parties prior to signing; be signed and notarized by both parties; and include legal provisions concerning consideration, effective date, and effect.

Moving on to the next dot that we need to connect, some states have already taken the idea of marriage as a contract to the next logical step. Going back to our unbundling methodology, they have begun making available the option of different

---

[679] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 18-21 (1981) (listing mutual assent and intent to be legally bound as requirements for a valid contract).
[680] A.L.I. Principles, § 7.04(1).
[681] *Id.* at § 7.04(2).
[682] *Id.* at § 7.04(3).

easily accessible packages, with alternative bundles of marriage terms, to their constituents. In 1998, for instance, Alaska began giving couples the option of community-property marriage.[683] Since 1997, Louisiana has offered both standard no-fault marriages and "covenant marriages," which retain immediate divorce in cases of fault such as physical abuse, but establish a lengthy waiting period for divorce without fault.[684] Covenant marriage laws also require couples to participate in premarital and pre-divorce counseling. There is no reason to think that there might not be room on the shelf for a third option, with dyadic network marriage co-existing easily with other kinds, and participants choosing the model that they are most comfortable with for themselves.

The concept of using a prenuptial agreement to specify the monogamous or non-monogamous nature of a marriage is not really a new idea. While written premarital agreements first appeared in English legal history only a little more than four centuries ago,[685] religious prenups have been around for thousands of years.[686] In fact, one of the

---

[683] ALASKA STAT. § 34.77.030 (2007).

[684] LA. REV. STAT. ANN. § 9:293 (2007). Other states, including Arizona, Arkansas, and Kansas have followed suit, and while legislation has been introduced to create legal covenant marriage in a number of other states, including California, Florida, Georgia, Indiana, Iowa, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia, these efforts have not, to date, been successful.

[685] Courts of both law and equity were passing on the validity of premarital agreements in the sixteenth century. *See* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 310, 311 (3d ed. 1945).

[686] *See generally* BABYLONIAN TALMUD, *Ketubot* (literally tractate of marriage contracts); *see also* PHILIP GOODMAN & HANNA GOODMAN, THE JEWISH MARRIAGE ANTHOLOGY 87 (1965). In the Bible, Laban sets

oldest extant prenuptial agreements that we have found deals with negotiating around the possibility of plural marriage. In ancient Jewish society, the default rule was to allow for the possibility of plural marriage later on down the line, unless the parties specifically contracted around it in the first place. In a prenuptial agreement from Elephantine, a Jewish military colony in Egypt, dated around the year 44 BCE, the husband (Ashor) promises his wife (Miphtahiah) that he will remain monogamous.[687] Similar documents have also been preserved in Babylonian and Assrian documents from approximately the same era.[688] Islamic law mirrors Judaism in this way, as, for instance, an Islamic woman who wants her husband to be monogamous can insert a non-polygamy clause into her prenuptial agreement.[689] Otherwise, the default in some Islamic societies would be that polygamy is legal.

In America, however, the reverse would be true—the rules for traditional dyadic marriage would remain the default rules for two reasons. First, as a matter of public policy, we can assume that most people in the United States would still prefer a traditional exclusive dyadic marriage, and so, keeping that option as the default rule is administratively more efficient. More importantly, in order to protect the participants

---

a precedent for a postnuptial agreement by telling (the admittedly already polygamous Jacob) not to marry any other wives.

[687] A. Cowley, Aramaic Papyri of the Fifth Century, B.C. 45-46 (1967).

[688] *See* 12 Encyclopedia Judaica, *supra* note 92, at 259; Ze'ev W. Falk, Jewish Matrimonial Law in the Middle Ages 5 (1966) [hereinafter Falk, Jewish Matrimonial Law].

[689] *See* Raffia Arshad, Islamic Family Law (2010). *See also* Attila Ambrus, Erica Field & Maximo Torero, *Muslim Family Law, Prenuptial Agreements, and the Emergence of Dowry in Bangladesh*, 125.3 Q. J. Econ. 1349, 1349-97 (2010).

who are entering into a theoretically non-monogamous marriage, we want to make sure that both parties affirmatively ask for it and acknowledge that they have full information about what they are doing. In terms of structuring a plural-marriage-allowing wedding license application with a built in prenuptial agreement, the safest way to insure parties share information up front would be for every marriage contract to be an exclusive marriage contract by default, unless both couple affirmatively fill out the opt-in to plural marriage box, with signature. In states that thought it necessary, such an opt-in could also come with pre-marital counseling as a prerequisite, as does covenant marriage in Louisiana.

In terms of how the actual prenuptial clause would have to look and function, in order to make such marriages administrable, the terms of the first marriage contract a party enters into would necessarily control the terms and conditions under which either party may enter any subsequent additional marriage contracts. Even assuming that a couple opted into a non-exclusive marriage contract, each later marriage contract would have to comply with the terms of the first, and any marriages that happened after that would have to comply with both sets of prior marriage contracts, and so on down the line. Hypothetical restrictions could include language such as "This marriage shall be the only marriage into which a spouse will enter, unless prior written authorization is given by the other spouse;" or "a spouse cannot enter into any additional marriage contracts

that would grant property rights to the additional spouse over any of this union's marital property;" or "Neither spouse may ever marry more than one additional partner." Restrictions could also be placed on whether or not additional spouses are permitted to live in the same household (or if there is a requirement that they do so), or stipulations about which spouse has priority in regards to inheritance or power of attorney.

From a policy perspective, it also makes sense to give each spouse veto power, so that a current spouse always has the power to veto any new marriage their spouse might wish to enter into.[690] This is true because, not only do additional spouses affect the emotional balance of a relationship when they enter into an existing one, but they also have the potential to seriously alter the economic standing of a first spouse—as his or her rights to inheritance, employment, government benefits, and earnings will be subject to more claims.[691] Even if the original contract provided for all of these things, additional spouses on a daily level will create more claims on food, shelter, utilities, etc., and also may produce more children that do the same. With the adoption of a unanimity rule, any additional spouse that any current spouse wants to marry must be approved of by all of their other current spouses. In fact, many polyamorous families

[690] *See* Davis, *Regulating Polygamy*, *supra* note 422, at 1991. *See also* Strassberg, *The Challenge of Post-Modern Polygamy*, *supra* note 439, at 439.
[691] *Id.*

already go through this process before adding new members.[692] While this does, in theory, open up new possibilities for a withholding spouse to be emotionally punitive, if the spouse that wishes to marry another is sufficiently unhappy, they can always get a divorce.[693]

Unlike entry, exit from a plural marriage would not require any form of unanimity—a spouse would, at any point in time, retain the right to gender-neutral no-fault divorce rules. As opposed to an all-with-all model, our dyadic network structure leaves open the possibility that one or more members may leave the marriage without the union being definitionally dissolved—as long as at least two members remain, the martial entity can continue, although it is likely that we would require the remaining parties to draft and sign a new agreement upon both the entry and exit of a spouse, since the change can have an effect on the remaining spouse's rights and duties. The fact that the marriage can continue might also be important for the children involved, who will have less disruption in their lives if just one spouse leaves than if their entire family was to dissolve.[694]

In terms of the specific packages of benefits that come with marriage, opponents of plural marriage cry out that it would be almost impossible to restructure our

---

[692] *See* Geri Weitzman et al., What Psychology Professionals Should Know About Polyamory (2009).

[693] *See* Davis, *Regulating Polygamy*, *supra* note 422, at 2008 (suggesting that polygamy should follow commercial partnership law, including the Revised Uniform Partnership Act's costly unanimity rules).

[694] *Id.*

dyadically-minded society to think about any other family forms. The reality, however, is that it is very easy to imagine what society would look like, and to be honest, most if not all of the elements we tend to think of as 'just dyadic' can remain in the marital bundle. And since we are negotiating and contracting, new elements may also come in—as a matter of efficiency, it is likely that, in time, lawyers and private enterprises will develop new, off-the-shelf marital kits for people to choose from when they come to get licensed, from which people of various religious and ideological backgrounds can select the marital agreement that they believe in, or most believe in.

Over the next few pages, we will run through some of the claims that most often come up in the discussion of how hard it would be to legalize plural marriage, and show how they are not quite as difficult to deal with as they might initially seem. That a modern nation can allow polygamy within its borders and survive is demonstrated by the English experience;[695] faced with large numbers of polygamous immigrants from former colonies where polygamy is legal, England relied upon the lex loci celebrationis principle of conflict of laws—the idea that a marriage is generally valid everywhere if it is valid in the place where it was celebrated—to reverse its common law rule based upon Christian matrimonial principles and allow plural marriage recognition.[696]

---

[695] Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 754.

[696] *See* Jorge Martin, *English Polygamy Law and the Danish Registered Partnership Act: A Case for Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 Cornell Int'l L.J. 419, 427 (1994). Truth be told, the effect that it would have on immigration issues

C. Common Polygamy Concerns and Their Solutions

Perhaps, the most common concern revolves around medical decisionmaking ability for an incompetent or dying spouse. What happens in a plural marriage situation when different spouses have different ideas about what could or should be done? The question is moot when we realize that there is no reason why terms in the prenuptial agreement could not be linked—i.e. the prenuptial agreement authorizing this marriage to be open for dyadic networking might also require each spouse to designate a medical power of attorney. It might even be more specific, with health care directives, health care proxies, and similar devices, because once we are forcing parties to think ahead and consider all possible consequences, we might as well go all the way.

The dyadic network prenup might also require the writing of a will—to be revised prior to any subsequent marital unions—in order to avoid any sticky intestacy issues. Truth be told though, if a state did not want to do this, it could easily accommodate in this situation by giving more than one wife the right to receive a portion of the estate of a spouse that dies intestate; state laws already provide for fixed shares for multiple persons, i.e. one spouse and an unlimited number of children. It is not difficult to imagine that the language could be modified ever so slightly to also

---

might be the quickest and most important effect of legalizing plural marriage in America. *See also* Smearman, *Second Wives' Club*, *supra* note 502, at 382 (describing how polygampus families coming to America are forced to make the difficult choice of either splitting up or continuing their relationships illegally).

include multiple spouses.[697] At the same time, the state could guarantee all wives subsequent to the first the right to avoid disinheritance by taking against the will, which would eliminate the potential problem of second spouses becoming wards of the state.[698]

In terms of giving preference to one spouse or another as personal representative of a spouse who dies intestate (assuming we do not require a will before we allow a second marriage), the state might easily implement a first-come, first-served rule, or whatever other rule a legislative body thought was more efficient. The point is just that we have the capability to do this, and to do it easily. In fact, courts have already done similar things. For example, in one 1948 California Court of Appeals case, the court applied the lex loci celebrationis principle to a polygamous marriage validly contracted in India, and the held that two women would both be recognized as wives for the purposes of estate administration.[699]

In regard to visitation, the rules for 'immediate family members' arguably already include the possibility of more than one spouse, just as they include a potentially unlimited number of children or siblings.[700] The same principle holds true for extending

---

[697] *See generally* VT. STAT. ANN. tit. 14, §§ 401, 403, 404, 551 (1989), which could easily be modified to divide the available money and household goods among multiple wives.

[698] Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 755.

[699] *See In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948).

[700] *See* Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 755. Thus, VT. STAT. ANN. tit. 18, § 1852 (1999), for instance, could be easily modified. It would seem to make no difference under the

the ability to sue for loss of consortium to multiple spouses,[701] or wrongful death, perhaps by way of joinder.[702] In regard to receiving spousal benefits at work, including health and life insurance coverage, again the issue has already been taken care of—varying numbers of spouses are to be handled in the same way that varying numbers of children are handled. Worker's compensation survivor benefits, at first glance, might seem tricky, but it would be solved with a household-based, rather than an individual-based award. In fact, the statutes in place already contain formulas to divide compensation among one wife and multiple children—it is hard to argue that it is prohibitively more difficult to also allow for division among multiple spouses.

Multiples spouses could also acquire homestead rights, with the property held as tenants in common.[703] The presumption of joint ownership of property with the right of

---

Patients' Bill of Rights if the "immediate family members" included more than one wife, as the term could include multiple siblings and multiple children without limit.

[701] Loss of consortium is even easier than the others, because it has already moved away from a strict spousal standard. For instance, in Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003), the New Mexico Supreme Court held that "a claim for loss of consortium is not limited to marriage partners." *Id.* at 951. In order to recover, an unmarried claimant "must prove a close familial relationship with the victim." *Id.* at 957. In evaluating the proffered relationship, the trial court must consider a variety of factors: "[T]he duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements." *Id.* (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (1994)).

[702] Default rules might govern whether each spouse is entitled to a full recovery or a corresponding fraction.

[703] Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 756-57.

survivorship would have to be extended, but it is already possible for three or more persons to acquire property as joint tenants with rights of survivorship.[704]

In regard to the spousal testimonial and marital confidences privileges that spouses hold for one another, Edward Zelinsky has argued that the amount of exceptions and limitations surrounding these rules make them of little value in the real world.[705] Still, the state could easily allow multiple spouses the evidentiary privilege of marital immunity—the state already grants multiple immunities to physicians and attorneys, regardless of whether they are sole practitioners or members of a large firm or practice. If we were worried about fraud (i.e. gang members all marrying each other to avoid testifying), we could submit them to one of the marriage fraud tests discussed below.

Upon divorce, all wives would be entitled to fair treatment in terms of spousal support and equitable distribution of property, subject, of course, to any terms in the original or preceding marital agreements.

In terms of how to go about properly taxing the spouses in plural marriage arrangements, Samuel Brunson[706] offers various solutions as to how the federal government could go about administering the federal income tax fairly if a state was to

---

[704] *Id.* at 757.

[705] *See* Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1203 (2006).

[706] Samuel D. Brunson, *Taxing Polygamy*, WASH. U. L. REV. (forthcoming).

legalize the practice. One suggestion involves just treating all spouses as a single economic unit. This involves minimal change for the IRS (Form 1040 would just be modified with lines for extra spouses), but it would result in significant unfairness to the multi-member polygamous unit that was being taxed as two people in a dyadic unit, making the same amount and living at a much higher standard.[707] Indexing tax brackets to family size might help this horizontal equity issue, but it opens the door for tax-induced distortions in marriage decisionmaking by incentivizing the addition of low-income spouses. This is against public policy in tax. Instead, what we need to have is a balkanized filing system in which polygamous families are treated as a collection of dyadic economic units, with each unit deciding whether or not to file jointly. This is yet another reason to push for dyadic networks and not group marriages—it requires the least amount of fundamental change to the joint filing system. Just like marriage, it remains at its core, in some sense, a purely dyadic setup. The partner in multiple marriages would receive a tax credit for taxes paid on his other returns, or could split his income pro rata between each of his spouses, with the marginal tax bracket adjusted to a plural marriage setting. [708]

The above-mentioned remedies address external issues. Internally—within the marriage entity itself—it is also important to make sure that every spouse is properly

[707] *Id.* at 38-39.
[708] *Id.* at 45.

protected. The age for marriage will be rigorously enforced, with no option of parental or judicial permission to enter into a polygamous marriage before the age of eighteen. As noted, we might also encourage premarital counseling to make sure that all parties understand what they are doing. In addition, the designation of whether a marriage will be traditional dyadic or plural would have to be made up front, ex ante, so that one could not convert a traditional marriage into a plural marriage at some later point in time. If the couple in question wished to expand their marital options, they would have to divorce and start over with a new plural marriage agreement, during which the parties would have the opportunity to renegotiate under the plural form. This is a crucial point in protecting weaker spouses from bargaining disparities and curbing more powerful spouses' indulgence in opportunistic behaviors. The same would be true for any conditions in the original or preceding marital agreements; nothing could be changed ex post facto. Without an anti-conversion rule, we might end up, as Michele Alexandre has pointed out, in the kind of society where the threat of polygamy could, in theory, influence and police a spouse's behavior in a marriage.[709] The threat or specter of divorce, on the other hand, is no different than it already is in traditional dyadic marriage.

In terms of understanding the commitment structure within a dyadic network

[709] Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L.J. 3, 6 (2007).

marriage, an analogy to the parent-child relationship is helpful. The child of a single parent has a single source of commitment and protection—when there are two (or more) parents, the responsibilities are jointly held. If the child's needs are not being met, then debt collection methods such as garnishing wages, seizing assets, etc., can and do occur in order to ensure that the child receives monetary support.[710] These actions are typically proportional to income and/or wealth, so that the wealthier parent will pay more and bear the brunt of it. Where a parent has commitments to multiple children, the parent must faithfully carry out his or her responsibilities to each and every child. A dyadic network model can, in some ways, be seen as a bidirectional version of this model, with each dyadic unit committing to each other.[711] Thus, the spouse with two different dyadic partners can rely on two commitments from partners that are jointly and severally liable.[712] If A is committed to B, and B to C, the transitive property does not mean that A is now committed to C, except in the following limited sense: if C's needs bankrupt B, B can now rely entirely on A for support. This becomes important when dealing with a spouse that has tremendous medical needs, for instance. Three or four spouses may be able to carry a commitment that would have driven a single spouse to bankruptcy and despair.

---

[710] *See* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357, 374 (2003).

[711] *See Legal Nitty Gritty of Polygamy*,MARRIAGE EQUALITY, http://marriage-equality.blogspot.com/2010/12/legal-nitty-gritty-of-polygamy.html.

[712] *Id.*

As demonstrated, legalizing plural marriage does not have to be difficult or groundbreaking. It can, in fact, be quite easy and cause no trouble. When Brazil approved their first three-person civil union in August 2012 activists were at first alarmed.[713] But then, the most amazing thing happened: nothing at all. They opened a joint bank account, and the world pretty much went on the next day quite the same as it had the day before.[714] Marriage as an institution was not destroyed, and no third parties were harmed in the creation of the union. If America decides to legalize polygamy instead of making it a battleground, it will likely have the exact same effect on society; i.e. not very much of an effect at all. The following chapter moves from administrative concerns in the plural marriage itself to address some broader systemic adminsitrative meta-issues, such as how to deal with the the possibility of plural marriage fraud, and the potential for the overall better regulation of marriage and protection of womrn and children.

---

[713] *See* Jessica Elgot, *Brazil Approves Civil Union For Three People, Sparking Religious Fury*, HUFFINGTON POST, August 29, 2012, *available at* http://www.huffingtonpost.co.uk/2012/08/29/brazil-approves-civil-union-three-people-christian_n_1838587.html.

[714] *See* Charles C.W. Cooke, *Brazil Allows Three-Person Civil Union*, THE CORNER, August 28, 2012, *available at* http://www.nationalreview.com/corner/315203/brazil-allows-three-person-civil-union-charles-c-w-cooke.

Chapter 6: Plural Marriage, Revisited

The final chapter in this section deals with some of the issues, both good and bad, that will automatically be triggered into existence if plural marriage becomes legal. The claim is made that while plural marriage fraud is not likely to be a problem, legalization may have some real side effects including strengthening marital stability and increasing the safety and security of vulnerable populations.

A. Potential Plural Marriage Fraud

Some people have expressed concern about fraudulent plural marriages being used to drain the public coffers and get their participants extra benefits. The truth, however, is that decriminalization and regulation would actually cut down on fraudulent behavior in terms of welfare fraud for current plural marriage candidates who are living together but filing as single.[715] Moreover, if we tied the tax benefits to a pro-rated system so that people were paying proportionate amounts, as Brunson suggested, the incentive to cheat is reduced. Still, if we are really concerned that people will go to the length of legal marriage for some or all of the above-mentioned benefits, our legal system has already developed an astonishing array of marriage fraud doctrines that exist across many different fields.

---

[715] *See* Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, *supra* note 469; *see also* Strassberg, *The Crime of Polygamy*, *supra* note 466, at 413; Ryan D. Tenney, *Tom Green, Common-law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. Pub. L. 141, 148 (2002).

While there are marriage fraud doctrines in family law, tax law, social security law, welfare law, immigration law, military benefits, and pension and insurance law,[716] there are really two main types. The first is the typical family law annulment-by-fraud doctrine, where the injured party is the spouse and not the public. Only the injured spouse can attach the voidable marriage, and it usually hinges on an 'essentials' test, which would be satisfied by fraud that went to the essentials of the marriage, usually having to do with a party's ability or willingness to engage in procreational activity.[717] In the mid-twentieth century, new models of marriage fraud doctrines sprung up, with the government and/or employers able to bring claims against those fraudulently claiming benefits. These are the models that interest us.

For some purposes, all that is required is a formal marriage test. The new plural marriage form will come with a state license, so that should not be a problem. This is the rule used by the IRS for federal income tax purposes.[718] Unfortunately, though, this would not help us prevent people from using formal plural marriage just for their

---

[716] Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 5 (2012) [Abrams, *Marriage Fraud*].

[717] *See* Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002).

[718] I.R.C. § 7703(a) (2006). *See, e.g.*, Freck v. I.R.S., 810 F. Supp. 597 (D. Pa. 1992), *vacated*, 37 F.3d 986 (3d Cir. 1994) (ruling that a woman could not avoid tax liability as an "innocent spouse" after she signed tax returns in which the man she was living with underreported their income and where the couple held themselves out as husband and wife and filed joint tax returns but were never married in a formal ceremony and their state of domicile did not recognize common law marriage); Lizalek v. Comm'r, 97 T.C.M. (CCH) 1639 (2009) (T.C. Memo 2009-122), *available at* 2009 WL 1530160 (holding a woman not liable for taxes on one-half of her unmarried partner's income where they were "married under the laws of God" but had no marriage certificate and their state of domicile did not recognize common law marriage).

benefit. As one court noted, so long as the underlying marriage was valid, "any person with nothing but the worst motives could enter into a marriage . . . and qualify" for benefits without violating the law.[719] That is why many other areas of law have established "marriage-plus" tests—tests that start with a bright line rule requirement of a formal marriage, but then add in some other layer or layers, including temporal, age, procreative, or cohabitation requirements.[720] They do this to ensure that the types of marriage being privileged are the types that the legislature had in mind and actually intends to favor, i.e. the ones we described above as reconstitutive of identity, and so we look for proxies to make sure that this was, in fact, that kind of relationship. Veteran's death benefits for a surviving spouse, for instance, require the marriage to have been for at least one year immediately prior to the demise.[721] Social security law uses a similar nine-month scheme, unless there are children, in which case, the time period is waived.[722] Minnesota requires cohabitation at the time of death to be eligible for spousal

[719] United States v. Dedman, 527 F.3d 577, 591 (6th Cir. 2008).

[720] Abrams, *Marriage Fraud*, *supra* note 687, at 19.

[721] *Dedman*, 527 F.3d 577 (stating, in dicta, that court would not entertain a sham marriage claim because the rule preventing fraudulent marriage was a time-based rule and nothing in the statute referred to parties' intent).

[722] 42 U.S.C. §§ 416(c)(1)(e), (g)(1)(e) (2004). New Jersey has a slightly less common age-based rule for determining surviving spouse benefits. . Under the New Jersey statute, a "surviving spouse" is a person who married the employee "prior to the time when such employee reached the age of 50 years," and that The statute then further limits the availability of benefits by stating that "[n]o such surviving spouse shall be eligible for any benefit hereunder who was or shall be more than 15 years younger than the employee at the time of their marriage," obviously viewing such marriages with suspicion.

pension benefits,[723] both to provide "an incentive for spouses to stay with and care for the pensioner" and to "prevent sham marriages."[724]

Another option would be to take a page out of the common law marriage book, and use functional tests to see if there is, in fact, a plural marriage the same way Utah does currently in order to find illegal bigamy.[725] We can have tests that ask things like, are they, for example, sharing expenses? Living in the same home? Do they have children together whom they co-parent? Do they perform household services for each other? Are they raising a family and holding themselves out to the community as man and wife? [726]

Immigration law is the most extensive and complex area of law that uses an integrated approach to determine marriage fraud. We can easily borrow this approach to test for things like evidentiary immunities. First, the couple must demonstrate a bona fide marriage. Then there are some 'plus' rules, which vary by jurisdiction. Under the Immigration Marriage Fraud Amendments (IMFA),[727] green cards based on marriage were restricted to immigrants whose marriages are at least two years old at the time the green card is granted. Everyone whose marriage was not yet two years old

---

[723] Scott v. Minneapolis Police Relief Ass'n, 615 N.W.2d 66, 75-76 (Minn. 2000).

[724] *Id.*

[725] UTAH CODE ANN. § 30-1-4.5; *see also* State v. Holm, 137 P.3d 726 (Utah 2006) (upholding constitutionality of Utah statute in light of *Lawrence v. Texas*); State v. Green, 99 P.3d 820 (Utah 2004) (allowing unsolemnized and unlicensed marriage to serve as a predicate marriage for purposes of a bigamy prosecution).

[726] *See* Abrams, *Marriage Fraud*, *supra* note 687, at 27.

[727] INA § 216(g).

received only "conditional permanent residency" instead of "permanent residency."[728] IMFA then goes one step further—for immigrants whose marriages are recent enough that they are eligible for only conditional permanent residency, IMFA applies a functional test in addition to the requirement of a formal marriage. These immigrants and their sponsoring spouses must produce documentary and testimonial evidence that their marriages are genuine.[729] In theory, no one measure is dispositive,[730] but clearly the regulations do encourage the couple to comply with a particular vision of what we think an authentic marriage should look like, i.e. a proxy for some level of personal and financial interdependency, long-term commitment, and conjugality.[731] In short, they are

---

[728] INA § 216(a)(1).

[729] Abrams, *Marriage Fraud*, *supra* note 687, at 32. This evidence "may" include, but "is not limited to": (1) Documentation showing joint ownership of property; (2) Lease showing joint tenancy of a common residence; (3) Documentation showing commingling of financial resources; (4) Birth certificate(s) of children born to the petitioner and beneficiary; (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship; and (6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States. 8 C.F.R. § 204.2(a)(1)(i)(B). *See also* In re Soriano, 19 I. & N. Dec. 764, 766 (B.I.A. 1988) (listing evidence of bona fides as including: "proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences").

[730] *See* Surganova v. Holder, 612 F.3d 901, 905 (7th Cir. 2010) ("Nothing in the record indicates that the [Immigration Judge] was using an inflexible rule under which a marriage could never be bona fide without cohabitation. All he did was permissibly weigh the couple's living arrangement as one of several factors supporting his ultimate conclusion.").

[731] Often, much of an applicant's file is filled with pictures of the wedding ceremony and reception, evidence that rings were exchanged, and pictures of the honeymoon. *See, e.g.*, United States v. Islam, 418 F.3d 1125, 1127 (10th Cir. 2005) (citing testimony regarding and pictures of wedding); Nakamoto v. Ashcroft, 363 F.3d 874, 882 (9th Cir. 2004) (citing testimony regarding courtship and wedding ceremony as evidence of intent to establish a life together); United States v. Orellana-Blanco, 294 F.3d 1143, 1145 (9th Cir. 2002) (noting that husband and wife used a borrowed ring); *Chowdhury*, 169 F.3d at 404 (noting that none of bride's friends or family attended wedding ceremony, that the groom gave her a wedding ring but not an engagement ring, and that there was no formal reception or honeymoon).

looking for that sense of a shared marital identity. The Ninth Circuit, in a long line of cases applying the holding of a 1953 Supreme Court decision, Lutwak v. United States,[732] has developed a test for ferreting out marriage fraud in immigration cases commonly referred to as the "establish a life" test, and several other circuits have followed suit.[733] The court declared that, "[t]he common understanding of a marriage, which Congress must have had in mind when it made provision for 'alien spouses' in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations."[734]

The point is simply that, in regard to our plural proposal, we have multiple tests available to make sure that people are really marrying 'for the right reasons,'-while, at the same time, recognizing that people's motives in marrying are complex, varied, and

---

Immigration examiners also ask couples questions during their interviews with the intent of determining whether their relationships are bona fide. Questions include: "How much is your current rent/mortgage payment?"; "are you paid weekly, every two weeks, twice a month or monthly? What about your spouse?"; "What is the name of your spouse's manager at work?"; and "How much money did you receive in your last paycheck/deposit? What about your spouse?" (*See* Nina Bernstein, *Could Your Marriage Pass the Test?*, CITY ROOM BLOG (June 11, 2010, 8:45 PM), http://cityroom.blogs.nytimes.com/2010/06/11/marriage-test. These questions, like the regulations, assume a shared economic life, something many couples have but many do not. Other questions get much more personal, including: Where do you keep your clean underwear? What about your spouse?"; "Do you and your spouse use birth control? What kind?"; and the infamous "What color is your toothbrush? What about your spouse's?" *Id.*

[732] *Lutwak*, 344 U.S. at 611.

[733] For cases applying "establish a life" test, see Boluk v. Holder, 642 F.3d 297, 303-04 (2d Cir. 2011); *Surganova*, 612 F.3d at 901; Cho v. Gonzales, 404 F.3d 96, 100, 103 (1st Cir. 2005); *see also Nakamoto*, 363 F.3d at 882 (9th Cir. 2004) (reaffirming "establish a life" test); Bark v. I.N.S., 511 F.2d 1200, 1202 (9th Cir. 1975) (adopting "establish a life" test).

[734] *Lutwak*, 344 U.S. at 611 (emphasis added).

rarely one-dimensional.[735] Getting at a person's motives can be very difficult—focusing instead on performance and willingness to engage in marital duties may be a more predictable and objective—if fact intensive—way to adjudicate the bona fides of a marriage.[736] With benefits tailored to match those of dyadic marriages generally, and a robust set of marriage fraud tests readily available to choose from, there does not seem to be any reason to suspect that people will try and flood the system with fraudulent plural marriages. And even if they tried, chances are that they would not get away with it.

B. Private Ordering in Family Law and the Benefits of Choice

Family law is currently in a state of disarray, but that is not a bad thing. The plethora of available relationship options, from civil unions, to domestic partnerships, to common law marriage, combined with a system that is increasingly favoring private ordering in matters such as entry into marriage, contractual ordering of marriage, non-marital relationships, divorce, adoption, the use of reproductive technologies, and the privatization of domestic relations dispute resolution, has led to a golden moment of

[735] Thus, Ninth Circuit judges have found repeatedly that merely having a motive to marry in order to receive immigration benefits is "at most evidence of intent" of marriage fraud but does not itself make the marriage a sham. *See* United States v. Tagalicud, 84 F.3d 1180, 1185 (9th Cir. 1996). One opinion even cited the book of Genesis for the proposition that "[m]arriages for money or other ulterior gain are as ancient as mankind, yet may still be genuine, and marriage fraud may be committed by one party to the marriage, or a person who arranged the marriage, yet the other spouse may genuinely intend to marry." *Id.* The court found that an "ulterior motive of financial benefit or immigration benefit" for marriage might be evidence of fraud, but "it does not make the marriage a fraud." *Id.*

[736] Sealing, *Polygamists Out of the Closet*, *supra* note 379, at 35.

opportunity. At this point in time, we have come too far from straight black-and-white monogamy and entered a monochromatic marital system with various shades of gray. At this point, even trying to impose one model for all relationships would inevitably shortchange some.[737] For simplicity's sake though, instead of having so many different doctrines, we can just embrace the idea of the private ordering in the prenuptial agreement and standardize the set of choices, from same-sex, to covenant, to plural forms of marriage, while keeping the norms of marriage—the essential bundle—intact.

For those who argue that such differentiation would somehow lead to a weakening of the marital institution, this dissertation argues that the opposite is true. Various standardized versions of approximately the same marriage relationship would likely emerge, and the increase in competitive forms of marriage with their detailed specifications would potentially strengthen the institution of marriage as we know it, by forcing individuals seeking to marry to consider the true meaning of marriage (beyond the mere obtainment of a marriage license from the state) and then subscribe to the exact form of marriage in which they believe.[738] If our concern is the formation and declaration of the new marital entity, then nothing could be greater than more ex ante conversation and explicit specification.

---

[737] *See* Shultz, *Contractual Ordering of Marriage*, *supra* note 48, at 204-334.

[738] *See* Cynthia M. Davis, *The Great Divorce of Government and Marriage: Changing the Nature of the Gay Marriage Debate*, 89 MARQ. L. REV. 795, 816 (2006).

The courts also seem to agree. In Buettner v. Buettner, for instance, the Nevada Supreme Court found that, contrary to previous assumptions about the effect of premarital provisions on marital stability, these agreements might actually be conducive to marital harmony by clarifying the rights and expectations of each spouse.[739] By encouraging more discussion and information sharing during the formation of the marriage, the ability to opt into other forms may even reveal and help rectify potential areas of later conflict in the relationship by forcing one party to expose an otherwise hidden (perhaps non-monogamous) agenda.[740]

Chapter 7 of the ALI principles justifies the concept of antenuptial agreements on multiple other grounds as well. First, "[a]llowing parties to make agreements respecting the rights and obligations that will arise from marriage . . . has special appeal in the United States, which as a general matter highly values contractual freedom."[741] More functionally, Chapter 7 suggests that the agreements may increase certainty about the future, cause parties to make better decisions about their relationships by putting them through the process of planning for contingencies.[742] In the event that one party still

---

[739] *Buettner*, 505 P.2d 600. *See also Brooks*, 733 P.2d at 1049 n.7, 1050 n.16; Newman v. Newman, 653 P.2d 728, 732 (Colo. 1982); Scherer v. Scherer, 292 S.E.2d 662, 665 (Ga. 1982); *In re* Marriage of Boren, 475 N.E.2d 690, 694 (Ind. 1985); *Osborne*, 428 N.E.2d at 815.

[740] Public policy rationales are best exemplified by the following articles: Elizabeth S. Scott, *Rational Decisionmaking*, *supra* note 176, at 69-70; Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future,* 24 FAM. L.Q. 77, 81-85 (1990).

[741] *Id.* § 7.02 cmt.b.

[742] *See id.* at 37 (overview of ch. 7), *quoted in Marriage As Contract and Marriage As Partnership , supra* note 674, at 2098.

does retain an unspoken agenda, or later wants to change a crucial term, the prenuptial contract will serve as a form of protection for their spouse, as well as a guide for compromises and remedies, in that it will reorient the relationship back to its original form or set the grounds for renegotiation. [743]

C. Other Benefits of Legalization; Safety and Security

Other benefits of legalizing plural marriage go back to some of the claims of its opponents. For those who are still worried about the potential for abuse, or third-party harms to women and/or children, it is currently the illegality of the act that drives practitioners underground, excluding them from legal regulation and protection.[744] Bemoaning the current inability to regulate, let alone prosecute, Utah's Attorney General Mark L. Shurtleff admits: "The thinking is this: This is a big group of people. They are not going away. You can't incarcerate them all. You can't drive them out of

[743] Kaylah Campos Zelig, *Putting Responsibility Back Into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1231 (1993).

[744] While not necessarily comparing their moral worth in this sense, arguments for legalizing plural marriage are similar to the case made for legalizing prostitution. Many scholars believe the laws against the practice have only helped make life more difficult for prostitutes because the laws exclude them from legal protection, encouraging predators to take advantage of their "powerlessness." Plural marriage, like prostitution, is another area in which public policy could reflect practicality, not morality, and, in turn, allow for more effective regulation. Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 748, 749 (2002), *quoted in* Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 337.

the state. So they are here. What do we do about it?"[745] The answer is to legalize the practice and let the practitioners come out into the open.

First, many have argued that it is the underground nature of polygynous communities itself that enables much of the abuse that might occur therein.[746] By legalizing polygamy, these communities could be introduced into mainstream society, enabling law enforcement to crack down on underage marriage, incest, abuse, and nonconsensual marriage. Second, legalizing polygamy would help prosecutors overcome the evidentiary hurdles inherent in prosecuting related abuses. The government currently struggles to find witnesses willing to testify against fellow polygynists even in cases where they do, in fact, suspect abuse, because the witnesses are worried that they too will be prosecuted for their way of life.[747] Following legalization, witnesses would be more likely to appear in court because they will know that their lifestyle is legally protected.[748] Legalizing polygamy would also eliminate any remaining First Amendment concerns. As a co-director of Principle Voice, a pro-polygamy group, once said, at that

---

[745] John Pomfret, *Polygamists Fight to Be Seen As Part of Mainstream Society*, WASH. POST, Nov. 21, 2006, at A1 [hereinafter Pomfret, *Polygamists Fight to Be Seen As Part of Mainstream Society*].

[746] *See* Kristen Scharnberg & Manya A. Brachear, *Where the Polygamists Have White Picket Fences*, L.A. TIMES, Oct. 15, 2006, at A12 [hereinafter Scharnberg & Brachear, *Where the Polygamists Have White Picket Fences*].

[747] *See* Michael Janofsky, *Conviction of a Polygamist Raises Fears Among Others*, N.Y. TIMES, May 24, 2001, at A14.

[748] Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 333.

point, "it would be all about going after the crimes, not the culture."[749]

But legalizing plural marriage would also do so many other important things. On the simplest level, having standardized marriage licenses would help alleviate some of the problems of underage marriage, nonconsensual relationships, incest, and welfare fraud simply because the act of getting a license allows an independent civil authority, such as a town clerk or Justice of the Peace—someone from outside the family circle—to express concerns about, and even refuse to approve, a marriage that is inappropriate.[750] From a financial and economic standpoint, forcing much-married men to register their multiple marriages will allow the government to accurately calculate, with much greater accuracy, whether each family is eligible for aid and, if so, how much. One commentator reasoned that making fundamentalist men legally recognize their multiple wives "would force the patriarch to provide independently for his family or to marry fewer women."[751]

Legalizing polygamy would also promote further collaboration between polygamous leaders and state law enforcement officials. The Office of Utah's Attorney General has already created a program called Safety Net, which, on a monthly basis, brings together representatives from various polygynous sects and law enforcement

---

[749] Scharnberg & Brachear, *Where the Polygamists Have White Picket Fences*, *supra* note 743.
[750] *See* Strassberg, *The Crime of Polygamy*, *supra* note 466, at 369, *quoted in* Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 335.
[751] Rower, *The Legality of Polygamy*, *supra* note 718, at 728, *quoted in* Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 334.

officers.[752] Legalizing plural marriage would provide for greater use and expansion of this program and other programs like it, because more practicing polygynists would be willing to come forward and work with law enforcement officials if they felt they would not be persecuted for their lifestyle choices.[753]

D. Plural Marriage, Revisited

Plural marriage can be legalized, quite easily in fact. Judges and legislators should be open to the possibility of prenuptial contracting because family law is already progressing toward that level of privatization.[754] Moreover, evidence is already showing that, as the veil is removed, and plural marriage becomes more and more a part of everyday life, society will quickly learn to tolerate and eventually accept its practitioners and their way of life as normal.[755]

---

[752] Pomfret, *Polygamists Fight to Be Seen As Part of Mainstream Society*, *supra* note 742, at A1, *quoted in* Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 469.

[753] Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 469.

[754] *See* Singer, *The Privatization of Family Law*, *supra* note 156, at 1531-65. Singer identifies four principle advantages of privatization: (1) it provides alternatives to traditional family structures; (2) it respects diversity in family structures; (3) it increases the degree of control exercised by participants in families; and (4) it increases private choice and autonomy. She also identifies five disadvantages of privatization: (1) it exacerbates existing gender inequalities; (2) it has detrimental effects on third parties, particularly children; (3) it interferes with family law reform efforts; (4) it perpetuates the public/private split; and (5) it inhibits public discourse to identify and develop shared values. *Id.*

[755] Several local towns in Utah are already being forced to acclimate to polygynists. In St. George, Utah, for example, economics has necessitated the hiring of polygynist construction workers. Known for their work ethic rather than their beliefs, these particular polygynists are creating family-run construction companies, and town residents are adapting well. A new town café, called Merry Wives, has acknowledged polygamy through its name; some residents have started to believe that polygamists should be "left alone." Kirk Johnson, *In Polygamy Country, Old Divisions Are Fading*, N.Y. TIMES, Sept. 10, 2007, at A18. In regard to the effect of television shows like Big Love and Sister Wives on the American public's attitude toward plural marriage, some experts think that they are certainly helping to change the minds of those who might have once been adverse to the practice. University of Virginia sociologist Andrea Press says

Calling the newly legalized relationship 'marriage' is extraordinarily important. Even if the plural marriage bundle differs from traditional marriage in that it requires extra opt-ins in advance, or different tax structures and property divisions during or after, the name 'marriage' remains an essential part of the bundle we are trying to re-tie. Formal marriage signals intention.[756] It signals each partner who enters into a new marital union, their friends, their families,[757] and even strangers—that each spouse has entered into a binding commitment that entails expectations of fidelity, sharing, and lifetime cooperation.[758] Formal marriage also signals intention to the state—government officials can and do assume that the married couple has undertaken obligations to each other which provides sufficient justification for treating them as an economic unit.[759] Formal marriage accomplishes all of these signaling functions prospectively, efficiently, and unequivocally, but not necessarily exclusively.[760] Still, as in regular dyadic marriage,

---

that "These shows help people imagine the alternative and start normalizing our own experience against them." Janet Bennion, an anthropologist at Lyndon State College in Vermont, writes that "Sister Wives and Big Love show that polygamy can work . . . . They show that polygamists are just regular people trying their best. They're trying to live the American Dream." KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 6 (quoting Janet Bennion Interview).

[756] Garrison, *The Decline of Formal Marriage*, *supra* note 157, at 493.

[757] *See* Michael J. Trebilcock, *Marriage as a Signal, in* THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999) (concluding that willingness to marry signals the undertaking of a long-term, exclusive relational commitment); Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, *supra* note 153, at 225.

[758] *See* Scott, *Social Norms supra* note 157, at 1907; Eric A. Posner, *Family Law and Social Norms, in* THE FALL AND RISE OF FREEDOM OF CONTRACT 256, 259-62 (F.H. Buckley ed., 1999); Scott & Scott, *Marriage as Relational Contract*, *supra* note 152, at 1288-92.

[759] *See* Garrison, *Reviving Marriage*, *supra* note 153.

[760] Garrison, *The Decline of Formal Marriage*, *supra* note 157, at 43.

after a couple marries, there is no question about what sort of relationship they intend to have.

As described extensively above, the marital advantage also provides benefits to the children of the marital family. Because of the greater stability that marriage provides, marital children are exposed to fewer financial,[761] physical,[762] and educational risks.[763] These lower risks are also associated with demonstrably higher levels of well-being.[764] There is also evidence that the advantages conferred by marital childbearing and rearing transcend the specific benefits associated with residential and economic stability.[765] For example, married fathers appear to be more invested and spend more time with their children than unmarried fathers, and even if parental separation occurs, they see their children more often and pay child support more regularly.[766] The

---

[761] *See* CASPER & BIANCHI, CONTINUITY AND CHANGE, *supra* note 171, at 111-12 fig.4.3 (reporting, in 1998, 6.9% poverty rate for married-parent households and 38.7% rate for single-mother households). *See also* Frank F. Furstenberg, Jr. et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319 (1995); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5 (1995).

[762] Rates of physical and sexual abuse are much higher when children live with an adult stepparent or cohabitant. *See* ROBIN FRETWELL WILSON, *Undeserved Trust: Reflections on the A.L.I.'s Treatment of De Facto Parents, in* RECONCEIVING THE FAMILY (2006).

[763] *See* Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review, in* THE FUTURE OF THE FAMILY 116, 120-22 (Daniel P. Moynihan et al. eds., 2004) [hereinafter Sigle-Rushton & McLanahan, *Father Absence and Child Well-Being*] (reviewing evidence); *see also* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HELPS 39-63 (1994).

[764] *See* Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 193 (2005) (summarizing studies); Sigle-Rushton & McLanahan, *Father Absence and Child Well-Being*, *supra* note 760, at 122-25.

[765] Garrison, *The Decline of Formal Marriage*, *supra* note 157, at 49.

[766] CASPER & BIANCHI, CONTINUITY AND CHANGE, *supra* note 171, at 46. *See also* MARCY CARLSON ET AL., UNMARRIED BUT NOT ABSENT: FATHERS' INVOLVEMENT WITH CHILDREN AFTER A NONMARITAL BIRTH (2007) (finding that parents' relationship status at child's birth is key predictor of paternal

advantages of marriage even appear to extend into a child's adulthood and on to the next generation of children.[767] Researchers have documented a strong link between growing up in a single-parent household and adult income, health, and emotional stability.[768] A number of studies have also found that both men and women who experience a single-parent household as children are more likely as adults to experience marital discord and to divorce or separate.[769] Plural marriage adds to these benefits a larger pool of resources from which children can draw individualized attention; support both emotional and financial; as well as guidance and a strong sense of familial identity.

Part of the problem with the public perception of plural marriage is that the average American only sees it when it is on the news, usually in the form of a

---

involvement); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269 (1996) (finding that married fathers were more likely to pay child support); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 223-24 (2003) (finding that unmarried fathers were significantly less involved with their children than married fathers). *See also* Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004) (reporting that children living in cohabiting-parent families experienced worse outcomes, on average, than those residing with married-parent families; among children age six to eleven, economic and parental resources attenuated these differences, but resources did not make a difference among adolescents age twelve to seventeen), *quoted in* Garrison, *The Decline of Formal Marriage*, *supra* note 157, at 496-97. Living with married parents is also significantly linked to age of sexual initiation, likelihood of having a teen birth, and high school graduation, even after family instability is taken into account. *See* Wendy E. Manning & Ronald D. Bulanda, *Parental Cohabitation Experiences and Adolescent Behavioral Outcomes* (2006), *available at* http://www.bgsu.edu/organizations/cfdr/research/pdf/2006/2006-15.pdf.

[767] Garrison, *The Decline of Formal Marriage*, *supra* note 157, at 497.

[768] *See* Sigle-Rushton & McLanahan, *Father Absence and Child Well-Being*, *supra* note 760, at 124-26.

[769] *See* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY 106-17 (1997) (summarizing studies). *See also* Chris Albrecht & Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. FAM. ISSUES 86 (2004); Kathleen Kiernan, *European Perspectives on Union Formation, in* THE TIES THAT BIND, 40, 55 tbl.3.8 (2000).

polygamous sect having their underage compound raided.[770] But as the evidence above demonstrates, these cases are quite the exception, not the norm. To be honest, if anyone looked at monogamous marriage only at its worst, with all of the broken homes, spousal abuse, and easy in-and-out divorce, they might also have a negative picture of what marriage is and can be all about.

The push to legalize plural marriage—contrary to popular belief or opinion—is a pro-family argument, just not a pro-monogamy one. But it cannot be stressed enough that this is an argument on behalf of families, especially children. Plural marriage is not a sexual system.[771] It is about multiplying everything that is good in a traditional dyadic marriage: love, responsibility, selflessness, and self-identification. In that sense, it seems absurd that the same behavior, when done in the context of a plural marriage, in many cases even imbued with religious significance and context, is illegal, and when done in the context of what most would call promiscuity, is fine.[772]

Plural marriage does not weaken the institution of marriage or family.[773] It might prevent some divorces by allowing for a non-monogamous partner to ex ante find

---

[770] *See* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, Introduction (discussing the raid at the Yearning for Zion Ranch, near San Angelo, Texas, in 2008).

[771] *See* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 205 (quoting from an interview with University of Nevada anthropologist William Jankowiak).

[772] Jeremy M. Miller, *A Critique of the Reynolds Decision*, WESTERN ST. UNIV. L. REV. 178, 178-79 (1984).

[773] In some ways, in fact, it is a throwback to an earlier time in American history, where extended families lived together, in close proximity and often in the same house, in more of a communal setting. Those who cling to the idea of the "traditional" as the absolute baseline against which all other change must be

someone else who can handle that, as opposed to cheating on a spouse later in life and destroying a family. Or it might allow aging widows and widowers with no family to join other men or women in a loving, caring relationship, providing a social safety net that will, at the same time, save the government money. Plural marriage might allow children of single parents a greater chance at growing up outside of poverty and inside a strong family structure. It may (quite humanely) allow traditional families immigrating from polygamous nations to keep their family units intact.[774] Plural marriage, which is widely recognized around the world, does not pose a threat to the existence of monogamous marriage. Traditional dyadic marriage will stay the legal default, and most people will probably choose it. Even in those societies where polygamy is or was considered an ideal, the vast majority of marriages are still, and always were, monogamous. That has been the case throughout history, and will likely stay the same.[775]

Marriage is not a simple topic to talk about, because it means so much to so many people and touches so many aspects of our lives. But it has to be recognized that it is impossible to discuss or define marriage in whatever form—monogamous, plural,

---

measured need only reflect on our own marital and family patterns over the last century or so to see that the idea of the traditional is itself always subject to changing circumstances. *See* KILBRIDE ET AL., PLURAL MARRIAGE FOR OUR TIMES, *supra* note 357, at 27.

[774] *See* Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L L. 382 (2009).

[775] Estimates of how many Mormons were ever involved in polygamy in the late nineteenth century, at the very height of the practice, range from a mere 2 percent to 30 percent.

same-sex, covenant, common law, etc.—without looking into the history and culture of the society that is asking where they have come from, what they value, and where they are, at least, ostensibly headed. As one legal scholar, Gregory C. Pingree, writes; debates about marriage pivot around

> the relative virtues of autonomy and community (and) are . . . variations on the fundamental question that motivated Socrates, Plato and Aristotle: what makes a good society? In every epoch this core social question has particular context and character; in the last two centuries, issues that have shaped this question include the nature of human subjectivity, the politics of state and social power.[776]

The family structure is changing rapidly from the so-called norm of traditional nuclear families. Blended families, adoptive families, gay and lesbian families, cohabiting families, single parent families, illegal polygamous families, etc., all have become so common place that there is really no such thing as any one—or even two—'normal' kinds of families anymore. Plural marriage already exists in the shadows, where it is criminalized, and in the open, where it is called by different, not as helpful names. The continued limitation of marriage to one-and-only-one partner at a time derives from a questionable ideological, not a logical, imperative.[777]

In our liberal, democratic society, in the year 2013, it is time to revisit the issue.

---

[776] Gregory C. Pingree, *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy*, 14 J. Gender, Social Policy & L. 314, 314-383 (2006), *quoted in* Kilbride et al., Plural Marriage for Our Times, *supra* note 357, at 5.

[777] *See* Gillian Douglas, An Introduction to Family Law (2004).

PART II

Polygamy and Religion in Public Discourse

The life of the law has not been logic; it has been experience.

—Oliver Wendell Holmes, Jr.

Introduction

The focus of this part of the dissertation is on the public policy aspect of what a decision to legalize polygamy might mean. While advocates of plural marriage can point to its purported benefits, and opponents can cite its supposed harms in what would essentially be an exercise in trying to predict the future, this dissertation instead now looks to the past for some kind of guidance.

Having just made the logical case for legalizing plural marriage in various forms, the second half of this dissertation argues, experientially, that not everything that can be legalized really should be legalized. The ensuing chapters assemble and analyze the relevant materials on polygamy in the Jewish tradition, from the Hebrew Bible passages through the early Middle Ages, when Judaism for the most part finally and conclusively rejected the practice of polygamy. The goal here is to trace the development of Jewish thought on point, the main arguments for and against the practice of plural marriage, and the ways in which the relevant biblical passages were interpreted in the evolving Jewish tradition. It will also attempt to answer the relevant questions of what happened to Jewish polygamy; when it happened, why it happened, and why it happened then. In

doing so, it will attempt to shed light on the related question of plural marriage in modern society, and whether or not it is a practice worth revisiting. It is also meant to part of the broader literature discussing what happens when law, religion, and culture become intertwined in their overlapping spheres. When religious (or historical) ideas are different than modern understandings, we must decide to what extent our underlying assumptions and ideals are culturally and/or historically contextual, and therefore to what extent they should be culturally and historically imperialistic; that is, in what situations should modern ideas of proper human behavior prevail over existing religious (or historical) ideas, and when should religious (or traditional) ideas inform and correct our newer approaches. The goal here is to examine the conversation between law, religion, and culture in regard to the issue of polygamy and note the reasons why ultimately something had to give.

Judaism's relationship with polygamy has always been fraught with tension, and perhaps can best be summed up by the fact that the word for co-wife in Hebrew is tzarah, literally 'trouble.' As many know, the practice of polygamy was once considered part and parcel of Jewish culture, at least in theory, and nowadays that is no longer the case. The story of Jewish polygamy has no clearcut ending; there was no one defining moment or document that shifted the Jewish societies in Western Europe away from

polygamy and into monogamy. But over time, these norms did shift for reasons we examine here in detail.

Remember that Judaism is a tradition that not only thinks polygamy is in theory legal; in fact Judaism believes that polygamy is Divinely sanctioned, and sometimes even mandated, i.e. in some cases of levirate marriage. This is a system that has thought through these issues, experimented, and come to a conclusion that is as relevant for our own times as it was throughout all times. Why then should we continue to ban the practice of polygamy? This chapter's arguments can be taken on two levels. The first is that if one were to rely on the evidence that religion supports polygamy as a basis to legalize the practice, one would be severely mistaken. A quick look at Judaism,[778] Mormonism,[779] and even (arguably) Islam[780] show that despite the legalization and initial tolerance towards polygamy, the religions themselves have moved away from this practice, experientially. This article will focus on the complete story of polygamy in the Jewish tradition, in an attempt to demonstrate why, after millennia of

---

[778] Ben-Zion Schereschewsky & Menachem Elon, *Bigamy and Polygamy*, *in* 3 ENCYCLOPAEDIA JUDAICA (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

[779] *See* SONJA FARNSWORTH, FROM POLYGAMY TO MONOGAMY: MORMONISM ON GENDER, MARRIAGE, AND THE FAMILY (1999).

[780] THE QUR'AN is one of the few if not the only foundational religious texts to make a practical argument explicitly for monogamy. The verse in AL QUR'AN 4:3 reads: "Marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one." Moreover, in the same chapter, *Surah An Nisa* 129 it is noted that:"Ye are never able to be fair and just as between women . . . ." (AL QUR'AN 4:129). Some have argued then that the practice of polygamy in Islam is meant to be an exception not a rule. Regardless, Islam sets some high pre-conditions on a plural marriage; the wives have to have no objection, there must be fair and equitable treatment, and the number is not to exceed four. *See* ABU AMEENAH BILAAL PHILIPS & JAMEELAH JONES, POLYGAMY IN ISLAM (2005).

experimentation, a religion walked away from a practice it had once legitimized. More broadly, stepping away for a second from the religious implications, this chapter argues from a historical/ experiential perspective that while plural marriage is good, in theory, in practice it does not create the marriages we are looking for. In doing so, this chapter hopes to answer the following question; Assuming that plural marriage can be legalized today, should it really be?

The discussion over polygamy presents valuable angles for reconsidering the contemporary marriage debate. First, plural marriage raises novel questions beyond those presented by gay marriage because it turns not on the idea of who can be in a marriage but rather on the very institution of marriage itself as consisting of a two-and-only-two part unit. Second, plural marriage, unlike gay marriage, represents an alternative bundling of marital principles that may be described as "traditional" within a broad range of cultures and religious communities.[781] In this context, an examination of

[781] Plural marriage has existed since recorded history, across cultures, and across the world. Many of the major world religions, including those in the Western tradition have supported, condoned, or at least acknowledged the practice of polygamy. *See Polygamy*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/p/index.php?title=Polygamy&oldid=950022; Campaign Against Polygamy And Women Oppression International (CAPWOI), History of Polygamy, POLYGAMY STOP, http://www.polygamystop.org/history.html (last visited Apr. 5, 2013); J. Patrick Gray, *Ethnographic Atlas Codebook*, 10.1 WORLD CULTURES 86, 86-136 (1998); Paul Vallely, *The Big Question; What's The History of Polygamy And How Serious A Problem Is It In Africa?*, THE INDEPENDENT, Jan. 6, 2010, http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html (quoting a University of Wisconsin study that surveyed more than a thousand societies and found that of these just 186 were monogamous). *C.f.* Blaine Robinson M.A., "*Polygamy*," BLAINE ROBISON.COM, May 14, 2006, revised February 17, Feb 2013, *available at* http://www.blainerobison.com/concerns/polygamy.htm (listing 40 men in the bible with multiple wives).

what a religious tradition has had to say about marriage over time can inform our understanding of what religion is capable of saying about the topic today.

This dissertation will focus on the history of polygamy in the Jewish tradition and examine why, after millennia of experimentation, a religion walked away from a practice it had once legitimized. We will follow this history through the various streams of Jewish law and tradition, and watch as the debate slowly shifts from a question of legality to morality, from "could" to "should not." Eventually, Jewish law walks away from the practice of polygamy, and realistically, that change must be understood in the context of three historical realities that developed over time, and converged at a particular moment in history that was conducive to this change. It is important to bear these truths in mind as we begin our expedition, as they are key to this process of evolution.

First, all of Jewish law is, at its core, an act of holding multiple values in a dialectic tension. The rabbi, before he rules on the permissibility of the chicken, for example, is first supposed to inquire about the finances of the individual asking; take into account the time of day on the Sabbath Eve.[782] The Law has areas that shift, contextually, when multiple legitimate values are at play. And so just because a particular action may be legal in one generation or time period, does not mean that other arguments do not exist that would militate against its continued legality, nor does

[782] *See* SHULHAN ARUKH, YOREH DEAH 69:6; 11.

it mean that additional factors might not very well come into play in the future that would shift that sometimes precarious balance in the opposite direction.

Second, for centuries, despite the fact that Jewish communities tended to be almost entirely monogamous, the rabbis made sure that polygamy was still legal on the books, if only to demonstrate the superiority of the rabbinic versus sectarian or Christian exegesis. At this point in history, the moral value of monogamy outweighed the advantages of polygamy enough but only enough so that it was not practiced popularly on the practical side, but the law still recognized the important polemical advantages the theoretical aspect of its legality provided—especially if, on the ground, it was not costing the community anything since no one was taking advantage of this particular allowance

Third, the time eventually came when this calculus forever shifted. The outside pressure of an increasingly monogamous secular and Christian legal world gradually grew, and at just the right moment it combined with multiple Jewish developments and concerns, including at the forefront an internal pressure that had been building in the Jewish world to fix the perceived gender inequalities of Jewish family law. Taken all together, the benefits of officially outlawing polygamy now outweighed the benefits of even keeping it legal just on the books, and so the above-mentioned factors led to the promulgation of two decrees, commonly known as two of the bans of Rabbeinu

Gershom.[783] One dealt with unilateral divorce, and one dealt with polygamy. Both served as an attempt to legitimize Jewish family law both internally and to the outside world.

In tracing these strands of Jewish law's historical development, this dissertation sheds light on the ways in which marriage norms within a religious community are mutable across time and place, religious doctrine can adapt to the practical needs of the community, and religious morality can ultimately serve as a progressive force in advancing women's rights, as well as understanding the ideals of marriage, generally and practically..

Chapter 1 of this section provides some initial background on the basic assumptions about polygamy in Jewish society as well as a primer for navigating the basic sources and authorities of Jewish Law. Chapter II outlines the prevailing patterns, themes and concerns about polygamy in the Old Testament. Parts III, IV, V, and VI analyze the evolving legal and scholarly commentary and interpretations of the Old Testament text as well as changing marriage practices in the Second Temple, Tannaitic, Amoraic, and Gaonic periods respectively. Part VII, VIII, and IX discuss the formal ban against polygamy in the Rishonim period and its relationship to Judaism's evolving conception of marriage generally. Finally, Parts X and XI discuss the geographic and

[783] There was a third such ban, that dealt with not opening other people's mail, but that is not relevant for our purposes.

temporal scope of the ban and their connection to the internal and external factors that motivated it.

Chapter 1: Polygamy in Jewish Law

A. Background Information

It is important at the outset to make one thing clear: the issue of polyandry was never a discussion. The Seventh Commandment proclaims, "Thou shalt not commit adultery,"[784] and adultery is defined as sexual intercourse between a married women and a man other than her husband.[785] Polyandry under Jewish law is by definition adultery, since it involves a married woman having more than one sexual partner.[786] The Talmud in Kiddushin unequivocally states that; "A woman cannot be the wife of two [men]."[787] Our discussion of polygamy then is really all about polygyny, and while polygyny may have always been uncommon de facto, in the rabbinic tradition it was certainly recognized de jure.

A survey of the sources reveals several underlying reasons for the practice of polygamy. Perhaps most importantly in a society that valued children, having many

---

[784] *Exodus* 20:13; *Deuteronomy* 5:17.

[785] *See Numbers* 5:11-31; Babylonian Talmud, *Sanhedrin* 51b; 84b; Maimonides, Mishneh Torah, Hilchot Ishut The Laws of Marriage ch.24.

[786] The Babylonian Talmud, *Kiddushin* 7a records this distinction as a matter of social fact: Rava said "[if a man said], 'Be betrothed to half of me,' [the woman] is betrothed. [If he said], 'Half of you is betrothed to me,' then she is not betrothed." Abaye said to him, "How does 'Half of you is betrothed to me,' differ so that she is not betrothed? [Is it because] the Merciful One said '[When a man takes] a wife...,' *Deuteronomy* 24:1, and not 'half a wife'? Here too, the Merciful One said 'a man',*id*, and not 'half of a man.'" [Rava] said to him, "Now, a woman for a pair [of husbands] is not fit. But a man, is he not fit for two [wives]? And this is what he is saying to her; 'If I wish to marry another, I will marry [her].'" Babylonian Talmud, *Kiddushin* 7a.

[787] *Id.*

wives increased the man's chances of having many children. Wives were often seen as providing spiritual protection in that they kept their husbands from straying sexually; some have suggested that the practice of polygamy resulted from the chastity enforced on a husband while his wife was pregnant or nursing.[788] In addition, while it was prestigious and a sign of prosperity to be able to afford many wives, it also provided an economic advantage; having many wives and children provided a ready labor supply. Historically, plural marriage served political purposes through the forming of alliances. Occasionally, it was also used to provide support for the helpless in times of surplus women.

B. A Jewish Law Primer

In order to better understand the flow of tradition this article will summarize, a brief introduction to the history of Jewish law is necessary. Jewish Law, or Halakha, denotes the entire corpus of the Jewish legal system from its earliest sources in the Bible to contemporary responsa. It includes public, private, ritual and civil law. It legislates not only that which is legal (things that law can compel or prohibit) but also the ethical and moral dimensions of daily life, and it includes obligations both interpersonal and between Man and his Maker.[789] The term "Halakha" was first employed by the early

[788] *See generally* JEWISH MARRIAGE 25 (P.Elman ed., 1975).

[789] Halacha encompasses practically all aspects of human behavior and experience; lifecycle events, joy and grief, agriculture, commerce, personal, social, national and international concerns, etc. Reflecting this comprehensive understanding of the function of law, the Hebrew word Halacha is derived from the word

Rabbis (called Tannaim, approximately 10-220 CE) to refer to an oral ruling handed down by the religious authorities (as in the phrase "'Halakha leMoshe miSinai,", a law given to Moses at Sinai). It later took on a broader scope, meaning the accepted or authorized opinion when a ruling was in dispute. Eventually, "Halakha" became the general term for the whole legal system of Judaism. Halakha is traditionally thought to consist of two primary sources. The Written Torah, which comprises of the Hebrew Bible, and the Oral Torah, which according to traditional belief, was given alongside the written Torah and is represented in the works of the Talmud and accompanying rabbinic literature.[790]

The Pentateuch, or Torah, is said to contain 613 commandments, 248 positive and 365 negative prescriptions.[791] Part of Halakha is the enumeration of these commandments, and the formal declaration of the manner in which they are performed, and the penalty for transgression. The Biblical books contained in the Prophets and Writings, which together with the Torah represent the Hebrew Bible, were written during the 700 years following composition of the Pentateuch. The Jewish biblical canon appears to have been completed no later than the year 150 CE. While the Prophets and

---

'halach,' (lit. 'to go'), following the statement, "Enjoin upon them the laws and the teachings, and make known to them the way they are to go and the practices they are to follow." *Exodus* 18:20. It is the legal system that outlines the way for properly living every aspect of ones life.

[790] *See* Mark Goldfeder & Ira Bedzow, *Early Modern Period: Jewish Law*, *in* THE OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW (Pamela Barmash et al. eds., 2013) [hereinafter Goldfeder & Bedzow, *Early Modern Period: Jewish Law*].

[791] *See* BABYLONIAN TALMUD, *Makkot* 23b.

Writings are traditionally understood to have been written with divine inspiration, and certainly had considerable impact on both the discourse and the homiletical material that appear in the primary documents of Jewish law, they are of far less significance than the Torah for establishing either normative legal or ethical norms.[792]

The Torah is the touchstone of Jewish law, and according to religious tradition and derived legal theory it is the manifestation of the Divine word, as revealed to Moses at Sinai. Torah means 'instruction' or 'teaching,' and like all teaching it requires interpretation and application. According to traditional belief, alongside God's revelation of the written Torah, represented in the text was a collection of material originally handed down orally from generation to generation. No legal system can exist on just a written text without explanatory notes and clarifications, and so this material was made up of a variety of additional laws, rules, explanations, and interpretive guidelines and tools. Although it was later written down, it remains known as the Oral Law.[793] The divine and therefore binding nature of these two intertwined Torahs is the predicate belief of normative Jewish law. The existence of the dual system accounts for

[792] *See generally* Emmanuel Rackman, Michael Broyde & Amy Lynne Fishkin, *Halakhah, Law in Judaism*, *in* ENCYCLOPAEDIA OF JUDAISM (Jacob Neusner et al. eds., 2d ed. 2005) [hereinafter Rackman, Broyde & Fishkin, *Halakhah*].

[793] For example, the Written Law prescribes: "You shall not do any work on the Sabbath"; the Oral Law defines exactly which acts of labor constitute a violation of this injunction. *See* BABYLONIAN TALMUD, *Shabbat* 73a.

two basic features of Jewish life; the chain of tradition linking generations and the emphasis on Torah study.

The legal debates between the schools of Hillel and Shammai set in motion new debating processes among the rabbinic teachers of first- and second-century Palestine, the Tannaim (lit. teachers). The Tannaim were the first redactors of Jewish law, whose period is closely associated with the editing of the Mishna, traditionally ascribed to Judah the Patriarch (commonly referred to by the simple honorific "Rabbi"). The Mishna, a redaction of nearly all the main areas of Jewish law then extant, became the basis of subsequent Jewish legal development and literature. It is composed of material thematically arranged in six structural "orders." They deal with agricultural law, family law, civil and criminal law, laws of Festivals, laws of the Temple, and laws relating to ritual purity.[794]

The Tannaitic period saw the transformation of Jewish law in three crucial ways. First, religious leadership was transferred from the triumvirate of king/priest/prophet to the rabbis, who assumed the mantle of expositors of Jewish oral and written law, thereby becoming the architects of authoritative rabbinic decrees and customs.[795] Second, during this period the oral law gradually came to be set in writing, a pivotal process that culminated in Rabbi's decision to allow the creation of an authoritative

[794] *See generally* MOSES MAIMONIDES, MAIMONIDES' INTRODUCTION TO HIS COMMENTARY ON THE MISHNA (Fred Rosner trans., 1994) [hereinafter MAIMONIDES, INTRODUCTION TO COMMENTARY].
[795] *See* Rackman, Broyde & Fishkin, *Halakhah*, *supra* note 789.

writing down of the oral law, fixed in the text of the Mishna. Finally, by the end of this period, after the Destruction of the Second Temple, Judaism was firmly rooted in the Diaspora and no longer geographically confined to the land of Israel. These three transitions caused profound changes in Jewish Law.[796]

The next five or six centuries saw the writings of the Babylonian and Jerusalem Talmuds, two running commentaries on most sections of the Mishna with elaboration and explanation of the rules and cases therein. They were written and edited by scholars called Amoraim (those who recount the Law) and to a lesser extent, towards the end of the period, by the Savoraim (those who ponder the law) and the Geonim (Geniuses of the Law). Once the Mishnah had been compiled it became a sacred text second only to the Bible. It became axiomatic, for instance, that no Amora had the right to disagree with a Tanna in matters of law unless he was able to adduce Tannaitic support for his view.[797]

The Jerusalem Talmud, compiling the interpretive traditions of the Rabbis in the Land of Israel, appeared around the year 425 CE. The Babylonian Talmud, which developed in the Diaspora, underwent a much heavier editing process; it did not become fixed until about a hundred years after its Jerusalem counterpart. As such, it is a more refined work, and as a result, and for a variety of other reasons (the Babylonian Talmud

---

[796] *See id.*

[797] *See* Goldfeder & Bedzow, *Early Modern Period: Jewish Law*, *supra* note 787.

is later than the Jerusalem and hence able to override the decisions of the latter; the textual condition of the Babylonian Talmud is in a more satisfactory state; the Babylonian Geonim at Sura and Pumbedita were in direct succession to the Babylonian Amoraim, so that the Babylonian Talmud became 'our Talmud,' etc.) the authority of the Babylonian Talmud ultimately eclipsed that of the Jerusalem Talmud, giving it far greater significance throughout most of Jewish history.[798]

Developing alongside the two Talmuds, and really also part of the Talmudic corpus, were the Midrashei Halakha, compilations of rabbinic teachings so called because the sages interpreted Scripture using a method called Midrash. There were two schools of Midrashic thought, the schools of Rabbi Yishmael and Rabbi Akiva. The Midrashei Halakha record the verse-by-verse expounding of the Scripture to substantiate halakhic rulings. Many early halakhic rulings are therefore called Divrei Sofrim (the words of the Scribes), although later that term also shifted to mean rulings of rabbinic rather than scriptural origin. Much of the Midrashic material makes its way into the two Talmuds as traditions or laws (known as baraitot), recognizable because they usually begin with a scriptural quote.

The fundamental significance of the Talmudic literature to Jewish law cannot be overstated. Jewish authorities accept that Talmudic law provides the base for all

[798] *See generally* Gerald J. Blidstein, *Halakhah: History of Halakhah*, *in* 6 ENCYCLOPEDIA OF RELIGION 3742-3747 (Lindsay Jones ed., 2d ed. 2005).

discussion of Jewish law, and its authority is beyond dispute, such that the denial of said authority effectively excludes one from the community of adherents. While the Talmud might in certain circumstances be unclear, or accept more than one view as acceptable or even normative, or at the very least cite several different views without explicit resolution of the matter under discussion, it nonetheless sets the framework of analysis for all that is Jewish within Jewish law. As Maimonides put it in the introduction to his Code, "All Israel is obliged to follow all the statements in the Babylonian Talmud. Every city and every province is compelled to conduct itself in accordance with the customs, decrees and regulations instituted by the sages of the Talmud, since all Israel agreed to accept them."[799]

The general assumption in the classical Jewish sources is that the halakhic principles in their entirety go back to Moses, except for various later elaborations, extensions, applications, and innovations in accordance with new circumstances. Thus, Maimonides, in the introduction to his Code counts forty generations backward from Rav Ashi, the traditional editor of the Babylonian Talmud, all the way to Moses, and concludes: "In the two Talmuds and the Tosefta, the Sifra and the Sifrei (names of Midrashic compilations), in all these are explained the permitted and the forbidden, the clean and the unclean, the liabilities and lack of liability, the unfit and the fit, as

[799] *See* MAIMONIDES, INTRODUCTION TO COMMENTARY, *supra* note 791.

handed down from person to person from the mouth of Moses our teacher at Sinai...To it [the Talmud] one must not add and from it one must not subtract."[800]

Internal Jewish law consists of a hierarchy of authority. Those laws that are derived directly from the Scriptural text are referred to as Torah obligations. Laws whose source is in statements of rabbinic scholars throughout the generations, from Moses to the present, are called rabbinic decrees. The difference between the two lies not only in the type of penalty that each demands if transgressed, but also in the type of consideration each must be given in doubtful circumstances. In the case of doubt with regard to a Torah commandment, one must lean towards stringency, while in the case of rabbinic decrees, on the other hand, one may be lenient.[801] Rabbinic decrees are often meant to make a protective fence around the Torah[802] so as to hinder possible violations of the Torah commandments through carelessness. Other types of rabbinic decrees are called gezerot (sing. gezerah) which differ from other rabbinic rules in their source of authority. They need not be explicitly exegetical nor directly related to Torah obligations, although they are often designed to protect some Biblical ethic or ideal.[803] However, once a gezerah is decreed and has been accepted by Jewry at large, it cannot

---

[800] *Id.*

[801] *See* BABYLONIAN TALMUD, *Beitzah* 3b; JERUSALEM TALMUD, *Erakhin* 3:4.

[802] *See* MISHNA AVOT 1:1.

[803] *See* Michael J. Broyde & Mark Goldfeder, *Contemporary Jewish Religious Movements: Orthodox*, *in* THE OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW (Pamela Barmash et al. eds., 2013).

easily be rescinded by later authorities.[804] Similarly, takanot (sing. takkanah) are rabbinic decrees that typically relate to social and economic situations that may arise. Another component of rabbinic law is minhag (custom), which can affect Jewish law depending on its strength of normativity.[805]

In the post-Talmudic era codification of the various strands of Jewish law became a popular endeavor. Based on available manuscripts from such leaders as Rav Shereira ben Hanina Gaon (900-940 CE) and Rav Hai Gaon (939-1038 CE), it appears that the Geonic era was an active period of codification. In the medieval era, different approaches arose with respect to codification. One genre that developed was responsa literature, in which individuals or communities addressed questions to major decisors of Jewish law. These responsa were collected, and sometimes organized by topic. Another genre was the systematic organization of Jewish law into codes. The greatest example of such a code is Maimonides' Mishneh Torah, a fourteen- volume codex covering all aspects of Jewish law. Another example is the Shulhan Arukh, written by Rabbi Joseph Karo, which covers all aspects of daily living, but is not as comprehensive as Maimonides' code.[806] The Shulhan Arukh, together with the glosses of the Rabbi Moshe Isserless, became the most authoritative code in the history of the Halakha, and it marked a turning point in the history of codification in that even when later authorities

[804] *See* MAIMONIDES, INTRODUCTION TO COMMENTARY, *supra* note 791.
[805] *Id.*
[806] Primarily in that it does not deal with laws seen only as relevant to a Temple based society.

departed from its rulings, they did so with extreme reluctance. Adherence to the Halakha as represented by the Shulhan Arukh became the test of Jewish fidelity and attachment to Orthodoxy, especially in the modern period when denominational divergence began. Its rulings are still authoritative, even if not the final authority, for halakhic Jews everywhere.

In looking at polygamy though the lens of Jewish tradition and specifically though Jewish law, the primary vehicle for the transmission of Jewish values throughout the ages, this dissertation will not attempt to quote every statement, law, or saying about polygamy, or co-wives- just the ones that have in some way or another left a mark or made an impact on the tradition. Nor will it quote every responsa, even by major rabbis; there are hundreds that touch upon the idea and practice of polygamy, many of them similar, and so instead of providing string citations I have sifted through them for the ones that in my opinion best make the relevant points. The viewpoint for this work is that of an internal Jewish law scholar, and so references to the Old Testament, Talmud, and Midrashic lore will see those texts, and Jewish law in general, as comprising a unified code for a coherent and continuous set of norms for a community (albeit one that has dynamically developed over time), which is the way

that it is and has been seen by its traditional practitioners.[807] It will also include a discussion of the development of divorce law in Halakha, particularly as it explains the changes in the Jewish marital structure.[808] It will also highlight the rationales that led to policy changes in family law overall, noting that the same factors that made polygamy ultimately distasteful then might still be around now.

[807] This part of the dissertation focuses on historic and legal sources, and so, for the most part, will not discuss aggadaic (homiletic or non-legal) or kabbalistic references to polygamy and proto-polygamy, unless and insofar as they do come to bear on the authoritative understanding of the Jewish position.

[808] Ability to divorce freely and polygamy are frequently linked; condemnation of divorce, both historical and even extant in the current push back against the so-called American divorce –revolution, along with popular romantic terms like "soulmate" and "one-and-only" point towards an even stricter ideal model of monogamy, an idea what Elizabeth Emens has called the fantasy of "supermonogamy." *See* Emens, *Monogamy's Law*, *supra* note 7, at 376.

Chapter 2: The Old Testament

A. Biblical Instances and Precedents

For Judaism and Jewish practice, everything eventually comes back to the Bible, and so there is no better place to begin. In both the narrative and genealogical sections of the Old Testament, there are numerous references to polygynous marriages, and there are quite a few Biblical laws and passages that presuppose the existence of polygamy.

The very first commandment in the Bible is pru u'rvu (be fruitful, and multiply).[809] This commandment is repeated to Noah and his sons when they exit the Ark after the flood,[810] and is echoed again several times throughout the Biblical literature.[811]

This commandment does three things; first, it sets the stage for the primary purpose of polygamy: the increase of viable children.[812] Second, the stage is also set immediately for tension, because the prototypical Biblical marriage is of course that of

---

[809] *Genesis* 1:28.

[810] *Genesis* 9:1.

[811] While marriages were clearly often contracted for the creation of progeny or for political alliance, Claire Gottlieb notes, "The element of romance is also not entirely lacking in the Biblical saga, especially from the Patriarchal narratives to the end of the United Monarchy." Claire Gottlieb, Varieties of Marriage in the Bible and Their Analogues in the Ancient World ix (1989) (unpublished Ph.D. dissertation, New York University). The Babylonian Talmud develops the parameters of this commandment to procreate. *See* Babylonian Talmud, *Yevamot* 61b-64a, *quoted in* Robyn Weiss Frisch, Haray Aten Mekudashot Li: A Study of Polygamy in Judaism from Biblical Through Rishonic Times 19 (2000) [hereinafter Frisch, Haray Aten]. *See also* Shulchan Aruch, Even Haezer 1.

[812] *See Psalms* 127:3-5 ("Children are a heritage from the Lord, offspring a reward from Him. Like arrows in the hands of a warrior are children born in one's youth. Blessed is the man whose quiver is full of them. They will not be put to shame when they contend with their opponents in court.").

Adam and Eve, the first (and at that point the only) man and the first woman.[813] Their relationship is patently monogamous, as no one else even exists.[814] In addition, the Bible notes that a man clings to his wife and the two "become one flesh,"[815] leading to the assumption by many scholars that the Bible introduced monogamy as an ideal before accepting polygamy as a compromise, the difficulties of which were then laid out in detail in the telling of the lives of the patriarchs.[816] Nevertheless, in the Rabbis view even an example set by God in ordering the world essentially belonged to the domain of aggadah (homiletics), and does not supply an adequate foundation for a specific

---

[813] It is interesting to note, however, that the Torah never speaks of their union as a "marriage" *per se*, unless one translates the words *Ish* and *Isha* in *Genesis* 2:23 as 'husband' and 'wife' (a valid translation although not the common one) as opposed to 'man' and 'woman,' as they are usually translated. The verse would then read: Then the man said, "This one at last is the bone of my bones and the flesh of my flesh. This one shall be called 'Wife' (*Isha*) for from 'Husband' (*Ish*) was she taken.

[814] While it is true that late Jewish mysticism believed in a demon woman named Lilith who is said to have been the first wife of Adam, such an understanding has never been used in a historical or legal normative context for family law. *See* I. ABRAHAMS, JEWISH LIFE IN THE MIDDLE AGES 114 (1932) [hereinafter ABRAHAMS, JEWISH LIFE].

[815] *Genesis* 2:24.

[816] *See* LAWRENCE H. SCHIFFMAN, FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE AND RABBINIC JUDAISM 257 (1991) [SCHIFFMAN, FROM TEXT TO TRADITION]. See also, from a Christian point of view, William B. Kessel, Address at the AZ District Pastoral Conference First Lutheran Church, Prescott, AZ (May 5, 1998) ("The fact that polygamy was and is practiced does not justify it Scripture does not present it as God's intent, or as God-pleasing, or as an example to follow.14 Is it possible, however, that God permitted polygamy to stand among the patriarchs to serve as a bad example or warning? Consider the plight of Abram and Sarai. Their polygamous household was anything but tranquil (*Genesis* 16:4-6). Problems between the co-wives translated into difficulties with their children (*Genesis* 21:9-11). Later Jacob loved his wife Rachel more than her co-wife and sister Leah (*Genesis* 29:32ff). This led to jealousy between the two (*Genesis* 30:1, 8). Then again, there was bitter strife between Elkanah's two wives Hannah and Peninnah (I *Samuel* 1:2). However, if God permitted polygamy to stand as an example not to be followed, then one wonders why conflict among David's wives—Michal, Abigail, Ahinoam, Maacah, Haggith, Abital, Eglah, and Bathsheba—is not mentioned. Likewise, familial disputes between Solomon and his 700 wives and Rehoboam and his dozen-and-a-half brides escape the lasting censor of Scripture.") (quoting LUTHERAN CYCLOPEDIA 626 (1975)).

halakha.[817] The Rabbis might appeal to God's example when enunciating general rules of religious, moral, or prudent conduct[818] or would reference it when elucidating a halakhic principle already established on other, proper legal grounds, but would go no further. (This is in direct contrast to a verse like Genesis 5:2, 'male and female he created them,' which the rabbis do cite in a legal context pertaining to how many children a man must have. Here, the primary duty of procreation, i.e. the commandment of 'pru u'rvu,' has already been established by an actual precept, 'Be fruitful and multiply.' The second verse is brought merely to give a more exact understanding of what that meant.[819])

Finally, the commandment of 'pru u'rvu' actually sets the stage for the idea of a Biblically prescribed polygamy.

B. Polygamy as a Religious Obligation

The Rabbis of the Mishna in Yevamot 6:6 teach us that

> [n]o man may abstain from keeping the law "Be fruitful and multiply" (Gen. 1:28), unless he already has children: according to the School of Shammai, two sons; according to the School of Hillel, a son and a daughter, for it is written, "Male and female He created them" (Gen. 5:2). If he married a woman and lived with her ten years and she bore no child, it is not permitted him to abstain [from fulfilling this legal obligation]. If he divorced her she may be married to another

[817] *See* DAVID DAUBE, THE NEW TESTAMENT AND RABBINIC JUDAISM 76 (1956) [hereinafter DAUBE, THE NEW TESTAMENT].

[818] See below for Rabbi Yehuda ben Beteira's statement that Job's rationale was that, "[i]f Adam was intended to have ten wives, they would have been given to him. But he was intended to marry only one wife. So too my wife is enough for me. My portion is enough." He does not even cite to a specific verse, a clear sign that he is speaking aggadaically, and not with legal precision. *Id.* at 76-77.

[819] *Id.* at 78.

> and the second husband may live with her for ten years. If she had a miscarriage the space [of ten years] is measured from the time of the miscarriage. The duty to be fruitful and multiply falls on the man but not on the woman. R. Johanan b. Baroka [dissents from this view and] says: Of them both it is written, "God blessed them and God said to them, Be fruitful and multiply" (Gen. 1:28).[820]

The husband of the barren wife who is required to fulfill his obligations is therefore left with only one of two choices: divorce his wife or marry a second one. The latter option is explicitly spelled out in the Mishna in Sotah, 4:3: "Rabbi Eliezer says, 'He can marry another woman to procreate through her.''

The Tosefta in Yevamot 8:6 deals with the problem of what happens to the infertile wife once it is confirmed that she is the problem: "And to how many husbands is she permitted to be married [until we are sure that she is the infertile one]? Three. Beyond that she should only be married to someone who has a wife and children."[821] The Talmud in Ketubot sees Abram's taking of Hagar in addition to Sarai after ten years of living in Israel as a Biblical reference to this practice.

The idea of monogamy as an ideal is reinforced by the oft-repeated Biblical metaphor of Israel as God's unfaithful but still beloved, and ultimately only wife, as well

---

[820] *See also* TOSEFTA YEVAMOT 8:5.

[821] The man, however, seems to have no similar limitation, but must continue to try and have children with other women. In fact, the famous statements of Rava and Rav Ammi discussed at length below come up in the context of a discussion of a man who wants to marry another woman in order to test his virility. *See* BABYLONIAN TALMUD, *Yevamot* 65a.

as by several verses that seem to indicate a definite monogamous preference, including Ecclesiastes 9:9[822] and Psalms 128:3.[823]

Still, while there are no Biblical passages that seem to indicate an actual preference for polygamy, there are plenty of legal passages that acknowledge its existence and even approve of it.[824] Aside from the many tales of multiple wives, the Bible assumes that female slaves will marry either their owner or his son,[825] regardless of whether or not they are already married. Elsewhere, the text is explicit that "If a man (who is already married) marries another woman, he must not withhold (from his first wife) her food, her clothing, or her conjugal rights."[826] The Torah also discusses what to do when bequeathing property to sons born from multiple wives in a situation where one wife is loved more than the other.[827]

The rules of levirate marriage[828] compel a man (in certain circumstances) to marry his childless brother's widow, regardless of whether or not the man is already married to his own wife. This is important because it is one of the only times (aside from the case of barrenness, above) that the taking of a second wife could be construed

---

[822] *Ecclesiastes* 9:9 ("Enjoy happiness with a woman you love all the fleeting days of your life that have been granted to you under the sun . . .").

[823] *Psalms* 128:3 ("Your wife shall be like a fruitful vine within your house; your sons like olive saplings around your table . . . .). *See also Isaiah* 50:1; *Jeremiah* 2:2; *Ezekiel* 16:8; *Proverbs* 12:4, 18:22, 19:14, 31:10-31.

[824] *See* FRISCH, HARAY ATEN, *supra* note 808, at 22-23.

[825] *Exodus* 21:7-9.

[826] *Exodus* 21:10.

[827] *Deuteronomy* 21:15-17.

[828] *Deuteronomy* 25:5-10.

as actually fulfilling a commandment,.[829] The Children of Israel are warned that their king should not have too many wives,[830] while Deuteronomy's discussion of the 'beautiful captive,'[831] seems to be given in a polygamous context, as it too does not differentiate between married and unmarried soldiers.

C. Polygamy's Benefits

In Biblical times, the benefits to a man of having multiple wives were obvious and many. Aside from increasing a man's chances of having more offspring, multiple wives and concubines served as a sign of wealth and power.[832] They also supplied a man with enough people to work the fields and tend the flocks.[833] A woman, meanwhile, may have preferred the status of a wife, even a secondary wife, to that of spinsterhood, or to

---

[829] Indeed, while the text of the Bible itself does not specifically state that a married brother can perform levirate marriage, and so one might have thought this was ambiguous, the Rabbis in the MISHNAH YEVAMOT 4:11 state unequivocally that: "Four brothers married four women and died. If the oldest of them [i.e. the remaining brothers] wants to take them all in levirate marriage, the authority is in his hand." Note that there were several other options available here; the younger brothers could each have taken a wife, or the oldest brother could have done chalitzah, the un-shoeing ceremony, an alternative to levirate marriage, on all but one; clearly, avoiding polygyny *was not* a priority here.

[830] *Deuteronomy* 17:17. This verse actually reflects the exact opposite ambiguity of the verse in *Genesis*; the word here is *nashim* (plural of *isha*) and, although it usually is not in this context, could also be translated as 'women,' which would presumably include concubines as well as full-fledged wives. Note that the Damascus document of the Dead Sea Scrolls sees this not as a prohibition on the king alone, but as an indication that the king should be an example to his people, who should all refrain from having multiple wives.

[831] *Deuteronomy* 21:10-14.

[832] *See* FRISCH, HARAY ATEN, *supra* note 808, at 26. Note that, throughout Biblical and Talmudic literature, the only references we find to actual polygamists are among the rich and powerful. This is not to necessarily say that the common man could not be or was not also polygamous, just that we lack any evidence that this was in fact the case. *See* Rachel Biale, *Women and Jewish Law*, *in* THE ESSENTIAL TEXTS, THEIR HISTORY & THEIR RELEVANCE FOR TODAY 50 (1984).

[833] *Id. See*, *e.g., Genesis* 34:7 (Jacob and his children).

living under the jurisdiction of a father or a brother.[834] Isaiah 4:1 points out that especially in times of national turmoil, multiple women would be content to take the name of one husband: "In that day, seven women shall take hold of one man, saying 'We will eat our own food, and wear our own clothes, only let us be called by your name; take away our disgrace.'" Polygamous marriages were also entered into for political reasons; Solomon, for example, used his marriage alliances with foreign women to establish cordial relations with the nations around him.[835] Aside from the reference to the king noted above, the Torah places no limit on how many wives a man can have.

D. Polygamy as a Tolerated Practice

The first example of polygamy in the Bible is that of Lamech and his two wives, Addah and Zillah.[836] Although the influential commentator Rashi[837] states that having two wives was the custom of the generation of the flood, Lamech's bigamy is the only recorded case of polygamy in the antediluvian period.[838] Other famous polygamous men from the Genesis narrative include Abraham (married to Sarah and later Hagar the

---

[834] *See* Claire Gottlieb, VARIETIES OF MARRIAGE IN THE BIBLE AND THEIR ANALOGUES IN THE ANCIENT WORLD 86 (1989) (unpublished Ph.D. diss., New York University), *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 26.

[835] See Chaim Pearl, *Marriage Forms*, *in Jewish Marriage* 24-25 (Peter Elman ed., 1967) [hereinafter Pearl, *Marriage Forms*].

[836] *Genesis* 4:19. *See also Midrash Genesis Rabbah* 23:3 (seeming to find Lamech's polygamy distasteful, as he kept one wife for pleasure and one for children).

[837] Rabbi Shlomo Yitzchaki of France, (1040–1105). See comment to *Genesis* 4:19.

[838] FRISCH, HARAY ATEN, *supra* note 808, at 28.

concubine[839]), Abraham's brother Nahor (married to Milcah and his concubine Reumah[840]), Jacob (married to Leah and Rachel, along with the concubines Bilhah and Zilpah) Esau (married to Judith, Basemath, Mahalath, Adah, and Oholibamah), and Esau's son Eliphaz[841]

Throughout the Prophets and Writings we encounter Gideon (who had 'many wives,'[842]), King Saul (who had multiple wives, although no exact number is given[843]) King David (who had seven wives before he reigned in Jerusalem,[844]and then took additional wives and concubines when he left Hebron,[845]) King Solomon (seven hundred royal wives and three hundred concubines[846]), King Mennasseh (at least one concubine[847]), Shaharaim (three wives, unclear how many concurrent[848]) King Rehoboam of Judah (eighteen wives and sixty concubines, and who sired twenty eight sons for whom he sought many wives,[849]) Abia (fourteen wives and an unknown number of

---

[839] By the time that Abraham married his second wife, Keturah , Sarah had already died. *See Genesis* 25:1.

[840] *Genesis* 22: 20-24.

[841] The text to *Genesis* 36:11 does not mention his wife's name, only his sons' names, but *Genesis* 36:12 tells us that Timna was his concubine and bore him an additional son, Amalek. *Genesis* 46:10 implies that Jacob's son Simon had a second wife, a Canaanite woman, although it is not clear if those wives were, in fact, concurrent. The text to *Genesis* 36:11 does not mention his wife's name, only his sons' names, but *Genesis* 36:12 tells us that Timna was his concubine and bore him an additional son, Amalek.

[842] *Judges* 8:30 (Gideon had seventy sons of his own issue, for he had many wives).

[843] 2 *Samuel* 12:8.

[844] 2 *Samuel* 3:2-5, 14.

[845] 2 *Samuel* 5:13.

[846] 1 *Kings* 11:3.

[847] 1 *Chronicles* 7:14.

[848] 1 *Chronicles* 8:8-9.

[849] 2 *Chronicles* 11:21, 23.

concubines[850]), and King Jehoash (two wives[851]). In Samuel I and II, the only recorded polygamist aside from the royal monarchs is Samuel's father Elkanah (married to Hanna and Penina[852]). [853]

In terms of the way the Bible thought about polygamy, none of these polygamous men are ever criticized for having multiple wives. Even King Solomon, whose many wives famously led him astray, was criticized not for marrying too many women, but for marrying women who were unsuitable because they were from among the nations with which God had prohibited the Israelites from intermarrying.[854] Still, others claim that the Bible is written in a way which already presupposes that monogamy was the general rule, pointing to verses such as Deuteronomy 20:7 ('And who is the man who has betrothed a wife'), 24:5 ('when a man takes a new wife'), which, although they don't prescribe polygamy, seem to indicate that it might not have been favored or the norm.[855]

---

[850] 2 *Chornicles* 13:21.

[851] 2 *Chronicles* 24:3.

[852] Roland de Vaux, 1 Ancient Israel-Social Institutions 25 (1965) (noting that Elkanah traced his lineage back to Kohath, the son of Levi, so in reality he was not an ordinary commoner). In general Samuel, like all the Biblical books, records the activities of the elite. *But see* Yalkut Shimoni to I *Samuel* 1:2; Midrash Shmuel I *Samuel* 1:2; Pesikta Rabasi ch.43 (seeming to justify Elkanah's polygamy due to Penina's barrenness).

[853] *See* 1 *Chronicles* 7:4 (implying that polygamy may have been common at that time amongst the tribe of Issachar).

[854] 1 *Kings* 11:4-5. *See also* Frisch, Haray Aten, *supra* note 808, at 30.

[855] *See* Moses Mielziner, The Jewish Law of Marriage and Divorce 28 (1884) [hereinafter Mielziner, The Jewish Law]. Mielziner also sees sich commandments as the prohibition to neglect one's conjugal duties toward one wife on account of another (*Exodus* 21:9) as designed to make polygamy practically difficult.

They also note that great men such as Moses and Aaron lived monogamous lives.[856] Others cite to the thirty-first chapter of Proverbs, as well as several of the Psalms, which seem to speak of and praise a monogamous union.[857]

It was possible, as in the cases of Esau and Jacob, for a man to have multiple wives of equal position and rank.[858] Oftentimes in ancient Israel, as in other polygamous societies, polygamy resulted in antagonism between the wives, whether because one was more favored (Rachel and Leah)[859] or because one was barren and the other bore children (also Rachel and Leah, as well as Hannah and Peninnah).[860] As noted above, Deuteronomy recognized the potential for this problem, stating that "if a man has two wives, one loved and the other unloved . . . ."[861]

The practice of a barren woman giving her husband her handmaid to bear children "on her (the wife's) knees"- i.e. a form of surrogate motherhood- was common in the Bible, and indeed in the Ancient Near East generally[862]; Rachel[863] and Leah,[864] for

---

[856] *Id.*

[857] *See* Pearl, *Marriage Forms*, *supra* note 832, at 27.

[858] *See* FRISCH, HARAY ATEN, *supra* note 808, at 38.

[859] *Genesis* 29:30.

[860] 1 *Samuel* 1: 1-6.

[861] *Deuteronomy* 21: 15-17. In *De Vertutibus* 115, Philo of Alexandria echoes the Rabbinic sentiment that if one takes a 'beautiful captive' as a wife, jealousy will ensue when the older wife is superseded by a newer wife, *translated in* PHILO OF ALEXANDRIA, ON VIRTUES: INTRODUCTION TRANSLATION, AND COMMENTARY (Walter Wilson trans., 2011).

[862] *See* VICTOR HAROLD MATTHEWS & DON C. BENJAMIN, OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST 47 (1997). *See also* Stuart A. West, *The Nuzi Tablets: Reflections on the Patriarchal Narratives*, 10 BIBLE & SPADE 68, 68 n.3-4 (1981); John C. Jeske, *Genesis*, *in* THE PEOPLE'S BIBLE 145 (Roland Cap Ehlke & John C. Jeske eds., 1991).

[863] *Genesis* 30:3.

example, both gave Jacob their handmaids, Leah even despite the fact that she had already borne some children.[865]

It is debatable whether or not the practice of concubinage falls under the rubric of traditional polygamy as the concubine was not "married" to the master, and while her status was higher than that of a slave it was lower than that of a wife and oftentimes (as in the cases of Sarah and Hagar, Leah and Zilpah, and Rachel and Bilhah,) she even belonged to the primary wife. Still, there was a committed sexual relationship between two people, in addition to any other wives a man might have, which was exclusive on the part of the woman. In many ways this looks like polygamy, as opposed to just an open sexual relationship. In addition, the reasons for having a concubine are the same as the reasons for having multiple wives; not only was it prestigious, having many concubines also increased the man's chances of having many children and a steady stream of helpers (while at the same time being somewhat less expensive, and avoiding some of the pitfalls of rivalry that co-wives might engender[866]). For some parts of this discussion then, we will equate the practices of polygamy and concubinage, noting here at the outset that this was not the case in all societies and at all times.[867]

---

[864] *Genesis* 30:9-13.

[865] For our purposes, the terms *amah* (handmaid) *shifchah* (maid or female slave) and *pilegesh* (concubine) all refer to the concubine.

[866] Although not always; *see Genesis* 16:4-6; after Hagar conceives from Abraham when Sarah could not, Sarah is lowered in her eyes, and responds by treating Hagar harshly.

[867] In classical Roman law, for instance, allowed members of the Senatorial order to take as concubines women who, they would otherwise not be permitted to marry. Since the relationship was devoid of legal

Louis Epstein makes the argument that the tradition of polygamy amongst the Hebrews was from time immemorial directly related to the outside culture of which they were a part. [868] It is true that polygamy did prevail among most ancient oriental nations[869] but not all; thus we find Abraham maintaining a matriarch in Sarah, as per Babylonian restrictions, while Esau, who, unlike Jacob remained in Canaan, participated fully in the Canaanite pattern of full and equal polygamy.[870] That might explain why Jacob's father in law Laban, seeking to preserve his daughters' dignity, made Jacob swear before he returned to Canaan that he would take no other wives to rival them.[871] Epstein argues that if the majority of the Hebrews in Canaan and later in Egypt did not practice polygamy, it was mostly due to practical considerations; only the chieftains could afford it even though the law did not forbid it.[872]

---

basis, it did not stand in the way of another, legal relationship. *See* F. SCHULZ, CLASSICAL ROMAN LAW 137 (1951). In the year 325, however, an edict was issued forbidding a man to take a concubine in addition to his wife, while a later version expressly prohibited the taking of a second wife while the first was alive. These decrees received further confirmation at the Councils of Toldeo $400) and of Rome (402). *See* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 22.

[868] LOUIS M. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD 8-9 (1942) [EPSTEIN, MARRIAGE LAWS].

[869] M. MIELZINER, JEWISH LAW OF MARRIAGE AND DIVORCE 28 (2d ed. 1901).

[870] *See* Claire Gottlieb, *Varieties of Marriage in the Bible and Their Analogues in the Ancient World* 87 (unpublished Ph.D. diss., New York University 1989), *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 38.

[871] *Genesis* 31:50.

[872] Epstein offers an interesting conjecture that perhaps Egyptian culture affected Jewish monogamy in one very particular way, i.e. outlawing polygamy amongst the priests. The Mishna assumes that the High Priest had only one wife (MISHNA, *Yoma* 2a), and we see a later reflection of this in the New Testament (I *Timothy* 3:2; *Titus* 1:6), which prohibits polygamy to bishops. EPSTEIN, MARRIAGE LAWS, *supra* note 865.

Most assume that even though polygamy was clearly sanctioned, it was not extensively practiced even in Biblical times except by the leaders and the wealthy.[873] Polygamy was a privilege of the rich, and while a poor Israelite might desire having a number of wives (along with their attendant slaves and children) to help him in his household, his financial standing would probably make this arrangement highly impracticable.[874] Also note that in almost every situation, polygamy in the Biblical era already leads to strife, pain, and discord.

[873] Russel K. Ryan, *Polygamy Among Jews and Mormons*, 9 JEWISH L. ANNUAL 205, 209 (1991).

[874] E. NEUFELD, ANCIENT HEBREW MARRIAGE LAWS 118 (1944). He does, however, think that bigamy alone might have been somewhat common, although many do disagree.

CHAPTER 3: POLYGAMY IN THE POST-BIBLICAL ANCIENT NEAR EAST

A. The Second Temple Period

After the Old Testament, the next references we get to Jewish stances on polygamy come from extant marriage contracts written during the time of the Second Temple period.[875] One such document was found in Elephantine, a Jewish military colony in Egypt located at the Southern end of a small island in the Nile. The agreement, written in Aramaic and dated to around the year 441 BCE, makes it clear that some men in this period did not take a second wife because of an explicit agreement they had made with their first wives. The relevant provision, written by the husband (Ashor) to the wife (Miphtahiah) reads as follows:

> And I shall have no right to say I have another wife besides Miphtahiah and other children than the children whom Miphtahiah shall bear to me. If I say I have children and wife other than Miphtahiah and her children, I will pay to Miphtahiah the sum of 20 kerashin, royal weight, and I shall have no right to take way my goods and chattels from Miphtahiah; and if I remove them from her (erasure) I will pay to Miphtahiah the sum of 20 kerashin, royal weight.[876]

---

[875] After the destruction of the First Temple in 586 BCE, the Jewish people went into exile in Babylonia. When the Persian King Cyrus defeated Babylonia in 539 BCE, he offered the Jews living under his rule the chance to return to their homeland and rebuild the Temple. While some did return, many remained in Babylonia and other areas in which they had settled during the Diaspora. *See* DAVID J. GOLDBERG & JOHN D. RAYNER. THE JEWISH PEOPLE: THEIR HISTORY AND THEIR RELIGION 51-53 (1992).

[876] ARAMAIC PAPYRI OF THE FIFTH CENTURY, B.C. 45-46 (A. Cowley ed., 1967), *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 52. Other such examples of agreements wherein the husband writes that he will refrain from taking a second wife because of an agreement with the first one, have been preserved in similarly written Babylonian and Assyrian documents. *See* 12 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 259; FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 5.

As noted above, this provision has possible Biblical precedent; when Laban encounters Jacob in Genesis 31:50, he adjures him not to take any additional wives other than his daughters, Rachel and Leah; "If you ill-treat my daughters, or take other wives besides my daughters, though no one else be about, remember, God Himself will be witness between you and me. (Emphasis added).[877] According to Ze'ev Falk, however, the clause in the Elephantine marriage contract prohibiting polygny was drawn less from the Bible and more from the influences of the community's non-Jewish neighbors.[878] Falk is careful to point out though that just because the format of inserting a specific clause in a marriage contract to restrict polygyny may have been borrowed by Jews from their gentile neighbors, "[i]t does not necessarily follow that the tendency to monogamy was also a result of foreign influences. . . ."[879] The tendency toward monogamy could have come from within the Jewish community, which then borrowed a formal medium from surrounding non-Jewish culture.

Texts found among the Dead Sea Scrolls at Qumran, from the library of the sectarian Jews that lived there, condemn marriage to one's niece,[880] divorce, and

---

[877] *See also* LOUIS M. EPSTEIN, THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW 125 (2005) [hereinafter EPSTEIN, THE JEWISH MARRIAGE CONTRACT] (noting that while the clause prohibits polygamy it does permit concubinage).

[878] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 4-5, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 53.

[879] *Id.* at 5.

[880] Not forbidden in the Torah. *See* BABYLONIAN TALMUD, *Yevamot* 62b.

polygamy, calling all of them zenut (fornication).[881] One scroll, commonly referred to as the "Damascus Document," has been dated to the late first century BCE. It states:[882]

> [They] are caught by two (snares). By unchastity, (namely), taking two wives in their lives, while the foundation of creation is "male and female he created them."[883] And those who entered (Noah's) ark went two by two into the ark. And of the prince[884] it is written "Let him not multiply wives for himself."[885] And David did not read the sealed book of the Torah which was in the Ark (of the Covenant), for it was not opened in Israel since the day of the death of Eleazar and Joshua and the elders. For (their successors) worshipped Ashtoreth, and that which had been revealed was hidden until Zadok arose, so David's works were accepted, with the exception of Uriah's blood . . . .[886]

While this text is somewhat ambiguous- most importantly, it is not clear from the context which person exactly is the subject of "in their lives," the husband (in which

---

[881] *See* ROBERT EISENMAN, JAMES THE BROTHER OF JESUS: THE KEY TO UNLOCKING THE SECRETS OF EARLY CHRISTIANITY AND THE DEAD SEA SCROLLS 40, 81, 104 (1997), *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 58. *See also* LENA CANSDALE, QUMRAN AND THE ESSENES: A RE-EVALUATION OF THE EVIDENCE 53 (1997) [hereinafter CANSDALE, QUMRAN AND THE ESSENES].

[882] To have two wives at once is, for the author of the Damascus Document, a breach of the ordinance of creation. *See Book of Covenant of Damascus*, *in* 5 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 397, 398.

[883] *Genesis* 1:27 (translation by author).

[884] *Deuteronomy* 17:17 (translation by author). The word 'prince' (*nasi*) here is a clear reference to the king.

[885] As mentioned above, Rabbinic exposition, apparently even sectarian exegesis, required an explicit commandment as an anchor before it would use a homiletic verse to fill in the gaps. Thus the Zadokite's turn to the Deuteronomic verse concerning kings as their base text, probably relying on a similar tradition to that which the Rabbis quote in the BABYLONIAN TALMUD, in the name of Rabbi Shimon ben Yochai; "all Israelites are considered sons of kings." *See* DAUBE, THE NEW TESTAMENT, *supra* note 814, at 85-96.

[886] *See* 2 THE DEAD SEA SCROLLS: HEBREW, ARAMAIC, AND GREEK TEXTS WITH ENGLISH TRANSLATIONS: DAMASCUS DOCUMENT, WAR SCROLL, AND RELATED DOCUMENTS 21 n.41 (James H. Charlesworth ed., 1995) [hereinafter DAMASCUS DOCUMENT]. *See also* FLORENTINO GARCIA MARTINEZ, THE DEAD SEA SCROLLS TRANSLATED: THE QUMRAN TEXTS IN ENGLISH 4:20-5:5 (Wilfred G.E. Watson trans., 1994) (1992). The author of the scroll here wishes to preempt the argument from history that David, God's beloved servant, was polygamous and never criticized for it, noting that it was not David's fault since in David's day the Torah was inaccessible; it had been sealed and hidden until Zadok (most likely Zadok the High Priest in Solomon's time) arose. The author does note, however, that David was still punished for having Bathsheba's husband Uriah killed.

case a man would be guilty of fornication for taking a second wife even if his first wife had already died) or the wife (in which case it was only forbidden to take a second wife if the first wife was still alive), most scholars have understood it as a reference to polygamy.887 If so, the apparent claim that polygamy is actually Biblically forbidden seems to be a complete innovation,888 although there are those who claim that at least some members of the Karaite sect also believed that it was Biblically prohibited. (They read the verse in Leviticus 18:18 ('Do not take your wife's sister as a rival wife,' broadly, with sister meaning something more akin to 'neighbor.')[889]

It is interesting that while in the Torah the prohibition of the king having too many wives is meant only for the king, and the same is true in the Temple Scroll found in Qumran 890, when it is referenced in the Damascus Document it is used for a different purpose, namely to show that the king serves as an example to his subjects.

---

[887] *See generally* CHARLOTTE HEMPEL, 1 DAMASCUS TEXTS (2000); *see also* JOHAN MAIER, 34 THE TEMPLE SCROLL: AN INTRODUCTION, TRANSLATION & COMMENTARY 16 (1985); LAWRENCE H. SCHIFFMAN, RECLAIMING THE DEAD SEA SCROLLS 130 (1994); BEN ZION WACHOLDER, 56 THE NEW DAMASCUS DOCUMENT: THE MIDRASH ON THE ESCHATOLOGICAL TORAH OF THE DEAD SEA SCROLLS: RECONSTRUCTION, TRANSLATION AND COMMENTARY 196 (2007). Joseph M. Baumgarten, *The Laws of the Damascus Document in Current Research*, *in* THE DAMASCUS DOCUMENT RECONSIDERED 51-62 (1992); Sidney White Crawford, *The Temple Scroll and Related Texts*, *in* 2 COMPANION TO THE QUMRAN SCROLLS 81 (2000) (CD 4.205.5 prohibits polygamy "taking two wives" and, evidently, divorce "in their lives.") *Id.*

[888] *See* 1 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 259.

[889] LOUIS FINKELSTEIN, JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES 23 (1972) [hereinafter FINKELSTEIN, JEWISH SELF-GOVERNMENT]. *See also* A. NEUBAUER, GESCHICHTE DES KARAERTUMS 46 (1866), *quoted in* 8 MARRIAGE AND ITS OBSTACLES IN JEWISH LAW: ESSAYS AND RESPONSE 62 (Walter Jacob, and Moshe Zemer eds., 2001).

[890] Temple Scroll Column LVI, Verse 18, *translated in* FLORENTINO GARCIA MARTINEZ, THE DEAD SEA SCROLLS TRANSLATED: THE QUMRAN TEXTS IN ENGLISH (Wilfred G.E. Watson trans., 1994) (1992).

"Just as [the king] is not permitted to have more than one wife, so others are not."[891] Perhaps the intent was to benefit women, or to promote stable marriages, or was simply in keeping with general Second Temple community attitudes.[892] It is also noteworthy that the Damascus Document seems to have been written during the reign of King Herod,[893] and could have been written as a critique of his and his supporters' polygamous ways as described in Josephus' Wars and Antiquities.[894]

The apocraphylic literature does not deal with polygamy that often; 1 Esdras 4:29 for instance simply mentions that Apame was a concubine of the king. The clearest statements we get come from the book The Wisdom of Ben Sirah, otherwise known as Ecclesiasticus. In regard to having multiple wives, Ecclesiasticus[895] writes that; "It is a

---

[891] SCHIFFMAN, FROM TEXT TO TRADITION, *supra* note 814, at 130, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 62-63.

[892] *See* CANSDALE, QUMRAN AND THE ESSENES, *supra* note 878, at 53, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 63.

[893] King Herod had nine wives according to Josephus. FLAVIUS JOSEPHUS, 1.3 ANTIQUITIES OF THE JEWS, Bk.XVII (Allen Wikgren ed., Ralph Marcus trans., 1963) (c. 94) [hereinafter JOSEPHUS, ANTIQUITIES].

[894] CANSDALE, QUMRAN AND THE ESSENES, *supra* note 878, at 53 (discussing the rules of relationships). Though Josephus wrote in ANTIQUITIES OF THE JEWS, Bk. XVII 1.2 that it is "an ancestral custom of [the Jews] to have several wives at the same time," Josephus himself, who was married to three different women, was never married to more than one woman at a time. Isaiah M. Gafni suggests that Josephus need to include these explanatory notes in his text because of the monogamy of the Roman Empire. Isaiah M. Gafni, *The Institution of Marriage in Rabbinic Times*, *in* THE JEWISH FAMILY: METAPHOR AND MEMORY 21 (David Kraemer ed., 1989) [hereinafter Gafni, *The Institution of Marriage*]. *See also* LOUIS GINZBERG, AN UNKNOWN JEWISH SECT 19 (1970) (1922). Ginzberg cites another Zadokite document which took the Levitical law (18:18) against marrying a woman and her sister to refer to simply "a wife together with another one," a definite linguistic possibility but also definitely not part of the mainstream Jewish tradition. The Karaites would later use a similar exegesis.

[895] JOSHUA BEN SIRACH, ECCLESIASTICUS 26:6, *translated in* THE APOCRYPHA (Edgar J. Goodspeed trans., 1989) (c. 200-175 B.C.E.).

heartache and sorrow when one wife is the rival of another . . . ." Later,[896] he advises his audience "not [to] consult with a woman about her co-wife." The author, however, was not against marriage, per se, and seemed to praise the monogamous lifestyle:

> In three things I show my beauty and stand up in beauty
> before the Lord and men;
> Harmony among brothers, and friendship among neighbors,
> And wife and husband suited to each other.[897]

The author also notes:

> Happy is the man who has a good wife!
> The number of his days is doubled.
> A noble wife gladdens her husband,
> And he lives out his years in peace.
> A good wife is good fortune;
> She falls to the lot of those who fear the Lord,
> Whether rich or poor, he has a stout heart;
> And always a cheerful face.[898]

Overall, the materials available from the Second Temple period both legal and homiletic seem to reflect a growing attitude in favor of monogamy. Despite the fact that the majority of Jewish texts (with the exception of the Damascus Document[899]) had not outlawed the practice of polygamy at this time, it is likely that it was not common.[900]

---

[896] *Id.* at 37:11.

[897] *Id.* at 25:1; *see also* 26:19-24, 37:11.

[898] *Id.* at 26:1-4.

[899] In general it is important not to overestimate the value of these scrolls even to the Dead Sea Sect living in Qumran. While it is possible and even likely that these scrolls did represent their philosophy, it is also possible that they were part of a larger collection or library, or that they reflected the views of one small group or even one individual.

[900] *See* Michael L. Satlow, *Family, Jewish*, *in* 37 ANTIQUITY 299-343 (2012); *see also* SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 90, at 325.

This concept, of polygamy being legally valid but socially frowned upon continued as a trend in the Jewish communities throughout the Talmudic period.[901]

B. The Tannaitic Period

The period of the Tannaim ('those who taught the Law) extends from the period of Hillel the Elder at the end of first century BCE until the compilation of the Mishna By Rabbi Judah HaNasi at the end of the second century CE.[902] The primary sources of Jewish law passed down from the Tannaitic period are the Mishna (designed to preserve, clarify and systematize the rabbinic teachings surrounding the commandments in the Torah) and the Tosefta (lit. additional material; made up of material attributed to the Tannaim that did not make the final cut in the redaction of the Mishna, but serves as a supplement to it).[903]

---

[901] *See* Jack N. Lightstone, *Roman Diaspora Judaism*, *in* A COMPANION TO ROMAN RELIGION 345, 362 (2007); *see also* Michael L. Satlow, *Marriage and Divorce*, *in* OAGFORD HANDBOOK OF JEWISH DAILY LIFE IN ROMAN TIMES 15 (Catherine Heszer ed., 2008).

[902] As the last of the "pairs" mentioned in the Mishna in Avot who were responsible for maintaining the chain of tradition of the Oral Law,, and the author of the 'seven rules of Hillel,' the first compilation of the technical exegetical that are to be used when expounding on the Biblical text, Hillel is generally credited as changing the way that Torah was taught and laying the foundations of a new era. *See* Stephen G. Wald, *Hillel*, 9 ENCYCLOPAEDIA JUDAICA, *supra* note 92, at 108-10.

[903] H.L. STRACK & G. STEMBERGER, INTRODUCTION TO THE TALMUD AND MIDRASH 149-50 (2d ed.1996) (1991). FRISCH, HARAY ATEN, *supra* note 808, at 75. According to Rabbinic tradition it was redacted by Rabbi Chiyah bar Abba (an Amora, one of the rabbinic sages from the second through the fifth century living in Israel, active from 290-320 C.E., and the last prominent scholar to be mentioned in the Tosefta), a relative and student of Rabbi Judah HaNasi, in the late third or fourth century C.E. in Israel. *See* Stephen G. Wald, *Tosefta*, *in* 20 ENCYCLOPAEDIA JUDAICA, *supra* note 92, at 70-72.

While the majority of the material cited in these works is attributed to sages from this era, it also contains some material attributed to sages dating back as early as 300 BCE.[904] Material from the Tannaitic period can also be found throughout the discussions in the Babylonian and Jerusalem Talmuds, which, although they were compiled and redacted later in the Amoraic period, preserve numerous stories, references, statements, and rulings of the various Tannaim.

The Talmudic tractate Yevamot (literally 'Levirate Marriages') deals with the legal rules that arise from the description of levirate marriage contained in Deuteronomy 25:5-10;

> If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not be married abroad unto one not of his kin; her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of a husband's brother unto her.' And it shall be, that the first-born that she bears shall succeed in the name of his brother that is dead, that his name be not blotted out of Israel. And if the man like not to take his brother's wife, then his brother's wife shall go up to the gate unto the elders, and say: "My husband's brother refuses to raise up unto his brother a name in Israel; he will not perform the duty of a husband's brother unto me." Then the elders of his city shall call him, and speak unto him; and if he stand, and say: "I like not to take her"; then shall his brother's wife draw nigh unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face; and she shall answer and say: "So shall it be done unto the man that doth not build up his brother's house." And his name shall be called in Israel the house of him that had his shoe loosed.

[904] Lawrence H. Schiffman From Text to Tradition: A History of Second Temple and Rabbinic Judaism 183 (1991). *See* Frisch, Haray Aten, *supra* note 808.

In addition to the polygyny that could occur when a married brother is biblically required to perform levirate marriage, several other passages presuppose the existence of polygyny.[905] The teachings at the very beginning of the tractate, for example, Mishnayot Yevamot 1:1-4, all make mention of co-wives in their discussions of the family, as do many other Mishnayot and toseftas throughout the tractate.[906] Perhaps the most important statement about polygamy and levirate marriage, however, comes from outside of Yevamot, in the Mishna, Bechorot 1:7:

> The duty of levirate marriage takes precedence over the duty of chalitzah [i.e.the un-shoeing ceremony, in which the brother-in-law tells the court that he will not perform his levirate duty] in the early days, when their intent was to perform a mitzvah, but now when their intent is not to perform a mitzvah, the duty of chalitzah takes precedence over the duty of levirate marriage.

Leviticus 18:16[907] and 20:21[908] make it clear that in general one is forbidden from marrying his brother's wife, even widowed or divorced. Levirate marriage was the exception to this rule, provided that it was done for the right reasons, i.e. to fulfill a religious obligation and not for personal or financial reasons. According to the commentators, if a man performs levirate marriage with ulterior motives, he is

---

[905] *See* FRISCH, HARAY ATEN, *supra* note 808, at 86.

[906] *See*, *e.g.*, *Yevamot* 15:4, where a co-wife is disqualified from testifying on behalf of a woman that her husband is dead, since, as he commentators explain, there is a fear that due to the dislike co-wives have for each other one will testify about the other falsely, so that she will marry someone else and then be prohibited to the original husband. *See also Yevamot* 4:11, 6:5, 6:6, 13:8.

[907] "Do not uncover the nakedness of your brother's wife. . . . ."

[908] "If a man marries the wife of his brother, it is indecency . . . ."

considered to be simply indulging in a forbidden union.[909] When it became clear that people were no longer acting with only pure motives, the rabbis ruled that performing chaliztah was the preferable option. According to Ze'ev Falk, when this changed,

> naturally the main effect concerned those already married, who were now at liberty to remain monogamous. An internal factor encouraging bigamy among Palestinian Jewry was thus neutralized while there remained the external opposition to polygamy on the part of the administration.[910]

Aside from Tractate Yevamot and the Mishna in Bechorot, many other passages throughout the Mishna also make mention of polygamy with various levels of detail given. Chapter 10 in Ketubot, for instance, deals with laws relating to cases where the deceased leaves two or more wives.[911] The numerous matter-of-fact references to polygamy throughout the literature support the image of a world in which polygamy must have existed, at least to some extent. There are, however, only a few specific examples that are recorded in the Talmud. One, cited in both the Tosefta Ketubot 5:1 and Jerusalem Talmud, Yevamot 4:12, involves Rabbi Tarfon, a prominent Tanna who was active in the years 80-110 C.E. The passage reports that during a year of drought Rabbi Tarfon, who was a priest, betrothed three hundred women, so that they would, as wives of a priest, be able to eat from the Terumah portion (the heave offering given to

---

[909] FRISCH, HARAY ATEN, *supra* note 808, at 88.

[910] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 9, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 85.

[911] For more examples, see MISHNA, *Gittin* 3:1, 8:7; *Kiddushin*, 2:6-7; *Sotah* 4:3; *Sanhedrin* 2:4.

the Priestly tribe) during this time of hardship. The Jerusalem text, however, makes it clear that the marriages were only nominal. Rabbi Tarfon makes another appearance in the canon in regard to polygamy, in a Tosefta in Yevamot 1:10; having been asked about the status of the children of rival wives,[912] Rabbi Joshua replied:

> "Why do you put my head between two great mountains, between the House of Shammai and the House of Hillel? They will destroy my head! However I testify that the family of the House of Alubai from Beit Sevaim and the family of the House of Kufai from Beit Mekoshish are the descendants of rival wives. And high priests have come from them that have presided over sacrifices at the temple." Rabbi Tarfon said, "I want a daughter of a rival-wife to come before me so that I can marry her into the priesthood."[913]

Jerusalem Talmud, Yevamot 4:12 contains another story about polygyny, this one involving thirteen brothers, twelve of whom died without leaving children, making their wives eligible for levirate marriage. The widows of the deceased brothers came before Rabbi Judah HaNasi, who told the surviving brother that he should enter into levirate marriage with all of them, apparently unconcerned about the resulting polygamous union.[914] Interestingly, in Babylonian Talmud, Ketubot 62a, when the same Rabbi

---

[912] A disagreement between the Houses of Shammai and Hillel recorded in the MISHNA, *Yevamot* 1:4.

[913] In demonstration of the fact that the law is in accordance with the view of the House of Hillel.

[914] *See* JERUSALEM TALMUD, *Yevamot* 4:12: ("Four of the brothers: A story; there were thirteen brothers, and twelve died without children. They came before Rabbi [Judah] requesting to be taken in levirate marriage. Rabbi said to [the brother-in-law], "Go initiate levirate marriage." He said to him, "I can't." Each one of the wives said, "I will pay maintenance for my month." The brother-in-law said," Who will pay maintenance for the intercalated month?" Rabbi said, I will pay maintenance for the intercalated month." And he prayed for them, and they left him. Three years later, they came carrying thirty-six children. They came and stood themselves before Rabbi's courtyard. [Some people] went up and told him, "There is a crowd of children below that want to great you." Rabbi looked out from the window and saw

Judah's daughter in law became too old to have children after his son finally came back from his studies, he was hesitant to tell his son to marry another woman polygamously, lest 'it would be said: The latter is his wife and the other his mistress.' Perhaps this is an early reflection of a trend that we will see again later in history, wherein polygamy is allowed when there is a mitzvah (positive commandment) to do so, (because technically the law allows it and the rabbis moral compunction was not enough to override a commandment,) despite the fact that it was otherwise frowned upon as somewhat immoral or something to be socially ashamed of.[915] This balancing system is in fact not uncommon in Talmudic literature generally; out of respect for the biblical commandments, the rabbis used much more discretion in mandating the non-fulfillment of biblical norms (here the practice of polygamy) in a passive way rather than

---

them. He said to them "What is your business?" They said to him, "We want you to pay the intercalated month." And he paid the intercalated month.").

[915] "R Judah went and busied himself for his son's [marriage] into the household of Rabbi Yose ben Zimrah. They agreed for him to go to the Great House [the Academy] for twelve years. They promenaded her in front of him, he said to them, "Let them be six years." They promenaded her in front of him, he said to them, "I will consummate [the marriage] and then go." He felt shame before his father, [Rabbi Judah] said to him, "You have the mind of your Creator. Originally it is written, 'You will bring them and you will plant them in the mountain of your inheritance.' (*Exodus* 15:17, referring to the Temple Mount), but in the end it is written, 'Make me a sanctuary, so that I may dwell among them...' (*Exodus* 25:8, referring to the Tabernacle)." He went and sat for twelve years. When he returned, his wife had become barren. Rabbi said, "What will we do? If we divorce her, they will say, 'This poor woman waited in vain.' If we marry [him to] another woman, they will say, 'This one is his wife and this one is his prostitute.'" He prayed for mercy on her behalf, and she recovered.

permitting active violations of commandments, something that they felt that they could not do.[916]

Other specific instances of polygamy in the Babylonian Talmud include one involving the major domo of King Agrippas, who, in the process of ascertaining his obligations regarding the holiday of Sukkot, mentions that he has two wives,[917] and one involving Rabbi Gamliel II of Yavneh (a leading Tanna who was active from 80-110 C.E.). Babylonian Talmud, Yevamot 15a tells us that Rabban Gamliel performed levirate marriage with one of his brother's wives when his brother Abba died childless. In regard to other Jewish sources from the time period, Josephus tells us that two of King Herod's sons, Archelaus and Herod Antipas, had more than one marriage at a time.[918]

Another source of Jewish material about polygamy from the Tannaitic period is the Aramaic Targum (lit. translation) of Ruth.[919] Chapter 4 of the Biblical Book of Ruth reads as follows:

---

[916] *See* BABYLONIAN TALMUD, *Berakhot* 19b-20a, where the Rabbis weigh meta-principles against non-fulfillment of specific norms. "The value of human dignity is so great that it supersedes a negative commandment of the Torah"; or, in the Jerusalem Talmud's version; "The dignity of the public (lit. the many) is so great that it supersedes a negative commandment of the Torah for one hour (i.e., temporarily).' (JERUSALEM TALMUD, *Berakhot* 3:1).

[917] *See* BABYLONIAN TALMUD, *Sukkah* 27a.

[918] JOSEPHUS, ANTIQUITIES, *supra* note 890.

[919] There has been some scholarly debate over the dating of Targum of Ruth: many believe it to be Talmudic. *See* MOSES MIELZINER, THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES AND ITS RELATION TO THE LAW OF THE STATE 29 n.2 (1901). Others consider it to be post-Talmudic, and others claiming it originated much earlier, among he Sadducees or some other non-

> Boaz continued [speaking to the redeemer, saying]: "When you acquire the property from Naomi and from Ruth the Moabite, you must also acquire the wife of the deceased, so as to perpetuate the name of he deceased upon his estate." The redeemer replied, "Then I cannot redeem it for myself, lest I impair my own estate. You take over my right of redemption, for I am unable to exercise it."[920]

In the Biblical account, the only reason that the redeemer gives for not redeeming is that doing so would 'impair his own estate.' A simple reading of these verses might imply that this is so because by marrying Ruth he would be required to expend capital for property that would go to Ruth's firstborn son, who would be legally regarded not as his own son, but as the son of Ruth's deceased husband Machlon, as per the rules of levirate marriage.

The Targum, however, tells a slightly different story:

> Boaz said: "On that day that you buy the field from the hand of Naomi and from the hand of Ruth the Moabite, wife of the deceased, you are obliged to redeem and required to act as her brother-in-law and to marry her in order to raise up the name of the deceased upon his inheritance." The redeemer said, "In such circumstances I am not able to redeem myself. Because I have a wife I have no right to marry another in addition to her, lest there be contention in my house and I destroy my inheritance. You, redeem my inheritance for yourself, for you have no wife, for I am not able to redeem."[921]

Interestingly, the redeemer does not say that he is not allowed to marry a second wife, just that it may result in contention in his house, reflecting the already established

---

Pharisaic sect. *See* D.R.G. Beattie, *The Textual Tradition of Targum of Ruth*, *in* THE ARAMAIC BIBLE: TARGUMS IN THEIR HISTORICAL CONTEXT 340 (D.R.G. Beattie & M.J. McNamara eds., 1992).

[920] *Ruth* 4:5-6.

[921] *Targum Ruth* 4:5-6.

Biblical view that polygamy, while not illegal, is at the very least inadvisable from a practical household standpoint.

Other Midrashic sources, perhaps of later composition but representing much earlier teachings, include Pesikta Rabbasi (roughly 845 C.E.) a midrashic collection in which the pious Elkanah's polygamous behavior needs to be justified, and so the rabbis explain that it was because his wife was barren.[922] A parable given in Midrash Canticles Rabbah (which is assumed to very early) takes it for granted that if a man is marrying a second wife he must have already divorced the first.[923]

C. Polygamy in Early Christian Sources

The Tannaitic period of rabbinic Judaism corresponds to the time of early Christianity and the writing of much of the New Testament, and so when exploring early rabbinic views of marriage and polygamy one must also take a look at the views of early Christianity.[924] The Gospels are relatively quiet on the marriage front, although some scholars[925] have argued that certain passages really seem to set monogamy as the ideal. Matthew 19:9 for example: "if a man divorces his wife for any cause other than

---

[922] PESKITA RABBATI 43, *cited in* S. Lowy, *The Extent of Jewish Polygamy in Talmudic Times*, 9 J. JEWISH STUD. 115, 117 (1958) [hereinafter Lowy, *The Extent of Jewish Polygamy*]. *See also Yalkut Shimoni* to 1 *Samuel* 1:2.

[923] *Canticles Rabbah* 1:6, *cited in* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 118.

[924] *See* FRISCH, HARAY ATEN, *supra* note 808, at 93.

[925] *See* DAUBE, THE NEW TESTAMENT, *supra* note 814, at 75.

unchastity, and marries another, he commits adultery."[926] The lack of explicit condemnation is probably due to the fact that on the ground it was taken for granted; indeed at least for the original sectarian Jewish Christian population, there is evidence that they were completely monogamous.[927]

One of the Church Fathers, Tertullian, went even further with this passage, in that he opposed not only what we can call regular or simultaneous polygamy, or even what this verse seems to describe on its face, i.e. second marriages after divorce, but even went so far as to proscribe a person's remarriage after the death of a spouse.[928]

Still, there are very few explicit references to polygyny in the New Testament, and it is never banned in the text for the general population.[929] It was not until the Council of Trent in 1563 that the Church legislated an unequivocal prohibition on the practice of polygamy. Passages written in the Tannaitic period do, however, mandate that an elder, bishop, or deacon, respectively, may each have only one wife.[930] It is possible if not likely that in forbidding their leaders and role models from a certain

---

[926] SACRED WRITINGS-CHRISTIANITY: THE APOCRYPHA AND THE NEW TESTAMENT FROM THE REVISED ENGLISH BIBLE, 18 (Jaroslav Pelikan ed., 1992). If polygamy were pemitted, why would taking a second wife be a problem? *See* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 132.

[927] *Cf.* H.J. Schoeps, *Ehebervertubg u. Sexual moral d. spatern Juden-Christen, in* 2 STUDIA THEOLOGICA 99-101, *quoted in* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 132.

[928] *See* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 134.

[929] While it can be argued that the New Testament prohibited polygamy in 1 *Corinthians* 7:2, which reads, "let each man have his own wife and let each woman have her own husband," that reading is no more conclusive than the "therefore shall a man leave" teaching in the Old Testament. *See* EPSTEIN, MARRIAGE LAWS, *supra* note 864, at 14. The Gospels of *Matthew* 19:9 and *Mark* 10:11 declare that "whosoever shall put away his wife . . . and shall marry another commiteth adultery," but there is reason to believe that the word adultery here just means sexual sin. *Id.* at 14-15.

[930] *See Titus* 1:6; 1 *Timothy* 3:2; 2 *Timothy* 3:12.

behavior, the authors of the New Testament were demonstrating their views of the practice in general.[931] It seems that, much like in the case of the Tannaim,[932] for the early Christians there was a grudging legal acceptance but a strong disinclination towards polygamy. Seeing as they were coming from the same traditions and operating in the same locale of the Holy Land, if one group did not directly influence the other, they must have at the very least been exposed to similar ideas and societal values regarding issues of marriage and family.[933]

Moving on to the world of non-canonical Christian literature, Justin Martyr, one of the Church fathers of the second century, was an important Christian apologist. His Dialogue with Trypho was the first anti-Jewish polemic written in Greek,[934] and is an adaptation of a debate between Justin and a Jewish philosopher.[935] In Chapter 134, Justin writes that Jewish sages in all the lands, even in his own day, permit marriage to four or five wives. Justin condemns the rabbis who, he claims, permit their followers to

---

[931] Note that, at least in the minds of the Tannaim, the Bible was *not* doing so when it proscribed multiple wives for the king. In regard to the limitations contained in *Deuteronomy* 17:17, TOSEFTA, *Sanhedrin* 4:5 states: "He shall not multiply for himself if the wives are like Jezebel. But if the wives are like Abigail, multiplying wives is permitted. These are the words of Rabbi Judah . . . . But a common person is permitted to do all of these things."

[932] At least in a case where there was no good reason, such as bareness, levirate duty, or drought.

[933] Indeed in the early centuries, the Christian teachings clearly assume that polygamy is contrary to Christian morals. *See, e.g.*, CORPUS JURIS CANONICI, *described in* EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 15-16 n.49.

[934] 4 ENCYCLOPAEDIA JUDAICA Church Fathers 719, 719 (2007).

[935] Who, ironically, some scholars claim may have actually been the Tanna Rabbi Tarfon, the very same Tanna who himself, when the need arose, married three hundred women. *See generally* J. D. GEREBOFF, RABBI TARFON: THE TRADITION, THE MAN, AND EARLY JUDAISM (1979), *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 101.

practice polygyny rather than obey God, and mistakenly cite to the Patriarchs as precedent. Elsewhere,[936] Justin reiterates that the purpose of the Patriarchs' polygamy was "not to commit adultery, but that certain mysteries might thus be indicated by them." As Falk notes, despite the fact that Justin Martyr clearly wrote for polemical reasons, criticizing Judaism to elevate Christianity, one can still infer from his work that the rabbis of his generation did not discount polygamy, at least in principle.[937] On the other hand, one must be cautious when using his writings as a historical source, since although he claims to be reporting on Jewish sages in "all lands," it is possible that he is in fact only describing some anomaly with which he was personally familiar.[938]

If polygamy was not de facto common in Tannaitic times, it was certainly accepted rabbinically de jure. From the Talmudic legal contexts in which it was discussed, polygamous unions per se were most likely to arise in a case where there was a biblical commandment or (as in the case of Rabbi Tarfon in the Jerusalem Talmud a moral imperative) mitigating against the discomfort that the rabbis felt towards the practice.

The split between Jewish and Christian views of polygamy is probably rooted in their differing views on marriage as an institution. In Christian minds, at least at the

---

[936] *Id.* at 364 ch.141.
[937] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 6, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 98.
[938] *Id.*

time, marriage was barely good; Paul famously proclaimed that, "it is good for a man not to touch a women. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband . . . I say this by way of concession, not of command . . . for it is better to marry than to burn."[939]

In rabbinic thought, however, marriage was "very good."[940] According to one fragment found in the Cairo Geniza, which has been referred to as the "sermon in praise of a wife,"[941] there are in fact twelve good measures in the world, and any man who does not have a wife in his house who is good in her deeds is prevented from enjoying all of them. They are; good; happiness; blessing; peace; help; atonement; a (protective) wall; Torah; life; satisfaction; wealth; and a crown. Based on the discussion of marriage in Babylonian Talmud, Yevamot 61b-64a, the anonymous preacher's list of goods might imply in simple mathematical terms that more wives would just equal more goods.

---

[939] I *Corinthians* 7:1-9, *quoted in* Gafni, *The Institution of Marriage*, *supra* note 891, at 17; *see also* TERTULLIAN, TO HIS WIFE (207 A.D.), *reprinted in* 4 ANTI-NICENE FATHERS 86 (Philip Schaff ed., 1885), *available at* http://www.ccel.org/ccel/schaff/anf04.pdf; ST. AUGUSTINE, ON MARRIAGE AND CONCUPISCENCE, BOOK I (419 A.D.), *reprinted in* 5 NICENE AND POST-NICENE FATHERS: SERIES 1, 764 (Philip Schaff ed., 1887), *available at* http://www.ccel.org/ccel/schaff/npnf105.pdf.

[940] MIDRASH, Genesis Rabbah, 9:7.

[941] S. D. Goitein, *quoted in*, SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 90, at 1.

Chapter 4: The Amoraic and Gaonic Eras

The composition of the Mishna by Rabbi Judah HaNasi in the beginning of the third century, and its dissemination and acceptance in the Jewish legal academies both in Israel and without, led to a clear break in the way scholars worked to pass on the tradition.[942] The generations that followed the Tannaim were called Amoraim (those who recount the law) because they worked to interpret and deliver the authoritative Mishnayot. Memorization and constant recitation were the cultural ideal.[943]

Polygamy continued to be legal according to Jewish law during this period, which lasted until the codification of the Babylonian Talmud around 500 CE. From what we know, however, it continued to be rare in practice, probably even more so than before.[944] Talmudic debate and legislation regarding multiple wives is frequent, but seems to have been mostly academic.[945] While the two Talmuds contain a great deal of biographical information about many sages over the centuries, there is not a single undisputed reference to any of the Amoraim actually having more than one wife.

---

[942] *See* Alyssa M. Gray, *Amoraim*, *in* 2 Encyclopaedia Judaica, *supra* note 92, at 89-95.

[943] *Id.*

[944] The Talmudic term for a spouse, 'zivug,' literally means 'pairing,' further postulating monogamy. Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 130. *See*, *e.g.*, Babylonian Talmud, *Sotah* 2a; Babylonian Talmud, *Gittin* 90b; Babylonian Talmud, *Sanhedrin* 22a.

[945] The debates tend to center around precise legal theoretical questions in regard to formation and dissolution of marriage, but ignore such mundane issues as how the laws of family purity would be affected, a topic which, if polygamy was actually happening, would definitely have needed to be addressed. *See generally Tractate Yevamot.*

While Jews had been living outside of Israel in Babylonia since the Destruction of the Temple in 70 C.E., the traditions until this point had been quite fluid and connected. In the Amoraic period, as demonstrated by the emergence of the two Talmuds, two distinct communities began to take shape. While the Amoraic period is said to have lasted until 500 CE, in truth the Amoraim in the land of Israel were only active until approximately 370 CE. The earlier close of the Jerusalem Talmud was probably sue to the political reality in Israel; in 351 the Roman commander Ursicinus wreaked vengeance on the Jews of Tiberias, Sepphoris, and Lydda, the seats of the three academies, because of their revolts against the army.[946]

There is much discussion in rabbinic literature about how to account for some of the differences between the Babylonian and Jerusalem Talmuds. Some assume that they represent the difference between two contemporary but different traditions, perhaps based on geographical and political influence. The Jews who remained in Israel during this period were under Roman rule, and were thus exposed to Roman views (and subject to Roman laws) about monogamy, for instance. The Jews in the Babylonian exile, however, were in close proximity to the polygamous Zoroastrian religious culture of Persia. Others, however, downplay these differences, noting that if you align the different tannaitic and amoraic layers of the two Talmuds, the corresponding strata are

[946] *See* Louis Isaac Rabinowitz & Stephen G. Wald, *Talmud, Jerusalem*, *in* 19 ENCYCLOPAEDIA JUDAICA, *supra* note 92, at 483-87.

remarkably similar. They thus assume that what the two Talmuds really preserve is the difference between two stages of the development of a single shared tradition.[947] Regardless though of whether the differences were due to time and/or place, to some extent the material that we have preserved from the Jewish communities of Israel and Babylonia must be examined separately, with Israel coming first.[948]

In 212 C.E., all Jews living in the Roman Empire became Roman citizens, and therefore subject to severe penalties for the practice of polygamy. In 285 C.E. Diocletian specifically extended the prohibition against polygamy over all the inhabitants of the Roman Empire, and in 324 C.E. Constantine the Great became ruler and Christianity became the official religion of the Roman Empire.[949]

On December 30, 393 Emperer Theodosius (with Arcadius and Honorius) prohibited Jews from polygyny, stating that, "None of the Jews shall keep his custom (morem) in marriage unions, neither shall he contract nuptials according to his law, nor enter into several matrimonies at the same time."[950] The imperial legislation was apparently not entirely successful, however, even outside of Israel, because in 537

---

[947] *Id.*

[948] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 7. The truth is though that it is not entirely convincing to say that Roman legislation deterred polygamy; uncle-niece marriages were considered incest by the Romans but permissible according to the rabbis. There must have been something else, i.e. some more universal underlying cultural aversion. *See* SALO BARON, 2 A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 26 (1983) [hereinafter BARON, A SOCIAL AND RELIGIOUS HISTORY].

[949] *See* FRISCH, HARAY ATEN, *supra* note 808, at 101.

[950] SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 90, at 189. It should be noted though that the decree only covered legal wives, not concubines. *See* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 20 n.1.

Justinian issued a novel ruling that granted an exemption from laws against polygyny to the Jews of Tyre; in 535 he had prohibited abominable marriages, and two years later, upon tearful supplication from the Jews, he relaxed the position somewhat.[951]

While some scholars, such as Lowy,[952] contend that Roman legislation such as the aforementioned laws did not serve as a deterrent for Jewish polygamy,[953] most assume that it played a fairly large role; as Salo Baron puts it; "No matter how little Jews were inclined to obey Roman legislation when it differed from their own, public violation of imperial criminal law throughout a lifetime, open to denunciation from any quarter, necessarily became unusual."[954]

Others point out that that the law bears on all those marriage customs that were peculiar to Jewish law, such as the degrees of permitted kinship, and legal age for marriage, in addition to any mention of polygamy. In fact, its formulation even permitted a more general interpretation to the extent of condemning the Jewish

---

[951] Justinian included Theodosius' edict in his *Codex* in order to stress the ban again, and the *Basilica*, compiled by the Byzantine Emperor Leo the Philosopher as a digest of Justinian's laws at the beginning of the tenth century, also contains similar language. See *Codex Justinianus* 1:97; *see also* AMNON LINDER, THE JEWS IN ROMAN IMPERIAL LEGISLATION 192-193 (1987) [hereinafter LINDER, THE JEWS IN ROMAN IMPERIAL LEGISLATION]. Leo the Philosopher (886-912) would try again to ban polygamy later, also with only limited success. *See* J. STARR, THE JEWS IN THE BYZANTINE EMPIRE 144 (1939).

[952] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 116, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 106.

[953] MIELZINER, THE JEWISH LAW, *supra* note 852.

[954] BARON, A SOCIAL AND RELIGIOUS HISTORY, *supra* note 945, at 2:226, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 102.

marriage ceremony itself.[955] They observe that clearly Imperial authorities never effectively implemented the law, because it was precisely this halakhic corpus that remained a constant throughout Jewish history. In fact, we have a textual witness to the already monogamous character of the Jewish family in the first half of the fifth century on the one hand, and to the enforcement (or lack thereof) of the Imperial legislation against polygamy on the other. In Theodoret's Commentary to Paul's First Epistle to Timotheus, we find that "[f]ormerly, both Greeks and Jews used to contract simultaneously marriages with two, three, or even more wives. Even now some copulate with concubines and prostitutes, although the Imperial laws forbid to marry two women at the same time." [956]

A. The Jerusalem Tradition

Discussing, as it does, the various cases of the Mishna, the Jerusalem Talmud does contains some legal rules about polygamy.[957] But the most important traditions about polygamy in the land of Israel during this time were actually preserved in the Babylonian Talmud. During the Amoraic period there was constant contact as well as correspondence between the centers of Jewish learning in Israel and in Babylonia, and so both Talmuds contain views from Amoraim who lived far away. In fact, for the most

[955] LINDER, THE JEWS IN ROMAN IMPERIAL LEGISLATION, *supra* note 948, at 192.

[956] *See* R.C. HILL, THEODORET OF CYRUS, COMMENTARY ON THE LETTERS OF ST. PAUL, *quoted in* LINDER, THE JEWS IN ROMAN IMPERIAL LEGISLATION, *supra* note 948, at 192.

[957] For examples of polygamy discussed in a legal setting see, for instance JERUSALEM TALMUD, *Yevamot* 1:1, 1:6, 2:1, 3:3, 3:5, 3:10, 4:1, and 5:3; *Kiddushin* 2:6.

part the two rabbinic centers are not portrayed as being equal in authority or in prestige; in general the Babylonian scholars considered themselves subordinate to the Israeli sages, who had a more direct connection to the tradition. Thus we find the fourth generation Babylonian amoraic sage Abaye, in Babylonian Talmud, Pesachim 51a, remarking that, 'since we are subordinate to them, we do as they do.'[958] So it is not surprising that the Israel traditions are quoted frequently and respectfully.

Babylonian Talmud, Yevamot 65a quotes Rav Ammi, an Amora from Israel who was active from 290-320 C.E. He holds that if a husband whose wife has not borne him children wants to take another wife:

> He must in this case pay her [his present wife] the amount of her keubah. For I hold that whoever marries a wife in addition to his [present] wife must pay [the present wife] the amount of her ketubah (the price stipulated in the marriage agreement for the husband to pay in the event of the termination of their marriage, either by his death or by their divorce).[959]

Falk maintains that Rav Ammi's ruling "expresses a fundamental change of outlook...a new precept, based on his own personal conclusions . . . [his ruling] for the first time,

---

[958] Alyssa M. Gray, *Amoraim*, *in* 2 ENCYCLOPAEDIA JUDAICA, *supra* note 92, at 89-95. The Babylonian Talmud also describes Babylonian judges as being the "agents" of the scholars of the Land of Israel who are only empowered to adjudicate certain types of cases that do not require expert, ordained judges only found in the Land. *See BB Bava Kamma* 84b; BABYLONIAN TALMUD, *Sanhedrin* 14a. The Shulhan Aruch (Hoshen Mishpat 1) applies the same agency rule to Jewish law courts nowadays, noting that only scholars ordained in the Land can really judge, and that judges today are simply fulfilling the historical agency mandate.

[959] And, the implication is, divorce her.

reflects a belief in monogamy on principle, as expressed by a rabbinical teacher, without any support from the law or from tradition."[960]

Falk claims that this ruing must have been "inspired by beliefs and customs common in the Roman world of that time, which were also propagated by the provincial administration."[961] He notes that the Mishna had already laid down a number of cases in which the court obliges the husband to grant his wife a divorce and pay her ketubah. The common denominator in those cases is that relations between the couple have become strained, "either because the husband treats his wife in an oppressive manner, or as the result of a grave infirmity on his part."[962] Falk therefore deduces that, for Rav Ammi at least, and probably reflecting the beliefs and customs common in the Roman world, bigamy was an injustice. Rav Ammi's statement is expressed without any support from a law or tradition; it is simply a sentiment.[963]It is particularly poignant when contrasted with the very next line in the Talmud, in which Babylonian Amora

---

[960] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 8.

[961] *Id.*

[962] *Id.*

[963] *Id. But see* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 120-123, who claims that Rabbi Ammi's statement has been grossly misunderstood when taken out of its original context, i.e. as part two of a three part statement regarding when a wife is entitled to a Ketubah payment. All three are cases where the husband wants to stay married after ten years of childlessness. In the first and third cases (husband wants a divorce due to barrenness, wife claims he is the impotent one; husband claims there was a miscarriage to avoid divorce due to barrenness and wife disagrees) the wife is believed and can get remarried, but is not entitled to a Ketubah, since she is not commanded to have children and therefore could have stayed and kept trying. In the middle case, where he takes a second wife, since the husband is no longer depending on her to fulfill *his* obligation, she is entitled to the payment. The innovation here has nothing to do with polygamy then, but rather with the payment of the Ketubah.

Rava[964] said: "A man may marry wives in addition to his first wife, provided only that he possess the means to maintain them . . . ."[965] Outside of a legal context, the Babylonian Talmud records that both Rabbi Ammi and Rabbi Assi (both of whom were sages who lived in Israel and were active between 290-320 C.E.) were sitting before Rabbi Isaac, who told them a parable about a man who had two wives, one young and one old: "The young one used to pluck out his white hair, and the old one used to pluck out his black hair. Finally, he was bald on both sides."[966]

Again, despite the fact that polygamy was still discussed and approved of at least in legislative contexts in Israel during the Amoraic period, comments like these reflect a progressively more negative attitude toward polygamy and a moral leaning towards monogamy on the part of the Talmudic rabbis.[967] In the Babylonian Talmud's Avot D'Rabbi Nathan (one of the minor tractates), Rabbi Yehuda ben Beteira, an Amora from Israel, also comments negatively on polygamy, noting:

> Rabbi Yehuda ben Beteira says, "Job thought to himself, for what would be my portion from God above, and my heritage from the Almighty

---

[964] Quoted from Adin-Even-Israel Steinsaltz.

[965] BABYLONIAN TALMUD, *Yevamot* 65a. Interestingly, the first part of the statement is written in Hebrew, and the second part in Aramaic. Gafni, *The Institution of Marriage*, *supra* note 891, at 23, believes that the qualification 'so long as...' was an additional gloss added by a later hand, while Falk believes it more likely that Rava himself, who spoke Aramaic, added the gloss to the preexisting rule regarding polygyny. FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 7. Regardless, the statement preserved and attributed to Rava reflects the view that if he can afford it, a man may marry many wives. *See* FRISCH, HARAY ATEN, *supra* note 808, at 107-08.

[966] BABYLONIAN TALMUD, *Bava Kamma* 60b (translation by author).

[967] *See* FRISCH, HARAY ATEN, *supra* note 808, at 104-06.

> on high?[968] If Adam was intended to have ten wives, they would have been given to him. But he was intended to marry only one wife. So too my wife is enough for me. My portion is enough."[969]

And in the Midrash Genesis Rabbah, redacted in Israel,[970] the rabbis describe the bigamy of Lamech in quite an unflattering manner. It says that Lamech, like other men of the antediluvian period, took two wives so that one could be used for procreation and the other for sexual pleasure. The Midrash says that Addah (the wife for procreation) was 'like a widow,' and Zilla 'like a harlot.'[971]

Regardless of the law, it was difficult for men in Israel in those days to marry more than one wife at a time, due to a combination of factors including difficult economic conditions, Roman influence over Jewish communities, and, in some places, contracts actually stipulating monogamy.

B. The Babylonian Tradition

The Jewish community in Babylonia presents an interesting foil. Unlike in Roman society where monogamy was the norm, in Persia, polygamy, "continued down to the Sassanian period, at least among the aristocracy that could afford a plurality of

---

[968] *Job* 31:2.

[969] AVOT D'RABBI NATHAN chs.2, 9 (S. Schechter ed., 1887).

[970] The Midrashic text was probably redacted sometime in the fifth century, although the traditions that it quotes are related in the names of much earlier Israeli Amoraim. *See* Moshe David Herr & Stephen G. Wald, *Genesis Rabbah*, ENCYCLOPAEDIA JUDAICA, *supra* note 92, at 448-49. Genesis Rabbah also reads like the Jerusalem Talmud, in that it is written mostly in Mishnaic Hebrew with some Galilean Aramaic.

[971] *Genesis Rabbah* 23:2. *See also* JERUSALEM TALMUD, *Yevamot* 7d.

wives.[972] The statement of Rava quoted above, to the effect that a man may marry wives (no number is given) in addition to his [first] wife, so long as he has the means to maintain them, seems to typify this different attitude.[973]

Some assume that Rava and Rav Ammi represent two different traditions, one in and one out of Israel.[974] Lowy, however, rejects the idea that Rava is disagreeing with Rav Ammi. He points out that while Rav Ammi was head of the Academy at Tiberias in Israel, he was also greatly influential in Babylonia. [975] According to Lowy,

> [i]t is impossible to presume that Rava contradicts Rav Ammi. While the Talmud opposes them to each other for the purpose of analyzing the sugya (discussion), it is almost certain that their original sayings were not meant in this sense, and that only for the final literary reflection were their sayings made into a controversy. Not only do we never find elsewhere in the Talmud a controversy between them, but Rava always accepts the authority of Rav Ammi.[976] Rava's words, "a man may marry as many wives simultaneously as he can afford to maintain" are merely his own way of repeating the ancient tradition about this legal freedom.[977]

---

[972] Gafni, *The Institution of Marriage*, *supra* note 891, at 21 (quoting M. Shaki, *The Sassanian Matrimonial Relati*ons, *in* ARCHIV ORIENTALNI 338 (1971).

[973] Note though that to assume that this is typical of the Babylonia/Israel split may be an oversimplification. There may in fact be differences of opinion regarding this matter even within the Babylonian Talmud itself. As mentioned above, the MISHNA, *Bekhorot* 1:7 says that *chalitza* is preferable to levirate marriage, despite the fact that in BABYLONIAN TALMUD, *Yevamot* 39b the Tanna Abba Saul holds that intent is relevant, as discussed above, and despite the fact that Babylonian Amoraim disagreed and said one should always do levirate marriage, since it is a Biblical commandment.

[974] *See* RÛT LAMDĀN, 26 A SEPARATE PEOPLE: JEWISH WOMEN IN PALESTINE, SYRIA, AND EGYPT IN THE SIXTEENTH CENTURY 139 n.3 (2000).

[975]He also notes that while many of Rav Ammi's statements are found in identical form in both the Babylonian and Jerusalem Talmuds, there is no Jerusalem Talmud parallel to his statement in BABYLONIAN TALMUD, *Yevamot* 65a, a parallel that would be expected if this were an exclusive Israel tradition. FRISCH, HARAY ATEN, *supra* note 808, at 109.

[976] Here, for example, Lowy cites BABYLONIAN TALMUD, *Gittin* 63b.

[977] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 124, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 113. Another possibility is that there were a few, like Rava, who supported the idea. See also

It is also possible that Rava's words contain the wry secret of polygamy in Talmudic times, namely that it was a legally acceptable but, practically speaking, a near-impossible option. The insertion of the difficult law that the husband must secure for each wife both adequate maintenance[978] and full conjugal rights tended to make polygamy even more obscure than it had been in the past, while keeping it legal on the books.[979]

Indeed, while polygamy remained legal in the ivory tower sense, in the Amoraic period even in Babylonia it was becoming clear that on the ground people did not like the practice, and that the way people really felt about polygamy did already sometimes touch upon the legal system in practical ways. The law, for instance, is that a judge or witness who is instrumental in allowing a woman to remarry may not thereafter marry that women himself, lest we have reason to suspect that his original testimony or opinion was tainted by some level of personal interest. But if at the time of the trial the judge or witness was married, and then his wife died at some later point, he can marry

---

BABYLONIAN TALMUD, *Kiddushin* 7a, in which Rava also seems to very matter-of-factly support the idea of polygamous marriage, as well as BABYLONIAN TALMUD, *Kiddushin* 80b, where he implicitly approves it, and BABYLONIAN TALMUD, *Yevamot* 63a-b where he advises one with a bad wife who has a large ketubah to marry a rival.

[978] As we will see later, this came to mean even separate quarters.

[979] *See* DAVID WERNER AMRAM, THE JEWISH LAW OF DIVORCE 76 n.3 (1897); MOSES MIELZINER THE JEWISH LAW, *supra* note 852, *quoted in* George J. Webber, *The Recognition of Polygamous Marriage in Mosaic law*, 49 L.Q. REV. 19-20 (1933).

the woman, because the idea of polygamy, and therefore the idea of scheming towards polygamy, was looked at as farfetched.[980]

Elsewhere in the Babylonian Talmud we come across the idea that the High Priest, at least, should only have one wife at any given time.[981] In regard to everybody else, the Mishna in Yevamot 4:11 states that if a man has four married brothers that have all died, he may perform levirate marriage with all four widows. An anonymous opinion in the ensuing Talmudic discussion adds on a disclaimer, however, stating that this is so only provided that he can in fact support them.[982] The source then states that regardless of financial means, a man should not take more than four wives so that each wife can receive at least one marital visit a month. It is interesting to note that previously in that same discussion, the Talmud states that a young man should not marry an old woman, or vice versa. The implication here is that in order to avoid discord in the home a man should marry someone who is like him in age. The whole discussion then is framed upon ensuring the quality of the marital relationship, with quantity as only one factor.[983]

---

[980] *See* EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 20 (quoting BABYLONIAN TALMUD, *Yevamot* 25b-26a).

[981] *See* BABYLONIAN TALMUD, *Yoma* 13a.

[982] This is consistent with Rava's statement cited above.

[983] See glosses of Rema to Shulhan Arukh Even HaEzer 1, where Rema hammers home this point.

Babylonian Talmud, Pesachim 113a records a conversation between Rav (an Amora from Babylonia, active from 220-250 C.E.[984]) and Rav Assi (from Israel, active from 290-320 C.E.[985]) wherein one of them gave the other some practical advice: Rav said, "Do not marry two women. But if you do marry two [women], then marry a third."[986]

Perhaps Rav was speaking from experience; the only actual reference to any Talmudic sage being a polygamist comes from a cryptic passage in Babylonian Talmud, Tractate Yoma, which is again repeated in Babylonian Talmud, Yevamot 37b, and also involves him. Babylonian Talmud, Yoma 18b contains the following story about the two great Babylonian Amoraim, Rav and Rav Nachman (another Babylonian Amora who was active between 250 and 290 C.E.).[987] Since Rav and Rav Nachman were both married,[988] taking additional wives would make them polygamists. However, many commentators and modern scholars have focused on this passage, offering several other explanations for Rav and Rav Nachman's unusual practice. The mere fact that they resist taking it literally testifies to the general assumption that even in Babylonia, during this time, such things were just not done. Moreover, these were two of the

---

[984] Quoted from Adin-Even-Israel Steinsaltz.

[985] *Id.*

[986] Rashi there explains that this is because two wives may conspire against the husband, but if there are three, then the third will check the first two and provide insurance for her husband.

[987] *Id.* at 33 ("Whenever Rav came to Ardashir he would announce; 'Who will be [my wife] for a day?' Whenever Rav Nachman would come to Shekhannesibh he would announce: 'Who will be my wife for a day?'").

[988] *See* BABYLONIAN TALMUD, *Yevamot* 63a; BABYLONIAN TALMUD, *Berachot* 51b.

absolute greatest sages of their generation; even if polygamy happened it is strange to think that such saintly people would engage in such a seemingly strange form of it. Aside from the general stories told about both of them and their piousness, [989] Rav's court is actually famous for having flogged people for contracting marriages without previous arrangements.[990]

Some scholars suggest that they only took their 'wives for a day' to escape the Persian royal 'gift' of a concubine when they visited a city, since some Persian princes are known to have taken the refusal of their "gift" as a serious affront.[991] In order to avoid complications, they went so far as to marry a local 'wife for a day,' despite the fact that they did not generally approve of the practice of bigamy. [992] Others suggest that when Rav and Rav Nachman had trouble with their primary wives, they would take a secondary 'wife for a day,' to threaten them.[993] Still others propose that they did this when their primary wives had their menstrual periods,[994] or that they were really

---

[989] Regarding Rava, *see* BABYLONIAN TALMUD, *Taanit* 21b; Regarding Rav Nachman, see BABYLONIAN TALMUD, *Megillah* 28b.

[990] BABYLONIAN TALMUD, *Yevamot* 52a; BABYLONIAN TALMUD, *Kiddushin* 12b.

[991] *See* FRISCH, HARAY ATEN, *supra* note 808, at 114.

[992] *See* R. Margoliot & S. Krauss, *Who Will be My Wife?*, *in* SINAI 176-179, *quoted in* FRISCH, HARAY ATEN, *supra* note 808.

[993] *See* Gafni, *The Institution of Marriage*, *supra* note 891, at 24; Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 126-29. The Talmud in BABYLONIAN TALMUD, *Yevamot* 63a and BABYLONIAN TALMUD, *Berachot* 51b, make it clear that they both had difficult wives. Lowy writes: "Not only do their personalities make the contraction of such temporary marriages impossible to credit in them, but the sources themselves indicate that their so-called advertisement for a temporary mate never resulted in a consummated marriage." *Id.* at 127-28, *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 115 n.360.

[994] *See* Gafni, *The Institution of Marriage*, *supra* note 891, at 24.

just "issuing proclamations stressing the importance of arranged marriages."[995] Lowy points out that both of these cities were well within the limits of the Jewish settlement, and so it was not likely that Rav and Rav Nachman considered them 'hiding places' where they could behave differently than they otherwise would.[996]

The other possibility is that these stories are literally true. The Talmud itself did not have a problem with the retelling on its face, and in keeping with the notion of influence by surrounding culture, marriage for a definite period of time was definitely part of the widespread practice in Sassanian Persia.[997] In both Yoma and Yevamot, the story is immediately compared and contrasted with the ruling of Rabbi Eliezer ben Yaakov (a Tanna who was active from 80-110 C.E.):

> But surely it has been taught [in a baraisa]:[998] Rabbi Eliezer ben Yaakov says: "A man should not marry a woman in one county and then go and marry a woman in another country, lest [the children from the two marriages one day] meet each other and [unknowingly] a brother will marry his sister (or a father marry his daughter) [and thus the brother and his sister (or the father and his daughter) would produce illegitimate children] . . . ?" They say: The Rabbis were famous.[999]

The anonymous Amora thus distinguishes between Rabbi Eliezer Ben Yaakov's ruling, which would normally prohibit a man from marrying two women in different countries,

---

[995] *Id.*
[996] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 128.
[997] *Id.* at 24-25.
[998] *Yevamot* 37b.
[999] BABYLONIAN TALMUD, *Yoma* 18b.

and the cases of Rav and Rav Nachman, who were famous enough that their offspring would be well known as their children.

The key to the Talmudic passage however, really seems to lie in the continuation of the Talmudic discourse. After the above cited interjection, the Talmud then goes on to ask how it was possible for these women to become engaged and married on the same day, when Rava had said that an engaged woman must wait seven clean days in her menstrual cycle before she can consummate the marriage? The Talmud answers and gives two possibilities. Either:

> [t]he Rabbis would send their agents in order to inform [the prospective brides seven days in advance]. And if you prefer, I could say that the private meetings of three Rabbis were only for the purpose of being closeted up with [the women]. As a master said, "One who has bread in his basket is not like one who does not have bread in his basket."

The answer is right there in the text; the Rabbis did this as a safeguard to keep their own desires in check while they were away from their wives,[1000] but never to really marry them long term. In the Yevamot version of this piece, the unit ends with one more statement attributed to Rabbi Eliezer ben Jacob which really seals this interpretation. It notes,

---

[1000] The Talmud considers that a period of temporary sexual abstention can be more easily endured if one knows that, should his desires in fact overcome him, there is a permissible method of gratification available to him. Here, the possibility of a legal even if not an ideal permissible union would have a cooling effect on a person's passions, since the Talmud also assumes that that which is unattainable is usually most desirable. *See* JERUSALEM TALMUD, *Sotah* 1:3 (quoting *Proverbs* 9:17 ("Stolen waters are sweet, and bread eaten in secret is pleasant."). *See also* Gail Labovitz, *Is Rav's Wife 'a Dish'? Food and Eating Metaphors in Rabbinic Discourse of Sexuality and Gender Relations*, *in* STUDIES IN JEWISH CIVILIZATION 18 (2008).

> [a] Tanna [taught]: Rabbi Eliezer ben Jacob says, "A man shall not marry his wife with the knowledge that he will divorce her, as it is said 'Do not devise evil against your neighbor, for he resides in security with you.'"[1001]

The rabbis then must never have intended these to be real marriages.

The above-mentioned discussion, with its various questions, quotations, and concerns, expresses the general feeling toward polygamy, and even concubinage[1002] and nominal polygamy (i.e. towards having second wives at all, of any status or for any period of time) at this point in history. Simply put, it is one of an uncomfortable legal acceptance, but a growing social concern.[1003]

Monogamy, on the other hand, seems to be generally and genuinely praised. Sayings phrased in the singular form about the goodness of a wife abound throughout the Talmud, and, while indirect, do paint the picture of a more companionate and singular union. In regard to his wife a proper husband 'loves her as himself, but honors her more than himself;[1004]we are told that in a home where the wife is the daughter of a God fearing man, the husband has God for a father-in-law. Who is rich, the Talmud

---

[1001] *Proverbs* 3:29.

[1002] *Genesis Rabbah* 53:5 and *Leviticus Rabbah*1:13.both recount the same parable, about a king who has both a wife and a concubine. The king goes openly to his wife, but when he goes to the concubine, he does it in a secretive fashion, 'as if it were a shameful and illegal act.' While concubinage is discussed on at least the academic level in both Talmuds. *See*, *e.g.*, BABYLONIAN TALMUD, *Sanhedrin* 21a; JERUSALEM TALMUD, *Ketubot* 5:2. There is no hard evidence that it was actually practiced, and parables like the Midrashic one above most likely reflect the negative attitude towards the practice that was pervasive in that period.

[1003] Note, however, that other readings are possible. For instance, Rabbi Eliezer ben Jacob's calling into question of certain types of polygamy, i.e. long distance relationships, might be read to implicitly grant legitimacy to other types.

[1004] BABYLONIAN TALMUD, *Sanhedrin* 76b, *quoted in* ISRAEL ABRAMS, JEWISH LIFE IN THE MIDDLE AGES 114 (1993).

asks? He whose wife's actions are comely.[1005] Who is happy? He whose wife is modest and gentle.[1006] We are told that when a man's wife dies, it is as if he has seen the destruction of the Temple; his world is darkened, his step is slow and his mind is heavy; she dies in him and he in her.[1007] We are told that marriages are made in heaven,[1008] that a man's happiness is in all of his wife's creations,[1009] and that God's presence dwells in a pure and loving home.[1010] Indeed, the word often used in marital contexts to describe a couple is 'zivug' (lit. a pair), which only makes sense if it is describing a monogamous marital home.[1011]

If it is true then that most of the Talmudic and Midrashic material suggests a clear preference for monogamy, and if, as the evidence suggests, most Jews were in fact living monogamously, why do the Talmuds contain so much legal material about polygamy?

Baron suggests that the sages insisted on the continued validity of the positive principle, however unrealistic, in conscious opposition to Graeco-Roman ideas of monogamy and in an effort to maintain an ancestral heritage against the influx of

---

[1005] BABYLONIAN TALMUD, *Shabbat* 25.
[1006] Avot D'Rabbi Nathan, 7.
[1007] BABYLONIAN TALMUD, *Sanhedrin* 22a.
[1008] BABYLONIAN TALMUD, *Shabbat* 22a-b.
[1009] BABYLONIAN TALMUD, *Bava Metzia* 59a.
[1010] BABYLONIAN TALMUD, *Sotah* 17a.
[1011] *See* BABYLONIAN TALMUD, *Sotah* 2a; BABYLONIAN TALMUD, *Gittin* 90b; BABYLONIAN TALMUD, *Sanhedrin* 22a, *cited in* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 117 n.27.

foreign ideas and institutions.[1012] Lowy agrees in part, recognizing that if the Rabbis favored monogamy and yet did not explicitly advocate it, and if, moreover, they tried to keep it alive, at least academically, it must have been a conscious effort. He contends however that the sources do not really indicate that much of a difference in attitude towards polygamy between the Jewish communities in Palestine and in Babylonia.[1013] He therefore thinks that the stubborn clinging to legalized polygamy was not so much a reaction to Graeco-Roman influence, which was only a problem in Israel,[1014] as it was a response to Jewish sectarians. Whether it was the Zadokite or Damascus Document with its focus on Genesis 1:27 ('in the image if God he created them, male and female he created them') and 7:9 ('male and female, came to Noah and entered the ark, as God had commanded Noah'),[1015] or the Samaritans' and Karaites' focus on Leviticus 18:18 (Do not take your wife's sister as a rival wife and have sexual relations with her while your wife is living),[10161017] the heretical influence might have been the real polygamic spur in the Rabbinic side.

It is safe to assume that Christian monogamy is based on the same inheritance of heterodox exegesis. According to Lowy, this might account for Jesus' silence on the issue

---

[1012] BARON, A SOCIAL AND RELIGIOUS HISTORY, *supra* note 945, at 227-28.

[1013] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 115.

[1014] As we noted, it also should have engendered a similar approach in regard to other laws as well.

[1015] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 132 (quoting L. Ginsberg, *Eine unbekante judische sekte*, MGWJLV 689-691 (1911)).

[1016] With the word 'sister' being understood in its broadest application—another woman.

[1017] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 132 (quoting Elijah Basyatchi, *Aderet Eliyahu*).

of polygamy; he didn't feel the need to explicitly advocate for monogamy because that is what was taken for granted in his sect. He did, however, say that, 'Whoever shall put away his wife, and marry another, commits adultery,'[1018] and the implications are quite clear; if polygamy were permitted, the marriage of a second wife after divorce would certainly not be considered adultery. As it were, the Jewish Christians at least, were known to be completely monogamous.[1019]

Also in common with the other sects, Jesus himself in Matthew 19:4-5 ('And he answered and said, "Have you not read that He who created them from the beginning made them male and female, and said, for this reason a man shall leave his father and mother and be joined to his wife and the two shall become one flesh') and Mark 10:6 ('But at the beginning of creation God 'made them male and female') quotes Genesis 2:24 ('Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall become one flesh') and 1:27 ('in the image if God he created them, male and female he created them'), and seems to make the exact same exegetical moves based on the Creation story that the other sectarian Jews did. In fact, he even strengthens it, by using more specific terminology; in his version the unambiguous 'two' shall be one flesh, as opposed to the slightly more ambiguous 'and they' in the original verse. Later, Tertullian would pick up on and use Genesis 1:27 and also 7:9 to

[1018] *Mark* 10:11.

[1019] *Cf.* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 132.

strengthen his arguments. Such Biblical exegesis certainly ran counter to traditional Jewish teachings, and the manner in which the Rabbis understood the meaning of these texts. However, since their own moral convictions prevented their giving expression to any outright opposition to monogamy, the Rabbis were in somewhat of a quandary. The least they could do then to oppose such heretical interpretation was to at any rate try and uphold the theoretical feasibility of polygamous freedom in the academic setting.[1020] Lowy writes:

> [In order] to counterbalance [the Jewish sectarians who claimed to recognize a Biblical commandment in monogamy], the Rabbis clung rigidly to an ancient legal freedom as expressed in the law, even if it was out of keeping with their own ethical feeling. It seems that, although they were opposed to polygamy on grounds principally moral, because the sectarians had proscribed polygamy on the basis of an alleged Biblical injunction, they could not themselves openly and explicitly condemn it. Social conditions did not warrant such radical preaching, since in reality the Jewish family life was, as a rule, monogamous. They were thus in the happy position of being able to afford to retain in their legal doctrine the traditional right of polygamy, and this academic tendency was emphasized, so as "to lend no support to the words of them that say that monogamy was a biblical commandment." [1021]

Such an idea of a polemic legal stamp was certainly not unheard of or unattested to; just in the area of family law- for instance, both the sectarians and the early Christians

[1020] Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 130-31, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 118.
[1021] *Id.*

sought to place severe limits on divorce,[1022] and so the Rabbis, despite the fact that they also did not like divorce,[1023] went out of their way to record the fact that even if a husband simply found someone that he liked better than his current wife, that alone was grounds enough to legally divorce her.[1024] Similarly, the Rabbis promoted uncle-niece marriage, considered incest by all sectarians, quite possibly simply to assert the orthodox position against what they considered the sectarians' faulty exegesis, and to defend the traditional system against the possibility of heretical schism.[1025]

On the flipside, the factors that led the Rabbis to push for polygamy in the academy might also explain why there was no polygamy on the ground. Outside of the ivory tower, Romans and sectarian Jews were both preaching against the practice, which led to a culture that frowned upon the taking of a second wife. Satlow[1026] however notes that even this doesn't tell the whole story. According to Satlow, the lack of polygamy was not just a reaction to Romans or to 'other' Jews; it was even closer to home. The Rabbinic Jews living in the land of Israel had been exposed to the same Biblical stories

---

[1022] *See Matthew* 5:32, 19:9; *Mark* 7:21-22; *Luke* 18:20. *See also* S. SCHECHTER, DOCUMENTS OF JEWISH SECTARIES 71-72 (Joseph A. Fitzmyer trans., 1970).

[1023] *See, e.g.*, BABYLONIAN TALMUD, *Gittin* 90b ("If a man divorces his first wife, even the Altar cries . . . .").

[1024] MISHNA, *Gitin* 10:10. Lowy notes that the strength of the position is made even more clear by that fact that the speaker here is Rabbi Akiva, whose marriage was famously happy and ideal. *See* MISHNA, *Gittin* 9:10; BABYLONIAN TALMUD, *Nedarim* 50a.

[1025] The Zadokies, for instance, derived their prohibition from Leviticus 18:3 and an analogy between men and women. For more, and for a similar discussion regarding intermarriage, see Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 136-38.

[1026] SATLOW, JEWISH MARRIAGE IN ANTIQUITY, *supra* note 90, at 190.

as their sectarian brethren, and had also increasingly developed a view of marriage as "natural" and rooted in creation, i.e. in the same primordial and paradigmatic coupling of Adam and Eve that the other sects had focused on. Despite their ideological justifications for it, and the precise legal readings that exegetically allowed for it, their own internal intellectual environment had also clearly led them to adopt a practically monogamous outlook. These positions were therefore, at least partially, outgrowths of an internal theological development based on a shared canon with others, not just of influence by completely external factors.

C. The Gaonim and Early Rishonim

Over time, and with the close of the Talmudic canon, the title 'Gaon' was given to the heads of the two Babylonian academies, in Sura and Pumbedita.[1027] While the positions existed in the Amoraic era the title began to be consistently used towards the close of the sixth century, at the end of the Persian rule, when Mar Rab Hanan was appointed Gaon of Pumbedita, and it was used until the death of Hai, the last Gaon of Pumbedita, in the year 1038.[1028]The primary sources regarding polygamy in both the Geonic and Rishonic (early commentators) eras are from early responsa literature

[1027] *See* Jehoshua Brand, Simha Assaf & David Derovan, *Gaon*, *in* 7 ENCYCLOPAEDIA JUDAICA 380-386 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).
[1028] *See Gaon*, *in* JEWISH ENCYCLOPEDIA 1901-06.

(records of legal questions posed to rabbis, and their answers), and eventually, as they developed, the early legal codes.

Before we shift to Babylonia, however, it is important to at least briefly mention that there was still an independent Jewish community in Israel even during this period. A number of sources preserve testimony about polygamy in Israel during the post-Talmudic period,[1029] but generally speaking the halakhic tradition recognized the woman's right to insist on monogamy, as per Rabbi Ammi's ruling. According to Mordechai Akiva Friedman, this explains why the in the dozens of Ketubot we have found in Israel from the period of the Geonim, no commitment is made by the husband not to engage in polygamy, and no consequences are discussed if he does. Presumably, this was because since the recognized halakha was that if she wanted to demand a divorce in such a case she had that right, there was no need to stipulate this in writing.[1030]

Sherira ben Hanina Gaon (906-1006 C.E.) was the head of the academy (Gaon, lit. 'genius' or 'honorable sage') of Pumbedita from 968-1006 C.E.[1031] In one of his responsa, Sherira Gaon held that if a man was married for ten years and his wife

---

[1029] *See* SEFER HAMAASIM LIVNEI ERETZ YISRAEL, MEKOROT UKEMKARIM (1971), *quoted in* 8 MARRIAGE AND ITS OBSTACLES IN JEWISH LAW: ESSAYS AND RESPONSE 69 (Walter Jacob & Moshe Zemer eds., 2001).
[1030] *Id.* Contrast this with the dozens of Ketubot in the Cairo Genizah reflecting the practice of Egyptian Jewry. Here there were conditions and penalties, and in fact there is evidence that people violated these conditions notwithstanding the hefty price. *See id.* at 69-70.
[1031] 14 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 1381.

remained barren, but the man could not afford to divorce her (i.e. pay her ketubah), and he could also not afford to take and support a second wife, he must remain with the first wife and not take a second.[1032] The implication is that if he could afford a second wife, he could take one, which is consistent with the view of the Amora Rava, the historic head of Pumbedita.[1033] A second responsa makes this point explicitly;

> We have seen it thus: every man according to his means, without there being any set rule. As the Merciful One wrote (Deuteronomy 17:17) "Nor shall he multiply wives to himself" and we learned (Mishna Sanhedrin 2:4) "But only eighteen" – this reference is to the king . . . but an ordinary man . . . need not restrict himself, as long as he can support each one in food and clothing.[1034]

Sherira's views were also accepted in practice in Spain and North Africa.[1035] Another responsum from the Pumbedita academy, written by Rav Hai Gaon (939-1038), explicitly holds that the halacha follows Rava, and that a man can have more than one wife.[1036]

While still not disallowing the practice of polygamy completely, the tradition at Sura did seem to track closer the ruling of Rav Ammi. Historically, this makes a lot of sense; although he left to Israel at an early age, Rav Ammi was born and raised in

---

[1032] FRISCH, HARAY ATEN, *supra* note 808, at 121 (quoting B.M. Lewin, *Otsar HaGeonim, Yevamot* 143 (1928).
[1033] EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 21.
[1034] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 11 (quoting OSAR HAGE'ONIM LEWIN, *Yebamot* at 134).
[1035] *Id.*
[1036] SHAAREI TZEDEK 4:30 (Joseph HaKohen Ardit ed., 1972); *see also Toratan Shel Rishonim.*

Babylonia, and began his studies under Rav, in Sura.[1037] Hilai Gaon, a ninth century Gaon of Sura, wrote that if a man's first wife is not agreeable to his taking a second wife, she can force him to pay her ketubah, even against his will.[1038] Similarly, although the Sura tradition favored levirate marriage to chalitza, Hilai ruled that if a widow did not want levirate marriage since the brother-in-law was already married, the brother-in-law could be compelled to perform chalitza instead.[1039]

Notwithstanding the continued legal tolerance for polygamy, what we do find in the Geonic period is the continued seeming disapproval of the practice by the general populace. Epstein, for instance, points to the extant ketubot from wealthy families that were found in the Cairo Geniza,[1040] Ketubot that contained clauses such as the following:

> he may not marry or take during the bride's lifetime and while she is with him another wife, slave-wife, or concubine, except with her consent, and if he does . . .

[1037] *See* BABYLONIAN TALMUD, *Nedarim* 40b-41a.

[1038] *Ardit.* at 4:60, *quoted in* FRISCH, HARAY ATEN*, supra* note 808, at 122.

[1039] *Ardit.* at 1:52.

[1040] The Cairo Genizah, mostly discovered late in the nineteenth century but still resurfacing in our own day, is a collection of some 300,000 fragmentary Jewish texts, manuscripts, and documents that were found in the geniza or storeroom of the Ben Ezra Synagogue in Fustat or Old Cairo, Egypt. Many of these were stored there between the 11th and 19th centuries. A genizah is a storage room where copies of respected texts that are no longer useful (scribal errors, physical damage, or age are common reasons), are kept until they can be ritually buried. These manuscripts outline a 1,000-year continuum of Middle-Eastern history and comprise the largest and most diverse collection of medieval manuscripts in the world. In addition to containing Jewish religious texts such as Biblical, Talmudic and later Rabbinic works (some in the original hands of the authors), the Genizah gives a detailed picture of the economic and cultural life of the North African and Eastern Mediterranean regions, especially during the 10th to 13th centuries. It is now dispersed among a number of libraries, including the libraries of Cambridge University and the University of Manchester. Some additional fragments were found in the Basatin cemetery east of Old Cairo, and the collection includes a number of old documents bought in Cairo in the later 19th century. *See* Yehoshua Horowitz et al., *Genizah, Cairo*, *in* ENCYCLOPAEDIA JUDAICA 460-483 (Michael Berenbaum and Fred Skolnik eds., 2d ed. 2007).

> he shall from this moment be under obligation to pay her the ketubah in full, and release her by a bill of divorce by which she shall be free to remarry.[1041]

Towards the end of the Geonic era rabbinic authorities began to move to the satellite communities in other parts of the world.[1042] While there are some references to cases of polygyny found in the responsa of the North African and Spanish rabbis, such as Rabbi Isaac Ben Jacob Alfasi (1013-1103, considered by many to be the last of the Gaonim, by others the first of the Rishonim),[1043] it seems that they were in a similar position to their Gaonic forebears; while it was legally permissible to have multiple wives, it was not widely practiced, even in the Sephardic (Jewish communities of Spanish, Portugese, or North African descent) enclaves which were for the most part under Muslim rule.[1044] Some Jews in Spain and other areas regulated bigamy by inserting clauses in the marriage contract protecting the wife against the husband's decision to take another.[1045] In one responsum, Rabbi Alfasi deals with a case in which a woman whose husband had married a second wife insisted that he pay her a fine of two hundred dinars. Rabbi

---

[1041] EPSTEIN, JEWISH MARRIAGE CONTRACT, *supra* note 874, at 272, *quoted in* WALTER JACOB & MOSHE ZEMER, 8 MARRIAGE AND ITS OBSTACLES IN JEWISH LAW: ESSAYS AND RESPONSA 63 (2001). *See also* J. MANN, 2 TEXTS AND STUDIES 177 (1931-38); GOITEIN, A MEDITERRANEAN SOCIETY, *supra* note 89, at 147.

[1042] *See* SEFER HAKABALAH OF RABI ABRAHAM IBN DAUD for the legend of how exactly this happened.

[1043] *See*, *e.g.*, SHEILOT U'TESHUVOT HARIF 282 (1825), where Rabbi Alfasi discusses a question regarding a man who had two wives. *See also* AVRAHAM GROSSMAN, PIOUS AND REBELLIOUS: JEWISH WOMEN IN MEDIEVAL EUROPE 79-81 (Jonathan Chipman trans., 2004) [hereinafter GROSSMAN, PIOUS AND REBELLIOUS].

[1044] FRISCH, HARAY ATEN, *supra* note 808, at 123.

[1045] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 12.

Alfasi reports that this was in fact the custom in Spain from early times,[1046] perhaps reflecting a compromise position between Rava and Rav Ammi- the husband did not have to divorce her, but was communally sanctioned.[1047] His student, Rabbi Joseph ben Meir HaLevi ibn Migash (1077-1141 C.E.) mentions a woman whose husband undertook that in the event that he married another wife, he would be obliged to pay the first wife her ketubah.[1048] Falk claims that these clauses, called "Kairouan clauses" after the city in which they originated, are "characteristic of a society where polygamy is the rule, yet which nevertheless evinces trends towards monogamy."[1049]

In the Ashkenazic communities, (primarily in Germany and Northern France, for the most part under Christian rule) no mention is found of stipulations in Jewish marriage contracts to protect the first wife in case the husband decided to take another wife.[1050] It is quite possible that this was a reflection of the difference in surrounding society; the Sephardic Jews, lived amongst the Muslims, who also had these prenups,

---

[1046] SHEILOT U'TESHUVOT HARIF 120 (1825).

[1047] *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at81 (noting that this can be thought of as a similar approach to the later Germanic ban, just using economics instead of excommunication in the communal edict trying to limit the practice of polygamy). The edict here would have been accepted no later than the beginning of the eleventh century, making it one of the earliest communal edicts known to us from Spain. *Id.* (quoting A.H. Freiman and Z. Leiter, although Grossman himself thinks from the continuation and context of the responsa that the edict in question was about husbands not leaving town without their wives for long periods of time (similar to Rabbeinu Tam's, see below), and not about polygamy at all.

[1048] TESHUVOT YOSEF IBN MIGASH 129 (1870).

[1049] See FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 12 (quoting MULLER, GEONE MIZRACH U'MAARAV 175-176), for a Responsa from Hanoch (tenth century Spain) about a case of polygamy.

[1050] *Id.* at 13.

and the Ashkenazic Jews amongst the Christians, who did not.[1051] In the eleventh or twelfth century, however, something drastic occurred; polygamy was officially prohibited by rabbinic decree for the Jews of Germany and Northern France.

[1051] *See* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 12.

Chapter 5: The Ban of Rabbeinu Gershom

The decree to end polygamy is famously attributed to Rabbeinu Gershom ben Judah of Mayence (ca. 960-.1040 C.E.), and is commonly referred to as the Cherem DiRabbeinu Gershom (the ban of our teacher, Gershom) because the decree was fortified by a device that put a ban on anyone who transgressed it.[1052] With a genius not only for scholarly pursuits but also for practical communal organization, Rabbi Gershom achieved not only the establishment of Jewish learning in his country but also the uniting of the scattered Jewish communities into a unified federation.[1053] He established takkanot (decrees) regulating the relations of the communities to one another and to their members, and other edicts in civil law,[1054] and while the communal ordinances were quite significant and innovative in his day, what Rabbi Gershom is most famous for are his decrees in the religious arena, particularly in the area of family law.[1055] The delivering of the edict banning polygamy probably happened sometime around the year 1030, at a synod of scholars under the presidency of Rabbi Gershom, at one of their meetings in connection with one of the customary large fairs. (Although, as we will see,

[1052] Because the Talmud clearly allows the existence of polygamy, the prohibition was introduced in the form of a *takkanah*, or rabbinic ordinance. The leading rabbis had the power to order that a person who breaks the rules of the community be excommunicated from the community, and to forbid any contact with him. Thus while there is no biblical or Talmudic punishment for practicing polygamy, the violator is threatened with being banned from the community whose *takkanah* he has broken.

[1053] Finkelstein, Jewish Self-Government, *supra* note 886, at 20.

[1054] Including ordinances protecting Jewish tenants, the privacy of letters, and the jurisdiction of the local courts. *See id.* at 30-35.

[1055] *Id.* at 22-23.

some scholars do question whether Rabbi Gershom was truly the originator of the ban.[1056]). As compared to the ketubah clauses, this ban prohibited polygamy even with the wife's consent, presumably because such practice was against public morality at that time.[1057] Eventually, the ban was extended to all of Ashkenazic Jewry, though the

---

[1056] Rabbeinu Gershom ben Judah was one of the first great German Talmudic scholars. His name is connected to numerous *takkanot* (rabbinic ordinances), of which the ban against polygamy is the most famous. No text of the ban has been preserved, and no reference is made to it until more than a century after its purported promulgation. A responsum written by the famous French commentator Rashi (1040-1105 C.E.) regarding the case of a man who married a second wife because his first wife had borne him no children in their ten year marriage, makes no mention of the problem of the ban or of the need to lift it. *See* YOEL HAKOHEN MULLER, TESHUVOT CHAKHMEI TSARFAT VELOTHAIR 14, 28 (1881). Additionally, the ban was said to have been imposed on the Jewish communities of Speyer, Worms, and Mainz. However, the Jewish community of Speyer was not founded until 1084 C.E., more than fifty years after Rabbeinu Gershom's death. FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 13-14. If, in fact, it was originally connected with the community of Speyer, it must have been promulgated some time after Rabbeinu Gershom had died. According to Louis Finkelstein, even if Rabbeinu Gershom was a prime mover behind it, the ordinance must have been established "by a synod [that met under the direction of Rabbeinu Gershom] representing the various communities for whom it was intended." *See* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 25. The oldest extant source linking the ban to Rabbeinu Gershom is from ca. 1160 C.E. Rabbi Eliezer ben Joel HaLevi of Bonn (1140-1225) in regard to the question of whether or not the decree nullified the Biblical commandment of levirate marriage in favor of chalitza. In that particular case, the judges did not address that issue but ruled that levirate marriage was inappropriate since the woman was too old to bear children. Later, Rabbi Meir ben Baruch of Rothenburg (1215-1293), among others, attributed the ban to Rabbeinu Gershom. *See, e.g.*, IRVING A. AGUS, RABBI MEIR OF ROTHENBURG 282-83, 301 (1970). Elsewhere though, Rabbi Meir cites a judgment of Rabbeinu Gershom himself, in which he allowed polygamy consistent with Rava's ruling from BABYLONIAN TALMUD, *Yevamot* 6a. *See Teshuvot Maharam*, 865. Falk argues that this proves that he was not the author of this decree, although it is also possible that this case came before him in his early years. *See* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 14-15. Many scholars believe that he ban was not actually issued until the twelfth century, and was then retroactively attributed to the highly respected and authoritative Rabbeinu Gershom. Another possibility is that Rabbeinu Gershommade informal pronouncements against polygyny but never actually issued a formal ban against plural marriages, and that such a ban was later introduced in his name by his students. Regardless of whether it originated with him, his students, or later in his name, he validity of the ban was never questioned. *See* 7 ENCYCLOPAEDIA JUDAICA Gershom Ben Judah Me'or Ha-Golah 551, 552 (2007). For the purposes of this memo, we will take Jewish law's understanding of the ban, with Rabbi Gershom's weight authority behind it.

[1057] Russell K. Ryan, *And Then There Was One: An Analysis and Comparison of Polygamy Among Jews and Mormons*, 9 JEWISH L. ANN. 205, 215 (1991).

Sephardic communities never officially adopted it. The ban was revolutionary in that it prohibited something expressly permitted by the Old Testament, a bold move in rabbinic interpretation and innovation.

It is important here to stop and place this ban in its proper historical context; first, as we have seen, for a long time the Jewish community in Christian lands had been, practically speaking, an almost completely monogamous one.[1058] One consequence of this reality was that when a man wanted to marry someone other than his wife, his only option was to get divorced, whether his wife agreed to it or not. This led to the often-overlooked second part of Rabbeinu Gershom's legislation; the ban on polygamy was in fact accompanied by a very related ban on unilateral divorce.

A. A Summary of Judaism's Approach to Marriage

In order to fully appreciate this development, we will briefly address the history and structure of the Jewish marriage laws that led to this historic moment.[1059] The two different viewpoints that developed over the course of Jewish history saw marriage as either a partnership model, wherein either side has an unfettered right to exit, or as a

---

[1058] In all of the halakhic rulings, commentaries, custom books, liturgical poems, and chronicles- including the memorial books containing the names of those killed during the First Crusade in 1096, there is no mention of anyone marrying a second wife, save a few isolated instances of doing so in "a case of a mitzvah," i.e. barrenness or levirate marriage. *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at73.

[1059] *See* MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA (2001) [hereinafter BROYDE, MARRIAGE]. This section draws heavily (with permission) from parts of this book, as well as from a later article co-written by Professor Broyde and myself.

corporate model, in which one party cannot exit merely by deciding that they want to leave. Divorce law therefore developed as a reflection of marriage; in fact, the Biblical verses describing divorce appear almost incidentally in the context of describing the remarriage of one's divorcee.

In general, marriage in Judaism is a contractual agreement requiring the mutual consent of both parties, unconditionally given. In regard to divorce, however, Deuteronomy 24 states that

> [w]hen a man takes a wife, and marries her, then it comes to pass, if she finds no favor in his eyes, because he has found some unseemly thing in her, that he writes her a bill of divorce, and gives it in her hand, and sends her out of his house, and she departs out of his house, and goes and becomes another man's wife, and the latter husband hates her, and writes her a bill of divorcement, and gives it in her hand, and sends her out of his house; or if the latter husband die, who took her to be his wife; her former husband, who sent her away, may not take her again to be his wife . . . .

Talmudic authorities took these verses to mean that the husband has a unilateral right to divorce his wife without fault, while the wife has no reciprocal right to divorce her husband except in cases of hard fault. The majority opinion in Jewish law maintains that there was no right to dower (ketubah) under biblical law, although there is an opinion which states that there was a limited right to dower, restricted to first marriages of virgin brides, in the amount of two hundred zuz.[1060] Biblical family law

[1060] *See* Michael J. Broyde & Mark Goldfeder, *Divorce in Judaism*, *in* CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 622-626 (Robert E. Emery & J. Geoffrey Golson eds., 2013) [hereinafter Broyde & Goldfeder, *Divorce in Judaism*].

appeared imbalanced in other ways as well; as we have been discussing, a man could be married to more than one wife, any of whom he could divorce at will, whereas a woman could be married to only one man at a time, and had no clearly defined right of exit aside from perhaps hard fault.[1061] If the husband and wife no longer wished to live together, the husband could just marry another woman as long as he continues to support his first spouse.

The biblical rules of divorce could thus be summarized by the husband's unilateral right to divorce (and responsibility to pay dower—absent fault—in some marriages). The Talmud attempted to mitigate the disparities between men and women by creating a minimum dower for all brides, which became, by rabbinic decree, a pre-condition to any marriage. Thus while the right to divorce remained unilateral only for the husband, it was now at least somewhat restricted by a clear financial obligation to compensate his wife if he so exercised this unilateral provision, absent any judicially declared fault on her part. The Talmud even records views that if the husband cannot pay the financial obligation he is prohibited from divorcing his wife.[1062] In order to protect herself from a frivolous divorce, the woman could also insist on a dower higher than the minimum amount promulgated by the rabbis. In addition, the Talmud clearly

[1061] Irving A. Breitowitz, Between Civil and Religious Law: The Plight of the Agunah in American Society 9 (1993) [Breitowitz, Between Civil and Religious Law].
[1062] *See* Shulchan Aruch, Even HaEzer 117:11.

enunciated the right of the wife to sue in cases of fault, including such grounds as provable repugnancy and impotence. In such a case, the husband was required to divorce his wife (and in most cases pay the dower as well). Finally, divorce could be by mutual consent, subject to whatever financial agreement the parties wished to follow.[1063]

Nonetheless, a significant imbalance in exit rights remained: Because marriages could still be polygamous but not polyandrous, and if the husband and wife no longer wished to live together the husband had the legal right to simply marry another woman, so long as he continued to support his first wife. As a general rule, she could not under such circumstances sue him for divorce, although she could perhaps restrict his right to remarry with a special ketubah provision.[1064] As it was under Biblical law, marriage remained fundamentally a partnership for the husband and of corporate structure for the wife. The Talmudic rules could therefore be summarized as follows:

1) The husband had a unilateral right to divorce and had to pay dower absent fault.
2) There was divorce by mutual consent with dower to be determined by the parties.
3) There was a right to divorce through a judicial declaration of "hard" fault: if by the woman, with no dower; if by the man, with dower.[1065]

[1063] *See* Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 1057, at 623.

[1064] Through the use of a mechanism called *takanta de-mitivta* (literally 'Decree of the Academy'). How exactly it worked is unclear. *See* BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 1060, at 50-53. *See also* BABYLONIAN TALMUD, *Yevamot* 65a.

[1065] Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 1057, at 624.

Shortly after the close of the Talmud, during the Gaonic times, the rabbis of that period changed or reinterpreted[1066] the substantive understanding of Jewish law to vastly increase the right of a woman to sue for divorce. All a woman had to do was leave the household for a certain period of time, and she had an automatic right to divorce, according to most opinions with a full or partial right to dower. In addition, it appears from the responsa literature that when a marriage needed to end and a divorce from the husband was not forthcoming, the rabbis of that era felt that they had the power to step in and annul it.[1067] The husband still had a unilateral right to divorce, and had to pay dower absent fault. Thus, during the Gaonic period, Jewish divorce law worked as follows:

1) The husband had a unilateral right to divorce and had to pay dower absent fault.
2) The woman had a unilateral right to divorce, and if she exercised it, she received dower.
3) There was divorce by mutual consent with dower to be determined by the parties.

[1066] Through the use of a mechanism called *takanta de-mitivta* (lit.'Decree of the Academy'). How exactly it worked is unclear. *See* BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 1060, at 50-53.

[1067] There is considerable evidence that the era of the *geonim* was the only one in which the annulment process (mentioned in only a very few cases in the Talmud, and always either pre-consummation or involving bad faith marriages or divorces) was actually used with any consistency or frequency by rabbinic authorities. *See* BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW, *supra* note 1060, at 62-65 (discussing the circumstances under which annulments were performed). There are five places in the Talmud where a marriage is declared terminated without the need for a divorce document, based on the concept that "all Jewish people who marry do so with the consent of the Sages, and the Sages nullified the marriage." *Id.* These situations all revolve around marriages under duress or other cases where one of the parties acted improperly.

4) There was divorce through a judicial declaration: if by the woman, with no dower, if by the man, with dower.[1068]

Within a hundred years of the Jewish expulsion from Babylonia, however, there was full abandonment of the rules used by the geonim in favor of a number of different alternatives.

The great Sephardic authority Rabbi Moshe ben Maimon (Maimonides, 1135-1204), like all of the authorities after him, ruled that Jewish law did not possess any annulment power, but liked the Gaonic idea of making marriage a partnership for everyone involved. He therefore greatly increased the woman's rights, expanding the obligation upon a husband to divorce his wife for fault to include even her assertion (even if unproven) that "he was repugnant to her."[1069] In such a circumstance, a Jewish court could compel the divorce under threat of court sanction, including physical coercion. This gave both men and women the unilateral right to divorce, with no dower paid when the woman initiated the divorce absent cause, and dower paid when the husband initiated divorce without cause. This no-fault divorce system remains the normative law in only small portions of the Sephardic Jewish community today (such as

[1068] Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 1057, at 624.
[1069] Mishne Torah Hilkhot Ishut 14:8-9, 14.

Yemen). Again, it was based on a partnership understanding of marriage; when either side wants out, Jewish law allows him or her to leave.[1070]

European Jewry also ruled that Jewish law did not possess any annulment power, but took a divergent approach, which becomes important again for our discussion of what exactly happened to Jewish polygamy. Rabbenu Gershom felt that rather than expanding the rights of the woman, in order to equalize the rights of the husband and wife it was necessary to restrict the rights of the husband, and prohibit unilateral no-fault divorce by either husband or wife. Divorce was limited to cases of provable fault or mutual consent; fault itself was vastly redefined to exclude cases of soft fault, such as repugnancy, and in only a few cases of serious fault could the husband actually be forced to divorce his wife or the reverse.[1071]

Although no extant copy of the original document remains, according to tradition this edict was in fact part of the very same decree that prohibited polygamy, placing considerable pressure on the man in a marriage that was ending to actually divorce his wife, since without a proper divorce procedure neither could remarry. According to this approach, Jewish law permitted divorce through only mutual consent or very significant

---

[1070] Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 1057, at 624.

[1071] This insight is generally ascribed to Rabbenu Tam in his view of *meus alay* (an assertion of repugnancy). In fact, it flows logically from the view of Rabbenu Gershim, who not only had to prohibit polygamy and coerced divorce, but divorce for easy fault, as Maimonides concept of repugnancy is the functional equivalent of no fault, identical in outcome to the Gaonic annulment. *See* BROYDE, MARRIAGE, *supra* note 1056, at 142 n.12.

fault; when there was no finding of fault, little (perhaps other than imposition of a support obligation) could be done to encourage the couple to actually get divorced. Absent hard fault, this view saw marriage as entirely corporate in nature; it takes the consent of both parties to enter and the consent of both parties to exit.[1072]

And so, as we have seen, not one but many and varied factors favored the establishment of a strong form of marriage at this moment in history; externally, the influence of the Christian tradition,[1073] and internally both the Ashkenazi aspiration to maintain the Palestinian monogamous model, which accorded well with their own worldview, along with the growing desire of the community to grant increased stability to marriage and certainty to a woman.[1074] One could say that these moves shifted the

---

[1072] *See* Broyde & Goldfeder, *Divorce in Judaism*, *supra* note 1057, at 625. *See also* BROYDE, MARRIAGE, *supra* note 1056, at 142-43. A second view within European Jewry agreed that there was no annulment power and that it was necessary to restrict the rights of the husband by banning polygamy and by prohibiting unilateral no fault divorce by either husband or wife. This was true under all circumstances except where the marital estate had ceased to exist and the couple had de facto ended all marital relations. What this did was to include the failure of the marriage as itself grounds for either to coerce a divorce. According to this approach, Jewish law permitted divorce only though mutual consent; failure of the marriage through the end of a marital residence, or very significant fault. This view of marriage had some corporate aspects; while the corporation was running neither had the right to end it; once the corporation ended de facto it could be made to end de jure. Finally, Oriental Jewry agreed that Jewish law did not possess annulment power, and that fault was limited to hard fault, however, they rejected the European decrees prohibiting unilateral divorce by the husband and polygamy. They thus effectively returned to the classical Talmudic rules of regulation and restriction of the husbands right to divorce by dower contract stipulations. Most decisors ruled that absent fault it was prohibited to divorce ones wife unilaterally if he could not afford to pay the contract. A woman could only sue for divorce in cases of hard fault, such as leprosy. In modern times, nearly all *halachically* observant Jewish people (those in America, Israel, and Europe) follow one or the other of the European model of Jewish Law divorce.

[1073] Founded on consent and a strict condemnation of polygamy.

[1074] *See* Michael S. Berger, *Two Models of Medieval Jewish Marriage: A Preliminary Study, in* MARRIAGE, SEX, AND FAMILY IN JUDAISM 166, 128-29 (Michael J. Broyde & Michael Ausubel eds., 2005).

model of marriage away from one of male dominance to one of companionship; men could no longer marry new wives in addition to their older ones or get rid of older ones for newer models, and so young people looking to get married would be even more selective for compatibility, and married couples would continue living together into old age.[1075]

B. Rabbeinu Gershom's Inspirations and Influence

Scholars such as Zacharias Frankel insist that even before the famous ban on polygamy, monogamy

> had been accepted previously as a general custom, and was merely reinforced by the imposition of the ban . . . polygamy had in any event begun to disappear from medieval Jewish society, since public opinion had come to disfavor it, and Gershom Meor HaGolah (the Light of the Exile) merely summarized this attitude.[1076]

Truth be told, eleventh century Ashkenaz is fairly well documented, with extant halachic rulings, commentaries, custom books, liturgical poems, and even historical chronicles memorializing and archiving medieval Jewish life, and none of them makes mention of anyone marrying a second wife, with the rare exception of a case of mitzvah, i.e. barrenness or levirate marriage.[1077]

[1075] *See generally* WOMEN AND JUDAISM: NEW INSIGHTS AND SCHOLARSHIP (Frederick E. Greenspahn ed., 2009).

[1076] *Id.* at 1. Other scholars such as Leopold Loew insist that "polygamy existed both before and after the issuing of the ban." *Id.*; *see also* FRISCH, HARAY ATEN, *supra* note 808, at 128.

[1077] *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at73.

In regard to the question of precise authorship, Rabbi Meir Katzenellenbogen of Padova wrote that Shimshon of Sanz was actually the originator of the ban,[1078] and that the reason behind it was 'for since we are in exile, we should not take many wives, nor beget many children, since we would not be able to rear them nor fend for them properly.'[1079]Others assume that it was done by later rabbis, who then pinned responsibility on Rabbeinu Gershom, a figure whose shoulders were broad enough that the elgislation would stick.[1080]

Regardless of whether or not the ban was actually Rabbeinu Gershom's work, two responsum of Rabbi Eliezer ben Nathan illustrate the fact that a) monogamy was the general practice in the beginning of the twelfth century, and b) that there had been some kind of community wide proclamation made on the subject. In one, he notes that there has been a fundamental change, writing that "this was the rule in former generations, when a man married a second wife . . . But in our generation, when one cannot marry a second wife . . . ."[1081]

[1078] RESPONSA XIII.

[1079] *See id.*; RESPONSA XIV.

[1080] For detailed discussions see Westreich, Lowy, and Grossman, among others.

[1081] ELIEZER BEN NATHAN, *EVEN HA'EZER*, *KETUBOT* V, *quoted in* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 16 n.2.

And in another, he explains the reason for the change and seems to cite to the famous edict: "Today, however, when a communal ordinance prohibits polygamy and [compulsory] divorce, we do not act according to this rule."[1082]

There are three possibilities then; that the ban happened just as tradition would have it and forbade a real practice; or, alternatively, that it was merely a codification of already present feelings and existing social praxis;[1083] or it is also possible that it was something somewhat aspirational, an ideal that was announced in a channeling sort of way and that gained more and more acceptance over time as traditional and social values coalesced around an understanding of the family norm until it finally took hold.[1084] No matter its origins, for the purposes of this dissertation it is enough to note that within a couple of centuries the ban was known by the great Rabbeinu Gershom's name, and his students were encouraged to enforce it strictly, as though it were a biblical commandment.[1085]

A twelfth-century responsa from Eliezer ben Joel HaLevi makes it clear just how seriously the ban was enforced: A husband whose wife was demented came before the

---

[1082] Eliezer ben Nathan, *Even Ha'Ezer* 121c, *quoted* in FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 16 n.4.

[1083] *See* Pearl, *Marriage Forms*, *supra* note 832, at 28.

[1084] A survey of responsa points toward a somewhat slow shift from legalized to forbidden polygamy; what starts with wives complaining to courts about husband's taking second wives but ultimately losing the cases moves towards polygamy becoming the exception in rare cases (such as levirate marriage or barreness) and finally illegal altogether.

[1085] *Resp. HaRosh*, 43:8 Rosh compares it to the takkanot of the Geonim, and notes that the ban is of an even higher status.

Communal Council asked for an exemption from the ban in order to be able to marry a second wife. The Council at first refused to even hear his case, and when they finally did, they refused to grant the exception, holding that it be "preferable that one soul should be lost than that an enormity be carried out as precedent for generations to come."[1086] This was so even though it was suspected that he was living with another woman in secrecy; the rabbis wanted to do nothing that would even on its face upset the validity of Rabbeinu Gershom's ban.

Once monogamy became the rule, it often took precedence even over man's highest duty of procreation; thus in the view of some leading authorities it was better for a man to remain childless than to violate Rabbeinu Gershom's ban.[1087] Still, it is interesting to note that the ban "never assumed such extensive authority as would enable it to annul the validity of any marriage carried out in defiance of it."[1088]

We established above that the rarity of polygamy was probably due in part at least to the influence of the Christian environment (and perhaps the greatest proof of this relationship is the simple fact that in the French and German communities in which the ban was accepted, the predominant culture was Christian and monogamous, while in

---

[1086] ELIEZER BEN JOEL HALEVI, MAVO 203 (year), *quoted in* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 17 n.1. SOLOMON LURIA, RESPONSA 65, *quoted in* FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 18 n.1.

[1087] EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 27 n.3.

[1088] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 33 n.49. Canon law, however, did make that move. Interestingly enough though, Jewish people seemed not to have taken advantage of this weakness; we find no mention of cases of marriage in defiance of the ban lending further credence to the theory that this ban was only cementing the reality on the ground. *Id.* at 34.

the Muslim neighborhoods, where polygamy was upheld, the ban was never really established), and indeed Rabbi Jacob Emden's responsa, in which he describes the ban as a result of Christian pressure, is probably the most well known source for the reason behind its promulgation.[1089] We must stress, however, that the ban also reflects a continuation of the internal Jewish trend and moral development towards monogamy. M. Gudemann points out that the Christians of the Rhinelands at that time, and even centuries later, were not always above polygamy,[1090] and that even in the Orient, where polygamy was acceptable to the host population, and where the ban had less authority, the Jewish people for centuries had already been developing formal working tools and devices to maintain monogamous standards, such as the insertion of clauses into the marital agreement.[1091] The divide between Christian and Muslim lands cannot, therefore, be the only factor.

Among the reasons given for Rabbeinu Gershom's ban (other than Christian influence), and for arguing against polygamy in general both in the Eastern European context and worldwide amongst the Sephardim, are the following; strict monogamy was

---

[1089] RABBI JACOB EMDEN, II RESPONSA 15.

[1090] Louis Epstein notes that, "the moral level of family life among the Christians of the Rhineland at that time, and even centuries later, was not above polygamy." EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 25 (citing M. GUDEMANN, 3 GESCHICHTE DES ERZIEHUNGSWESENS 115-19 (1888)). *See also* Abrams, at 117-18. Abrams has an interesting theory that accounts for the split in a different way; he assumes that the Jews *around the world* had developed a practical code of monogamy, but that in Muslim lands, where it was not the standard, they relapsed into polygamy. Id, at 118-19.

[1091] 3 M. GUDEMANN, GESCHICHTE DES ERZIEHUNGSWESENS 115-119 (1888), *quoted in* EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 25-26.

instituted to prevent people from taking advantage of their wives;[1092] it was intended to avoid potential infighting between rival-wives;[1093] Rabbeinu Gershom was concerned lest the husband be unable to provide properly for all his wives (especially during the difficult times of Exile);[1094] there was a concern that a man might marry two wives in different locations who would not know about each other,[1095] which could lead to forbidden relationships between offspring;[1096] the ban was intended to avoid the inherent rivalry and hatred between rival wives, which could also lead to the transgression of a number of biblical violations;[1097] and, in a reversal of the argument from a moral religious consensus across Judeo-Christian thought, it has been suggested that the ban was adopted from Christian practice and laws not because the Jews agreed with it in principle, but simply to avoid Christian attacks against Jews who, if left alone, might otherwise have acted differently.[1098] A. Grossman however notes that drawing too many conclusions from Christian practice and influence one way or the other is hard; based on the evidence; if, in practice, the communities were already behaving in an almost identical fashion, and if the idea was one of conformity for better or for worse, then the

---

[1092] Maharik in the name of the Rashba (Spain), *cited in* DARKEI MOSHE, EVEN HAEZER 1, n.10.
[1093] *Mordechai* (Germany), *Ketuvot* #291, *cited in* DARKEI MOSHE, EVEN HAEZER 1, n.12.
[1094] *Maharam M'Padua* #14 (Germany, quoted above); *Mishkanot Yaakov* (France) #1.
[1095] *See* BABYLONIAN TALMUD, *Yoma* 18b.
[1096] *Id.*
[1097] Maharam Shick (Hungary) EH #4. *See also* MISHNAH, *Yevamot* 15:4 (assumes that co-wives are liable to give false testimony about the death of a husband in order to get rid of an unwanted rival) and MISHNAH, *Ketubot* 10:5 (concerned that they may deal fraudulently with each other in regard to their husband's inheritance).
[1098] SHEILAT YAAVETZ 2:15.

edict would be practically superfluous.[1099]. Mordechai Akiva Friedman suggests that maybe this was merely a declarative act, affirming the fact that the ancient tradition of Rav Ammi had in fact been preserved and passed over to Ashkenaz (and, perhaps, either showing solidarity with or at least openly conforming to the Christian community).[1100] Still, edicts were usually introduced to meet a real need, not just as declarative statements, and so this does not seem like it would have been reason enough for the ban on its own.[1101]

Along this line of thinking, however, some scholars, such as S. Eppenstein, have suggested that around the beginning of the eleventh century there was a migration of Jews from Oriental countries to Germany, and that when these Jews arrived with two wives Rabbi Gershom was afraid that they would end up having undue influence on the nature of his monogamous community, leading to the official ban.[1102] Baron[1103] conjectures that perhaps it was the literary sources, especially those responsa from the

---

[1099] GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at74. Also important to note is the fact that there are no extant Christian sources accusing the Jews of polygamy anymore at this time.

[1100] MORDECHAI A. FRIEDMAN, JEWISH POLYGYNY IN THE MIDDLE AGES (1986).

[1101] *Id.*

[1102] GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at73. *See also* Avraham Grossman, *The Historical Background for the Ordinances on Family Affairs Attributed to Rabbenu Gershom Me'or ha-Golah (The Light of the Exile), in* JEWISH HISTORY: ESSAYS IN HONOUR OF CHIMEN ABRAMSKY 3, 7-8 (Ada Rapoport-Albert & Steven J. Zipperstein eds., 1988). Roth relies on a shaky foundation to support its claims. Roth, however, points out that it is difficult to imagine that Rabbenu Gershom instituted the ban on polygamy in order to break apart already existing polygamous marriages of Sephardic migrants to Germany, or to prevent the daughters of Germany's monogamous society from become second wives to Sephardic Jews, or to prevent polygamous marriages amongst Sephardic immigrants.

[1103] BARON, A SOCIAL AND RELIGIOUS HISTORY, *supra* note 945, *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at73.

well-respected geonim, that arrived from Oriental lands at that time containing documentation of official permission to marry more than one wife, that led Rabbeinu Gershom to feel he had to take a stand. The influence was not limited to books, however; some heads of Ashkenaz communities in Rabbeinu Gershom's time actually traveled to Babylonia, particularly the academy of Pumeditha in order to study under the tutelage of Rabbi Hai Goan. One example of an Ashkenaz scholar studying in Babylonia is Rabbi Elijah, who established the Torah center in Northern France, having studied extensively under Rabbi Hai in Babylon and having made several pilgrimages to the Holy Land.[1104] The Gaonim were greatly respected in Germany and the rest of Christian Europe, and as their views, which were radically different than those of the European community in practice, became better known, had Rabbeinu Gershom not clarified the matter once and for all, their opinions might otherwise have caused quite a stir. A few scholars, like A.N.Z. Roth,[1105] note that for any of the above mentioned reasons, or simply just because, there may even already have been German Jews who themselves actually became bigamists, and whose viewpoint Rabbeinu Gershom now felt he practically needed to stand up and protest against. As mentioned above, however,

[1104] *See* GROSSMAN, CHACHMEI ASHKENAZ HARISHONIM 56 (1988) [hereinafter GROSSMAN, CHACHMEI ASHKENAZ HARISHONIM].
[1105] GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at73.

there is no internal evidence for this type of practice in the quite considerable extant literature from the Jewish community of that time period.[1106]

Falk notes that at this point in history, the position of women in Jewry had changed for the better. They were now accorded more respect, as evidenced by the higher dowries they brought their husbands; the higher level of compensation those husbands agreed to in their marriage contracts to secure against the event of death or divorce; and the fact that they tended to run all domestic and business affairs in their husbands' often long absences.[1107] We even have evidence of women conducting negotiations with other Jewish and Gentile merchants, as well as feudal princes.[1108] Given their status in society, people now thought it unjust that the 'mainstay of the house'[1109] should have to share her privileges with a co-wife.[1110] Rabbi Nissim of Gerona (the Ran) suggets tghat Rabbeinu Gershom's concern in imposing the ban may not have been only the welfare of the women, but also that of the men, and of overall domestic harmony; "...perhas this ban was intended, not only for the benefit of the women, but also for that of the men, so that they will not bring conflict into their homes."[1111]

[1106] The evidence Roth points to is an inference from an external Sephardic responsa from Maimondies, quoted below, discussing a polygamous element from the Fench and Germanic lands.
[1107] *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at14.
[1108] *Id.*
[1109] *See* BABYLONIAN TALMUD, *Sanhedrin* 22a-b.
[1110] FALK, JEWISH MATRIMONIAL LAW, *supra* note 685, at 25-26.
[1111] GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at90.

Grossman himself believes that the main motivation and impetus for the decree was the economic activity of German Jews during Rabbeinu Gershom's lifetime. Many were engaged in international trade and stayed for lengthy periods of time in remote lands, including predominantly Muslim countries.[1112] They are mentioned frequently in the responsa of Rabbi Gershom and of his student, Judah HaKohen.[1113] Explicit testimony of the hardships and burden this placed on the Ashkenazic Jewish family at that time can be seen in the edict of Rabbenu Tam (Rabbi Jacob ben Meir) from the mid-twelfth century, prohibiting Jewish traders from being away from home for more than a year and a half, and requiring them to remain at home for at least half a year upon returning from a journey.[1114] The reality that husbands did not always hurry back can be seen in among other sources the responsa of the Spanish sages and the Geniza sources; it is hardly surprising then that some men chose to marry second wives while they were away.[1115] They would then return home after either divorcing or abandoning their new wives. Maimonides' edict, issued in Egypt during the twelfth century, bears directly on this point.

> That Maimonides enacted edicts on behalf of the welfare of Jewish women; namely; that no woman be married to a foreign Jew, who is not from the

---

[1112] *See* Irving A. Agus, The Heroic Age of Franco-German Jewry 23-77 (1969); Irving A. Agus, Urban Civilization in Pre-Crusade Europe (1965).

[1113] *See* Teshuvot Ragmah, and Introduction, pp. 46-52. Grossman, Chachmei Ashkenaz Harishonim, *supra* note 1103, at 151-58. *See also id.* at 195-210 (discussing Rabbi Judah HaCohen's responsa).

[1114] Finkelstein, Jewish Self-Government, *supra* note 886, at 140-41; Elliot N. Dorff & Arthur Irwin Rosett, A Living Tree: The Roots and Growth of Jewish Law 418-19 (1988).

[1115] *See* Responsa of Rif 28, 67, 185.

> community of Egypt, unless he brings proof that he is not married, or takes an oath to this effect on a Pentateuch. And any foreign man who married a woman here and wished to go out to another country is not allowed to leave, even if his wife agrees to this, until he writes her a (conditional) divorce and gives it to her . . . .[1116]

The historical reality of shifty businessmen, combined with the wealth and power of the Jewish community at large and the desire of fathers to protect both their daughters and their dowries, along with the rising social status of Jewish women in this society, all contributed to the coming of this tipping point in Jewish family law.[1117]

Another interesting point to consider in relation to the Jewish development of formal legislation against polygamous practice is the development of the Canon law itself. As early as 326 C.E., the Catholic Church banned both polygamy and concubinage.[1118] In Germany in the ninth century, however, it became common practice for Christian men to take a concubine. Church authorities warned men to put an end to this practice, but not by divorcing their wives. Falk claims that even though Jews were no longer practicing polygamy, they were witnesses to these debates about concubines, and these developments were yet another prompt for women to demand equality,[1119] and

---

[1116] TESHUVOT HARAMBAM 2:347. Responsa from Alfasi indicate a similar milieu.

[1117] The fact that we find this phenomenon mentioned in the Sephardic responsa and not the Ashkenazi literature is to be expected; obviously the problem that needed to be solved was in the country where the Ashkenazi men had married and left the second wife. *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at13-14.

[1118] *See* ZE'EV W. FALK, MARRIAGE AND DIVORCE REFORMS IN THE FAMILY LIFE OF GERMAN-FRENCH JEWRY 8 (1961) [hereinafter FALK, MARRIAGE AND DIVORCE REFORMS].

[1119] Or, more likely, for wealthy fathers to do so on behalf of their daughters.

then for Rabbeinu Gershom to issue his ban.[1120] At a church synod held in Rome in 826, the ban on polygamy was once more promulgated, and the prohibition soon made its way into the legislation of Emperor Lothair.[1121] Shortly thereafter, Pope Nicholas I used Tertullian's exhortations in his own writings to warn against bigamy. In the tenth century, Regino of Prum complained not only of bigamy but of general licentiousness, including the practice of men divorcing heir first wives without justification in order to wed another (more echoes of Rabbeinu Gershom's first decree).[1122] In his book, compiled around the year 1020, Buchard of Worms enumerates all the laws of the Church enacted up to that date, including regulations against bigamy and licentiousness in general.[1123]

Despite the fact that ancient authorities had already flatly forbidden it, in 1274 the medieval canonists adopted and repeated the ban against polygamy, including it in the long list of forbidden sexual unions; polygamy in this sense was a mortal sin and a serious crime, and if done with knowledge and intent; once convicted by a church court such a polygamist faced a temporary ban from the Eucharist, and, interestingly enough, a ban or excommunication in serious cases. England passed a parallel statute in 1276, as

---

[1120] *See* TESHUVOT HAROSH 42:1 (indicating that the basic purpose of the ban of Rabbenu Gershom was to create a better balance of rights between the husband and the wife).

[1121] FALK, MARRIAGE AND DIVORCE REFORMS, *supra* note 1115, at 23.

[1122] *Id.* at 24.

[1123] While there is no direct evidence that even a little 'fringe' Christian polygamy was actually being practiced at the time that Rabbeinu Gershom's edict is said to have been enacted, the arrival of the eleventh century did bring about a movement for religious reforms in general, which included the Reformist Popes such as Gregory VII removing Priests who did not uphold their vows of abstinence, along with reforms against concubinage, a practice that was still somewhat popular. No doubt tremors of these movements were felt across religious boundaries. *See id.* at 25.

did many other nations within a few years, including, perhaps, in reality, the Jewish nation.[1124] On November 11, 1563, the Council of Trent still felt the need to condemn anyone who claimed that "[i]t is lawful for Christians to have several wives at the same time, and that it is not forbidden by any divine law,"[1125] perhaps reflecting the slow and gradual acceptance over time of the Jewish ban against polygamy. Tremors of all these movements were undoubtedly felt by the Christian's Jewish neighbors, and surely factored into the subtle calculus of the shift away from polygamy towards monogamy.

[1124] *See* Expert Report Prepared for the Attorney General of Canada, In the Matter of the *Constitutional Question Act*, R.S.B.C. 1986, c. 68, 67-68.

[1125] William B. Kessel, *Address at the AZ District Pastoral Conference First Lutheran Church, Prescott, AZ* (May 5-6, 1998).

Chapter 6: The Limits and Contours of the Ban

A. Issues of Authority, Authorship, and Scope

The various sources that refer to Rabbeinu Gershom's decree differ in regard to its intended duration. Many authorities held that the ban was heavily restricted, and was set to expire at the end of the fifth millennium, in the year 5000 of the Jewish calendar, corresponding to 1240 C.E.[1126] Others held that the ban was not at all limited in duration.[1127] Regardless of whether it was originally set to expire in 1240 C.E. or any other time, it remained in force after such time (likely due to its overall acceptance and reflection of society), and later generations have continued to accept it as absolutely

[1126] Solomon ibn Aderet (1235-1310), a Spanish sage, who claimed to have heard this from the French scholars. The statement is not found in his written responsa, but is quoted by R. Joseph Colon. Rashba did say that the reason behind the decree was because of licentious men who abused their wives. Havlin, *The Takanot of Rabbenu Gershom Me'or Hagolah*, *in* MATTERS OF FAMILY LAW IN SPAIN AND PROVENCE 230-231 (1975). *See also* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 29, 142-143, who contends that since in all of the French and German discussions of this ordinance there is no such reference, it must be mistaken. Epstein, on the other hand, points out that even though "we have not even the testimony of R. Solomon himself, but of a later scholar quoting him . . . legally, because of the great weight of Aderet in Jewish law, even such uncertain testimony given in his name is granted full authority, and the herem is regarded as having lesser binding force in law since the end of the fifth millennium." *See* EPSTEIN, MARRIAGE LAWS, *supra* note 866, at 26, *quoted in* FRISCH, HARAY ATEN, *supra* note 808, at 134 n.409. In response to the question of how a tradition of a limited time could have been preserved only amongst the Sephardi rabbis and not the Ashenazi ones, Rabbi Caro suggests that perhaps the knw about ut, but deliberately concealed it because of their wish to continue the ban. *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at78.

[1127] Asher ben Yehiel (1250-1327), a leader of German Jewry who settled in Spain in 1303, said that the *takkanot* of Rabbeinu Gershom were "permanent and deeply rooted, as if they had been given on Sinai." *See* BARON, A SOCIAL AND RELIGIOUS HISTORY, *supra* note 945, at 6:136-37.

binding.[1128] Thus, wherever the ban was accepted, it now appears to have the force and status of law for all time.[1129] This seems to be based if not entirely on then at least in accordance with a responsa of the Maharshal, a leading authority in Poland in the thirteenth century. In 1240, he wrote a responsum in which he noted that

> [m]ost of the decrees of Rabbenu Gershom Me'or Hagolah were formulated with no mention of time; moreover, with respect to the decree on bigamy, he wrote that this can only be permitted with the consent of one hundred sages . . . and even then, they shall not permit it unless they see good reason for doing so. How can there be good reason, changing for the better, when, on the contrary, due to our many sins each succeeding generation is more lowly and worsens from day to day?[1130]

Maharshal also noted that the conditions which gave rise to the ban in the first place in the fifth millennium still applied equally in his day in the sixth,[1131] and that eminent Ashkenazi rabbis had upheld the full validity and legal weight of the ban even after is supposed expiration date.[1132]

An interesting in-between opinion is given by the prominent sixteenth-century Polish Ashkenazic authority Rabbi Moshe Isserles in his Darkhei Moshe: he claims that the edict had lapsed but the prohibition was still valid, as a matter of minhag or

---

[1128] 4 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 987.

[1129] *See* JOSEPH, KARO, SHULHAN ARUKH, *Even HaEzer* 1:10. There is a debate among scholars as to whether the original ban contained a clause allowing for its suspension in exceptional cases, or whether that clause was attached to the ban at a later time. *See* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 142-43.

[1130] RESP. MAHARSHAL (Jerusalem, 1969), 14, *quoted in* Elimelech Westreich, *The Ban on Polygamy in Polish Rabbinic Thought,* 10 POLIN 69 (1997) [hereinafter Westreich, *The Ban on Polygamy*].

[1131] And, presumably, in our days as well.

[1132] *Id.*

prevailing custom. [1133] As noted above, the ban against polygyny does not include a clause that annuls the second marriage of a man who breaks the law by disregarding it. Such a marriage would still be legally valid,[1134] although since it is a prohibited marriage, the first wife could either require the court to compel her husband to divorce the second wife, or ask the court to order the husband to give her a divorce.[1135]

In regard to the conflict between positive commandments and the cherem, there were two main issues. First, in terms of what to do with a levirate marriage requirement that would involve a married brother taking on a second wife (i.e. his brother's widow), this was not really a problem in France, where chalitza was already the preferred method even in cases that did not involve polygyny.[1136] In Germany, however, where levirate marriage was still practiced,[1137] authorities were split on this issue and remained so for quite some time.[1138] Rabbi Jacob ben Moses Moellin (1360-1427) allowed a man to take a second wife in such a case.[1139] This was also the practice in the Spanish

---

[1133] *Darchei Moshe* to Tur, Even HaEzer 1:10. The Ritva, cited in Rabbi Joseph Caro's *Beit Yosef* to Tur 1:8 considers the prohibition to have shifted from public to private law, which would again allow polygamy based upon the wife's consent.

[1134] MOSES ISSERLES, DARKHEI MOSHE, TUR, *Even HaEzer* 44.

[1135] Abraham Tzvi Hirsch ben Jacob, *Pitchei Teshuva* 5 [hereinafter Jacob] on SHULCHAN ARUCH, *Even Ha'ezer* 154. This sounds a lot like Rav Ammi's ancient ruling. *See also* RESPONA MAHARSHAL 14.

[1136] *See* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 27.

[1137] Rabbi Judah KaKohen, a disciple of Rabbeinu Gershom himself, ruled that levirate marriage is permitted but is not to be enforced against the woman's will. GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at93.

[1138] *See* EPSTEIN, MARRIAGE LAWS, *supra* note 866, at 26-27.

[1139] Yaacov Molin, Sefer Meharil, Hilchot Chalitza, and many others, including Elizer ben Joel haLevi (quoted in SOLOMON LURIA, RESPONSA 188), Oohr Zaruah, 1: 638, 739, and MEIR BEN BARUCH, RESPONSA 866. As attested to in the Bayit Hadash of Rabbi Joel Sirkes, (Commentary to Tur, Even

communities that did not accept the ban for themselves, but did enforce it on German Jewish immigrants.[1140] In contrast, the sixteenth century Italian authority Rabbi Judah Mintz held that the cherem overrides the commandment of levirate marriage.[1141] Similarly, authorities were divided on the question of whether or not the ban against polygyny should be suspended in order to fulfill the duty of procreation in the case of a barren wife, with some approving,[1142] and others, including Rabbi Mintz, holding that the ban should still apply even if the result was that the husband would remain childless.[1143] Two German authorities even quote responsa of Rabbeinu Gershom himself permitting a second marriage under these circumstances, although others are quick to respond that those may have been from before the ban.[1144] The Maharshal writes that conduct unbefitting a wife, such as licentiousness or immodest behavior, constituted just

---

haEzer 119), this position was accepted in actual practice by the rabbis of Frankfurt, Ashkenaz, and Russia. In regard to a woman who could not give birth, however, Rabbi Moellin ruled differently in practice. See Responsa Maharil HaHadashot, 202. *See also* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 74-75.

[1140] According to OTZAR HAPOSKIM*, Even HaEzer* 1:75, if a man goes from a place where the *cherem* of Rabbeinu Gershom is in effect to a place where it is not in effect, the *cherem* "goes on the head" of the individual." *See* FRISCH, HARAY ATEN*, supra* note 808, at 138.

[1141] YEHUDA MINTZ, SEFER SHEILOT U'TESHUVOT MEIHARAV 10 (1882). According to Rabbi Mintz, the *cherem* has the force of a Talmudic *takkanah*. *See also* FRISCH, HARAY ATEN*, supra* note 808, at 135 n.430.

[1142] *See* EPSTEIN, MARRIAGE LAWS, *supra* note 866, at 27. Responsa of Rabbi Meir of Rothenburg quotes this in the name of Rabbi Gershom himself. *See also* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 73.

[1143] MINTZ, *supra* note 322, at 10; *see also* Beis Yosef to Tur Even HaEzer chapter 1; Kaftor VaFerach p.178; JOSEPH HABIBA, NIMUKE YOSEF TO YEVAMOT, ch.6.

[1144] *See* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 28.

cause for waiving the ban,[1145] but divorce suits based on anything but the wife's behavior (including, but not limited to, levirate marriage, barrenness, or madness), the ban was upheld.[1146] Even in those cases where cause was found for waiving the ban however, the preference was to waive the enactment forbidding a man to divorce his wife unilaterally, as opposed to the enactment against polygamy.[1147]

One situation in which it was quickly decided that ban did not apply was where a wife accepted baptism and left the husband's home. It was assumed without question that the ordinance protecting the Jewish home against polygamy had never been intended for this purpose, and after it could be established that this was really a voluntary abandonment (as opposed to an involuntary captivity), the husband would be allowed to marry a second wife.[1148] Later, the custom became for the man to divorce his wife unilaterally though a Court appointed agent,[1149] again reflecting the preference to suspend the ban against coerced divorce before that of polygamy.[1150]

[1145] Presumably since it has been put in place for her protection. *See* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 67.

[1146] *Id.*

[1147] RESPONSA OF MAHARAM 946, *cited in* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 67. *See also* Responsa Maharam Even HaEzer, 245, 272, 273.

[1148] FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886, at 26 (quoting Responsa Hakme Zarfat ve-Lotir, 11b).

[1149] This is almost never allowed; the agent normally nees to be appointed by the woman herself. Here though, the rabbis relied on another Talmudic principle: One is rightfully allowed to assume that every rational person is a self-interested actor, and that what they would want if they were here, or of they had the capacity to consent, would be anything that is to their benefit. Since in this atypical case getting divorced would save her from the terrible sin of adultery, it was considered to be solely in the wife's benefit.

[1150] *Id.* (quoting Israel Isserlein, Pesakim 246).

Recognizing that sometimes even the suspension of the other enactment would not help,[1151] these and other emergency cases might be at odds with the ban, the early authorities provided for the possibility of suspending it in special cases, by joint decree of a hundred rabbis from at least three territorial divisions.[1152] When utilizing this mechanism, the husband must also leave the wife a valid bill of divorce and her full ketubah payment in escrow with the court.[1153] Scholars are unsure if this dispensation was so early as to actually be part of the original ban itself[1154] or was simply a later addition made by either Rabbeinu Gershon or others.[1155] Regardless, Rema's conception of the ban, as still binding but now based on custom and not law, leads to the following statement in his commentary; 'In any event, it seems to me that at the present time one does not need the approval of a hundred rabbis to waive it, since the period of the edict has already elapsed and no waiver is necessary at all."[1156] In respect to the Shulchan Aruch's ruling, that the ban on polygamy did not apply in the case of levirate marriage,

---

[1151] Say, when the woman did not have the requisite capacity to accept a divorce.

[1152] The circumstances are usually those in which a woman is obligated to take a get but cannot or will not for some reason. *See* SHULCHAN ARUCH, *Even Ha'ezer* 1:10, 115, and 119:6. The enactment is usually attributed to Rabbeinu Tam (1100, Ramerupt–9 June 1171), although some, like Finkelstein, believe that it is earlier, perhaps part of the original ban. *See* FINKELSTEIN, JEWISH SELF-GOVERNMENT, *supra* note 886.

[1153] *See* JOEL SIRKIS & BAYIT HADASH, COMMENTARY TO TUR EVEN HA'EZER 1. *See* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 80-83. *See also* FALK, MARRIAGE AND DIVORCE REFORMS, *supra* note 1115, at 28. ("The Frankish Church also permitted bigamy when one of the partners had been abroad for an extended period," or under other extenuating circumstances. See, for instance, the decision of the Synid of Compiegne, from the year 757). *Id.* at 28 n.1.

[1154] *See* BARON, A SOCIAL AND RELIGIOUS HISTORY, *supra* note 945, at 6:394.

[1155] *See* FALK, MARRIAGE AND DIVORCE REFORMS, *supra* note 1115, at 29 n.2.

[1156] DARKHEI MOSHE, COMMENTARY ON THE TUR, EVEN HA'EZER 1:10. In practice though, the courts do try to obtain the "Heter Meah Rabbonim," which means the permit of 100 rabbis.

Rema adds, "The same rule applies in every case where fulfillment of a precept is held in abeyance, as in the case of a man who has lived with his wife for ten years, and she has not given birth . . . but there are some who disagree and hold that the ban of Rabbeinu Gershom is to be enforced even in the case of a precept and even in the case of levirate marriage."[1157] In regard to a case that did not directly involve a commandment, such as insanity or unwillingness on the part of the wife to accept a valid divorce, Rema writes that, "in those cases . . . one should rule leniently and permit the husband to marry another woman."[1158]

Despite the fact that certain kinks needed to be worked out, over time Ashkenazic Jewry accepted the Jewish ban against polygamy as binding for all time, at least in those communities where polygyny was also forbidden by the dominant religion, Christianity, and was therefore forbidden by government law.[1159] According to Epstein, by the thirteenth century, although the ban had still not been fully accepted, its existence was already enough to create a legal presumption that the average marriage was a contract for monogamy.[1160] While it is true that we do have testimony from France that in that same time period (the thirteenth century) polygamy was still being

---

[1157] Commentary to SHULHAN ARUKH, *Even HaEzer* 1:10.

[1158] *Id.* This was the recorded opinion of Rema's teacher, Rabbi Shalom Shakhna. *See* Westreich, *The Ban on Polygamy*, *supra* note 1127, at 75-76.

[1159] 4 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 987. Even if not directly causative, this might indicate some correlation.

[1160] EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 30 (citing *Shilte HaGiborim* ad *Alfasi* to Yevamot, Chapter 6; *Or Zarua* I, 181a).

practiced on the fringes,[1161] and the same is true of Italy in the first part of the thirteenth century[1162] (even until the sixteenth century, Italian rabbis permitted a childless husband to marry a second wife without formally suspending the ban, even though it had already been accepted,[1163] without feeling the need to make use of the formal procedures for getting around it. Interestingly enough though, the permission of the rabbis was not enough; the Pope had to grant it as well[1164]), still, for the most part, soon after the decree of Rabbeinu Gershom had caught on, in that part of the Jewish world polygamy was gone forever.

B. Polygamy in Non-Christian Lands

In those countries where polygamy was permitted by the dominant religion of Islam, the ban was not officially adopted.[1165] Maimonides never even mentions the cherem of Rabbeinu Gershom, although his legal code, the Mishneh Torah, contains numerous references to polygyny.[1166] In Hilchot Ishut, 14:3, Maimonides states:

[1161] *Id.* at 30 (citing BEIS YOSEF TO TUR EVEN HA'EZER I (quoting Rabbi Samson ben Abraham)).

[1162] EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 30 (citing JACOB ANATOLI, MALMAD HATALMIDIM 101b (1866)).

[1163] *Id.* (citing RESPONSA RABBI MEIR PADUA 14; TAKKANOT OF FARRARA (1554)), *quoted in* ISRAEL ABRAHAMS, JEWISH LIFE, *supra* note 811, at 71.

[1164] EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 30 (*citing* Loew, L., Gesammelte Schriften, III, Szegedin (1893) 74 (citing LEONE MODENA, THE FOURTH PART OF THE HISTORY OF THE PRESENT JEWS THROUGHOUT THE WORLD ch.2:2 (1711)).

[1165] 4 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 987. Islam allows polygamy, with Koranic sura 4:3 providing that a man may have up to four wives, assuming that he can deal justly with the co-wives. *See* 7 THE ENCYCLOPEDIA OF RELIGION 448-449 (Mircea Eliade ed., 1987).

[1166] *See*, *e.g.*, MAIMONIDES, MISHNEH TORAH, *Hilchot Ishut* 6:14, 6:15, 17:1.

> A man may marry several wives, even one hundred, either at the same time or one after the other, and his wife may not prevent him, provided he can supply each one with the food, clothing, and conjugal rights that are due to her. But he may not compel them to dwell in one courtyard, but rather each one [must be allowed to reside] by herself.

Practically speaking, just like in the Talmud's original formulation of these rules, these requirements mean that it would only have been possible for men who were extremely affluent to practice polygamy and afford to have more than one wife. In addition, following his discussion of conjugal rights in the very next paragraph, Maimonides offers a further limitation on the practice of polygamy:

> Therefore the sages have commanded [in Babylonian Talmud, Yevamot 44a] that a man shall not marry more than four wives, even if he has a lot of money, so that he can provide them [each wife] with conjugal relations once a month.[1167]

It is interesting, of course, to note that Islam also allows a man to marry up to four wives simultaneously, provided that he can support them. Each is entitled to a separate dwelling and an equal portion of the husband's time and companionship.[1168]

Although the ban never took hold in Spain and Provence, from the late thirteenth century and on, beginning with Rabbi Shlomo ben Aderet (Rashba), the rabbis there acknowledged that it was in fact binding for the Ashkenazi Jews who had moved into the region.[1169]He did, however, view the ban as much less radical in its

[1167] *Hilchot Ishut* 14:4.
[1168] *See Islamic Law: Personal Law*, *in* ENCYCLOPEDIA OF RELIGION (Mircea Eliade ed., 1987).
[1169] Westreich, *The Ban on Polygamy*, *supra* note 1127, at 67 (quoting S.Z. Havlin).

restructuring of family law, as just a temporary attempt to address a problem of the day, and make sure that husbands did not arbitrarily hurt their wives. As such, not only did he maintain that the ban was of limited duration,[1170] in any case where the husband had legitimate halakhic grounds on which to contemplate marrying a second wife, whether it was her fault or not, Rashba maintained that the ban did not apply.[1171] When Spanish Jewry first began arriving in Ashkenazi lands in large numbers (after the expulsion from Spain in 1492), Rashba's view was introduced to Ashkenazic Jewry by Rabbi Joseph Colon (Maharik).[1172]

As we discussed, however, despite the fact that Jewish communities in Islamic countries did not ever formally adopt the cherem, it was still probably never very common to have more than one wife.[1173] As we have seen, in some communities women included explicit stipulations in their marriage contracts prohibiting the husband from taking a second wife without the first wife's consent or the permission of a rabbinic

---

[1170] *See id.*

[1171] *Id.*

[1172] RESPONSA MAHARIK 101. Rabbi Joseph Caro, the Sephardic author of the SHULHAN ARUKH, enthusiastically adopted it, ruling that the ban had expired, and that even an Ashkenazi Jew could marry multiple women, except in Ashkenaz lands where the restriction still held on the strength of custom. In response to the question of how a tradition of a limited time could have been preserved only amongst the Sephardi rabbis and not the Ashenazi ones, Rabbi Caro suggests that perhaps the knw about ut, but deliberately concealed it because of their wish to continue the ban. *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at78.

[1173] *See* RACHEL BIALE, WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES 51 (1984); *see also* 12 ENCYCLOPEDIA JUDAICA, *supra* note 92, at 259-60; EPSTEIN, THE JEWISH MARRIAGE CONTRACT, *supra* note 874, at 31.

court.[1174] The Cairo Geniza does contain some legal documents and letters reporting or referencing cases of bigamy, although in general the reasons given were the same as cases in which such marriages may even have been allowed under the Ashkenazic exceptions to the rule, i.e. in cases where the first wife was barren for ten years, or of levirate marriage, or where the first wife was insane and could not legally accept a divorce.[1175] There is also however evidence of some local ordinances prohibiting the taking of a second wife, not as strict or as comprehensive as Rabbeinu Gershom's ban, but still perhaps influenced by it.[1176]

Thus, while polygamy was not officially outlawed for Sephardic Jewry, it seems that it was only practiced rarely, perhaps due to an internal moral aversion that had been growing throughout the entire Jewish world in prior centuries, even in Talmudic times when, and in places where, polygamy was also still widely permitted, at least on the books.The main difference between Jewish communities in Christian versus Islamic lands seems to have been the objective versus subjective nature of the disapproval of polygamy, manifested in whether or not there was a choice for the first wife to consent

---

[1174] Two such documents were found in the Cairo Geniza. *See* GOITEIN, A MEDITERRANEAN SOCIETY, *supra* note 89, at 143-44. A similar contract is referenced in a responsum by the Sephardic authority Rabbi David Ben Solomon Ibn Abi Zimra (1479-1573). In that case, in addition to signing the document the husband took an oath to the effect that he would not take a second wife at the time of the signing of the ketubah. *See* SHEILOT U'TESHUVOT, RADBAZ HASHALEM 221 (1967).

[1175] GOITEIN, A MEDITERRANEAN SOCIETY, *supra* note 89, at 206, *cited in* FRISCH, HARAY ATEN, *supra* note 808, at 144.

[1176] *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at87-88.

to the husband taking a second wife in communities in which the ban was not accepted.[1177]

It is interesting to note that despite the fact that polygamy was more accepted generally in Islamic lands, this did not necessarily make for a more pleasant or comfortable polygamous household. A document written by a young son of a polygamous Jewish man who had immigrated from Spain to Egypt talks about how happy he was when his half-siblings (the children of the second-wife, his own mother's co-wife) died yong, and in it he also prays that the second-wife herself should die as soon as possible.[1178] The Rashba in one responsa notes that although people do have second wives, he has never heard of a single family in which such a marriage was successful.[1179] A generation later, interlocutors writing questions to the Rosh described polygamous families as "filled with arguments, resentment, and divorce,"[1180]and a

[1177] Havlin and Assis do present evidence of several cases of bigamy amongst the Sephatdim even in Christian Spain, despite its official illegality. They note that the cases tend to be from wealthy upper class families, because in addition to the expensive practice of polygamy itself, one first had to pay for permission from the crown. *See* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at84-87 (quoting Havlin and Assis).

[1178] CAIRO GENIZAH, *quoted in* GROSSMAN, PIOUS AND REBELLIOUS, *supra* note 1040, at89. The boy also hinted at the fact that the second wife taunted his mother, and the egneral tone points to an atmosphere of intense animosity and tension. The harsh picture of biblical polygamy, in the homes of the patriarchs, and of Elkanah and David, returns here in full force. *Id.*

[1179] *Id.* at 85, 90.

[1180] *Id.* at 90.

generation after that the Rivash noted that, "there is no one who brings dispute into his home like one who takes another wife into his home."[1181]

C. Revisiting the Concubine

At this point, we should take a step back and revisit the issue of concubinage in the Jewish world. Going back a few generations, the Talmud made a concerted effort to regulate the concubine; she was seen as possessing an intermediate status that did not have all the rights of a wife but was not to be considered like a prostitute.[1182] Still, already in Talmudic times, the manner of discussion as well as the divergence of opinions and traditions indicates that concubinage was no longer in practice.[1183] Maimonides protested vigorously against concubinage, and sought to eliminate it by claiming that it was a right limited to the kings of Israel, not the common man.[1184] While some authorities disagreed but prohibited it anyways[1185] other authorities permitted it,[1186] some commenting that it was legal but at the same time warning against the moral evils involved.[1187] There is little evidence of any actual Jewish

---

[1181] *Id.*

[1182] In the Babylonian tradition she was seen as having neither *kiddushin* (official marriage status) nor a ketubah; *see* BABYLONIAN TALMUD, *Sanhedrin* 21a. In the Jerusalem tradition she was of slightly higher status, possessing a ketubah but without *kiddushin*. See JERUSALEM TALMUD, *Ketubot* 5:2, 29b.

[1183] *See* Lowy, *The Extent of Jewish Polygamy*, *supra* note 919, at 117. He also quoted the Midrashic story of the king furtively visiting his concubine to make the point that it was considered shameful to have such an arrangement. *Id.*

[1184] MISHNEH TORAH, HILCHOT MELACHIM 4:4.

[1185] *See* TUR & SHULHAN ARUKH, EVEN HAEZER, 26:1.

[1186] Raavad, Rashba, Meiri; *see* Jacob, *supra* note 1134, at 67.

[1187] RESPONSA OF RASHBA 284; *Genesis* 25:6, *cited in* Jacob, *supra* note 1134, at 67.

concubinage in the Middle ages,[1188] and the understanding was that even the rabbinic authorities who permitted it did not consider it ideal.[1189] Eventually it came to be universally prohibited, and today this is thought of as connected to if not part of the original ban.[1190] Whatever exactly spurred it, what we see in the concubine's slow disappearance and the steady erasure of the practice entirely is just another small step on the march toward companionate monogamy in the Jewish marriage tradition.[1191]

D. The Story Behind the Story

A careful reading of the Shulchan Aruch finds that even if it was only in the background of the discussions when the ban against polygamy was being contemplated, the real reason why the ban against has stayed and stuck on, first amongst the Ashkenazim and then over the centuries across all of Jewry, so that by the year 2013 anything but monogamy in Judaism is unheard of, is simply because anything but monogamy does not produce the kind of loving, intimate companionate marriage that the Rabbis wanted to promote in order to inspire marital happiness, social growth,

---

[1188] Anson Rainey et al., *Concubine*, 5 ENCYCLOPAEDIA JUDAICA 133-136 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

[1189] Jacob, *supra* note 1134, at 67.

[1190] *See* RESPONSA RADBAZ 4:22, 7:33 ("At the present time a woman is permitted to no man except through kiddushin, huppah, sheva berakhot, and ketubah. This applies even more in the case of a married man . . . both for the protection of his wife and because his taking a concubine – since he is aware that he must not take an additional wife – can only be for the purpose of prostituting, and this is forbidden in the opinion of all the posekim"). RESPONSA OF RASHBA 4:314; OTZER HAPOSKIM, EVEN HAEZER 1 n.4; 26, n.5, *quoted in* Rainey.

[1191] Some assume that Maimonides opinion and rejection of the practice might have been influenced by the fact that in day the Sunni Muslims prohibited the practice of mut'ah, or temporary marriage. In this view, his opinion, like perhaps that of Rabbeinu Gershom, was also one affected by and effecting public policy.

child development, and economic enhancement.[1192] This development can be seen in the conversational subtext between the author of the Shulchan Aruch, Rabbi Joseph Karo, a Sephardic Jew living at a time before the ban became really normative in Sephardic lands, and the commentary of Rabbi Moshe Isserles, of Ashkenazic descent and leadership.

The Laws of Marriage open up with the following discussion; the Shulchaun Aruch writes: "Every man is obligated to marry a woman in order to reproduce . . . ."[1193] To which the Rema responds with an exposition on the virtues of the marital relationship:

"Anyone who is without a wife lives without blessing, and without Torah, and is not called a person. Once one marries a woman, all of one's sins are forgiven, as the verse states, "one who finds a wife finds goodness, and obtains the favor of God."[1194]

The same subtext plays out just two paragraphs later; Rabbi Karo describes how the court will force someone who has waited past the age of twenty to get married,[1195] and Rabbi Isserles writes that this is not our custom anymore. Rather even if one doesn't get married at an age when they should, because they have not found the right person, or even if they found someone they want to marry, but the women is sterile or

---

[1192] *See* MARRIAGE, SEX AND FAMILY IN JUDAISM 103 (Michael J. Broyde & Michael Ausubel eds., 2005) [hereinafter MARRIAGE, SEX AND FAMILY IN JUDAISM].
[1193] SHULCHAN ARUCH, EVEN HAEZER 1:1.
[1194] Rema to Shulhan Arukh Even HaEzer 1 (quoting *Psalms* 18:22).
[1195] SHULCHAN ARUCH, EVEN HAEZER 1:3.

too old to have children, despite the fact that traditional Jewish law would compel the court the force him to marry someone capable of reproduction so that he could fulfill the Divine command to be fruitful and multiple, the custom is not to do so. [1196]

Having defended the policy option of companionate marriage, based on love and bringing blessing, as opposed to the more functional marriage Rabbi Karo describes, based on law and bringing kids, the attempt to codify the monogamous custom is made once again in the discussion of polygamy. The Shulchan Aruch states that "[a] man may marry many women, so long as he can support them all . . . . Rabbi Gershom decreed that one may only marry one wife at a time . . . but the decree was not accepted in all lands."[1197] To this, Rabbi Isserles adds: "Only in a place where you know that it was not accepted does it not apply. But ordinarily, it applies everywhere . . . ."[1198] Notwithstanding the possibility of polygamy as an option in Jewish law, the Jewish tradition of Jewish life settled on monogamy as the only option that could really bring those blessings that Rabbi Isserles described, going so far as to enact strong decrees with weak foundations against even Biblical precepts to enforce this new ideal.[1199]

[1196] Rema to Shulhan Arukh Even HaEzer 1.
[1197] EVEN HAEZER 1:9-10.
[1198] Rema to Shulhan Arukh Even HaEzer 1.
[1199] *See* MARRIAGE, SEX AND FAMILY IN JUDAISM, *supra* note 1191, at 105.

Chapter 7: Conclusion and Summary of Findings

There really is nothing new under the sun.[1200] Whosoever thinks that today's society has a monopoly on the questions surrounding the complex family structure and marital definition has never studied the Jews of antiquity.

Jewish law, from the perspective of a Jewish law practitioner, is a sometimes-shifting scale that allows for adaptive modality in changing circumstances. Values are held in dialectic tension, and there is always enough leeway and flexibility to provide an answer for literally every situation on this earth.[1201] Why was polygamy allowed? Because in some situations having it available as a tool or as an option was useful, whether to increase the number of viable children being born, or to feed the needy, or for political stability, or for any other of a number of conceivable reasons.

At some point though, the reality began to change, and society moved away from this model of male-centric marriage.

For a while, due to circumstances both internal and external to the Jewish community at large, polygamy remained legal on the books if not in practice. As time went on, however, more and more factors came to bear on the question of polygamy, most of them centering around the quite compatible desires to both fit in with European

---

[1200] *Ecclesiastes* 1:9.

[1201] *See Mishna Avot* 5:22 ("*Ben Bag Bag* used to say, 'Turn it over, and turn it over, for everything is in it . . .'").

society for better or for worse, and to create a more equitable and stable Jewish family life, whether by cutting off the possibility and stemming the flow of unilateral divorces by men, or by making sure than angry or even just uninterested husbands could not simply marry other women and abandon their original families, or in general by making sure that people chose their partners for the right reasons. There was a feeling—stemming from the Bayblonian tradition and demonstrated in the capstone commentary of Rabbi Moshe Isserles—that only monogamy could really bring the kind of close companionship that a marriage really needs to be called blessed.

Change this big was slow to come however; especially as time passed, and the as rabbis of the Talmud became legends, the idea of drastically rethinking anything in family law must have seemed more and more daunting and unlikely. To do so would require an authority figure with tremendously broad shoulders.

A man of such stature arose in the persona of Rabbeinu Gershom 'the Light of the Exile,' and whether it was actually him, or whether he was just the authority figure on which the ban was eventually hung, the medieval decree against polygamy came to be known forever by his name.

Once the tipping point was reached, polygamy never really made a comeback. In contrast to the rabbis of earlier eras, the rabbis of the Middle Ages no longer felt the need to even nominally cling to their heritage of polygamy, at least in Ashkenazic lands.

Perhaps once the Jews were no longer living under the rule of the Roman Empire, the fear that national and cultural Jewish identity would be overtaken subsided.[1202] The Church, with its divergent and anti-polygamous exegesis, was no longer recognizable as another branch of Judaism, and sectarian influence in general had also largely died out. Eventually, the ban of Rabbeinu Gershom made legal what was for most people already likely the practical reality of the day, except in exceptional cases such as levirate unions and barren wives. Despite the fact that certain details on the edges needed to be worked on, thought about, and responses refined, questions about how it played out on the fringes should not overshadow the overwhelming success of the enactment.[1203] For the most part, and now forever, polygamy is gone.

Interestingly, despite the fact that polygamy was very consciously removed (one step at a time) from the realm of practice, it was never removed from the theoretical discussions in the study hall, nor was its practice ever retroactively whitewashed or hidden like some shameful thing in the tradition, even after it was banned. Ashkenazic Jewish polygamy was simply mounted on its rightful place as a museum piece in the hall of Jewish history, and life carried on.

A Midrashic teaching, dated roughly from around Rabbeinu Gershom's time, shows how comfortable Jews were talking about their polygamous ancestral heritage

[1202] FRISCH, HARAY ATEN, *supra* note 808, at 148.

[1203] Especially because, as in all legal material and responsa, it is the fringe cases that tend to get discussed.

(perhaps this openness is a vestige of the fierce sectarian pride which led them to keep it so alive for so long in the academy, or, alternatively, maybe it is a nod to the fact that by the time it finally happened the ban was really just declaratory; it just goes to show that polygamy was not a hot button issue and so was easy to talk about and reference without causing any stir). The Midrash here has God himself asserting that, at least historically speaking, polygamy was a good and viable option for Jewish marriage. Exodus Rabbah 1:14, speaking about Pharaoh's decree to kill all the male Hebrew infants, stated that[1204]

[i]f it is a son, you will kill him . . . . The Holy One Blessed be He said, "Whoever gave you [Pharaoh] this counsel is a fool. You should have killed the females. If there are no females, from where will the men marry wives? A woman cannot marry two men, but one man can take ten wives, or a hundred." So, "the princes of Zoan are idiots, the wisest of Pharaoh's counselors is a poor counsel,"[1205] because they gave him this counsel.

In Exodus Rabbah then, polygamy is comfortably right back where it had been for the last several centuries in practice, and where it has been ever since; occupying a prominent place on the shelf of history in the study hall/ivory tower, important both for the values it once held and in reference to the values that led to its decline.

[1204] *Exodus* 1:16.
[1205] *Isaiah* 19:11.

Unlike the arguments in contemporary debates either lauding[1206] or castigating polygamy[1207] the Jewish tradition over time has refused to categorize polygamy as inherently either evil or good, but has instead recognized the institution as another tool that has a time and a place, the abuse of which is wrong and the support of which is sometimes a good idea. Over time, Jewish law developed a recognition that polygamy fundamentally changes the nature of the marital relationship and might not be a good idea unless exigent circumstances, such as war or famine, call for it. In most if not all of modern American society today, those mitigating factors are just not present.

Modern societies, such as in the United States of America, where the questions surrounding the next frontier of family law partially revolve around the issue of 'what is a family,' should take heed of the lessons of Judaism's struggle with polygamy: an advanced legal system has already thought through the complicated issues, tried it, and retreated. While there are plenty of people making prima facie good and novel-sounding arguments for the re-introduction or at least the formal licensing of polygamy in the modern world- in the United States, estimates are that somewhere between thirty thousand and a hundred thousand families are already currently living life in plural marriage[1208]- with everything ranging from calls for a re-established patriarchal center of

---

[1206] Duncan, *The Positive Effects of Legalizing Polygamy*, *supra* note 471, at 315.

[1207] Strassberg, *Distinctions*, *supra* note 470, at 1504-06.

[1208] *See* Ward, *I Now Pronounce You Husband and Wives*, *supra* note 433, at 132 n.14 (citing sources estimating thirty thousand to one hundred thousand polygamists among fundamentalist Mormons alone).

the family[1209] to feminist ideas of a more manageable work-life balance,[1210] anyone attempting to draw conclusions about the advisability of legalizing polygamy should be wary of this simple truth- just because something can be made legal in theory does not mean that it is a good idea in practice. Judaism in particular as a system of thought has what to tell the world about the social impracticality of polygamy despite the legal availability.

In particular, Judaism's growing concern about the about the practical unworkability of polygamy with a companionate form of marriage presents an example of the way in which religious morality can serve as a progressive force in reshaping legal and social institutions to improve conditions both for women and the family over time.[1211] This same potential is reflected in other advances in family law promoted by the Jewish legal system, including divorce, the forbidding of marital rape, the idea that women could own property, and mandatory prenuptial agreements specifying a large alimony in the event of divorce. Yet, despite the historical attentiveness of Jewish law

---

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 . . . .").

[1209] Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, *supra* note 471, at 166.

[1210] *See* MCCLAIN, THE PLACE OF FAMILIES, *supra* note 186.

[1211] *See* BABYLONIAN TALMUD, *Ketchubot* 47a (giving married women additional rights).

to women's interests,[1212] modern scholars and policy advocates have failed to recognize the ways in which religious discourse has informed and can continue to shape contemporary debates over women's human rights. While it is true that religious thought cannot currently be considered at the forefront of the academic and advocacy/policy discussions of women's rights, without the tremendous groundwork that religion laid, it is very possible that these debates would not exist at all. This article would argue then that we should approach perceived conflicts between religious practice and women's human rights with a sense of humility, and nuanced, contextual understanding, recognizing the potentially progressive nature of religious morality instead of immediately labeling particular practices discriminatory or chauvinistic. In the conversations between law, religion, and culture an issue like polygamy can demonstrate how religious doctrine may well serve as a guide for how to balance and to protect the practical rights and wellbeing of members of society, taking into account what people in a particular culture, time, place, and setting might both want and need.

Table of Statutes

A.L.I. Principles, § 7.04(1).

Ala. Code § 13A-13-1 (1994) 91

Ala. Code § 13A-13-2 (2003) 103

Alaska Const., art. I, § 25 62

Alaska Stat. § 11.51.140 (1983) 91

Alaska Stat. § 34.77.030 (2007) 162

Ariz. Const. art. XX, par. 2 151

Ariz. Rev. Stat. Ann. § 13-1408 (2003) 91, 103

Ariz. Rev. Stat. Ann. § 13-3606 (2001) 91

Ariz. Rev. Stat. Ann. §§ 25-901 to -906 (West 2000 & Supp. 2002) 78

Ark. Code Ann. § 5-26-201 (2000) 91

Ark. Code Ann. §§ 9-11-801 to -811 (2002 & Supp. 2003) 78

8 C.F.R. § 204.2(a)(1)(i)(B) 177

42 C.F.R. § 411.12 ..... 43, 44

Cal. Fam. Code § 300(a) 151

Cal. Fam. Code § 297(a) 152

Cal. Fam. Code § 2201(a) 152

CAL. PENAL CODE § 281 (West 1999) 91

COLO. REV. STAT. ANN. § 18-6-201 (West 2003) 104

COLO. REV. STAT. § 18-6-501 (2003) 91, 103

CONN. GEN. STAT. ANN. § 53a-190 (West 2001) 91

Criminal Code of Canada, B.C.S.C. § 293 (2011).

D.C. CODE § 22-201 (2001) 91, 103

D.C. CODE § 22-501 (2001) 91

D.C. CODE § 22-1602 (2001) 90

Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1997); 28 U.S.C. § 1738C (1997)) 18, 78

DEL. CODE ANN. tit. 11, § 1001 (2001) 91

FLA. STAT. ANN. § 798.01 (West 2000) 91, 103

FLA. STAT. ANN. § 826.01 (West 2000) 91

29 USC § 2612(a)(1) (2000) 48

GA. CODE ANN. § 16-6-19 (1990) 91, 103

GA. CODE ANN. § 16-6-20 (1990) 91, 104

HAWAII CONST., art. I, § 23 62

H.R.J. Res. 93, 107th Cong., 2d Sess. (2002) 79

INA § 216 177

IDAHO CODE ANN. § 18-1101 (1997) 91

IDAHO CODE ANN. § 18-6601 (2003) 91

IDAHO CODE ANN. § 18-6603 (2003) 90, 103

IDAHO CONST. art. I, § 4 151

720 ILL. COMP. STAT. ANN. 5/11-7(a) (West 2002) 91, 103

720 ILL. COMP. STAT. 5/11-8 (2002) 90

720 ILL. COMP. STAT. ANN. 5/11-12 (West 2002) 91

IND. CODE ANN. § 35-46-1-2 (West 1998) 91

IOWA CODE ANN. § 726.1 (West 2003) 91

KAN. STAT. ANN. § 21-3507(1) (2002) 91, 103

KAN. STAT. ANN. § 21-3601 (1995) 91

KY. REV. STAT. ANN. § 530.010 (West 1999) 91

LA. REV. STAT. ANN. § 9:272(A) (West 2000) 79

LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000 & Supp. 2002) 78

LA. REV. STAT. ANN. § 9:293 (2007) 162

LA. REV. STAT. ANN. § 14:76 (1986) 91

MD. CODE ANN., crim. § 10-501 (2002) 91, 103

MD. CODE ANN., crim. § 10-502 (West 2002) 91

MASS. GEN. LAWS ANN. ch. 207, § 4 (West 1998) 91

MASS. GEN. LAWS ANN. ch. 272, § 14 (West 2000) 91, 103

MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2000) 90

ME. REV. STAT. ANN. tit 17-A, § 551 (1983) 91

MICH. COMP. LAWS ANN. § 551.5 (West 1998) 91

MICH. COMP. LAWS ANN. § 750.30 (West 2003) 91, 103

MINN. STAT. ANN. § 609.36 (West 2004) 91, 103

MINN. STAT. §§ 513.075; 513.076 41

MINN. STAT. ANN. § 609.355 (West 2003) 91

MINN. STAT. ANN. § 609.34 (West 2003) 90

MISS. CODE ANN. § 97-29-1 (1999) 91, 103

MISS. CODE ANN. § 97-29-1 (2003) 90

MISS. CODE ANN. § 97-29-13 (1999) 91

MO. ANN. STAT. § 568.010 (West 2000) 91

MONT. CODE ANN. § 45-5-611 (2003) 91

NEB. REV. STAT. § 28-701 (1995) 91

NEV. REV. STAT. ANN. § 201.160 (West 2002) 91

N.H. REV. STAT. ANN. § 639:1 (1996) 91, 103

N.J. STAT. ANN. § 2C:24-1 (West 1995) 91

N.M. CONST. art. XXI, § 1 151

N.M. STAT. ANN. § 30-10-1 (West 1978) 91

N.Y. Penal Law § 255.15 (McKinney 2000) 91, 103

N.C. Gen. Stat. § 14-183 (2000) 91

N.C. Gen. Stat. § 14-184 (2003) 90, 91, 103

N.D. Cent. Code § 12.1-20-13 (1997) 91

N.D. Cent. Code § 12.1-20-08 (2003) 90-91

N.D. Cent. Code § 12.1-20-09 (1997) 91, 103

N.H. Rev. Stat. Ann. § 645:3 (1996) 91, 103

N.Y. Dom. Rel. Law § 170 (McKinney 1999) 51

N.Y. Penal Law § 2.55.17 (McKinney 2004) 91, 103

Ohio Rev. Code Ann. § 2919.01 (West 1997) 91

Okla. Const. art. I, § 2 151

Okla. Stat. Ann. tit. 21, § 871 (West 2002) 91, 103

Okla. Stat. Ann. tit. 21, § 881 (West 2002) 91

Or. Rev. Stat. § 163.515 (2001) 91

18 Pa. Cons. Stat. Ann. § 4301 (West 1983) 91

Pub. L. No. 109–365; 20 C.F.R. § 641.841, 51 44

R.I. Gen. Laws § 11-6-1 (2002) 91, 104

R.I. Gen. Laws § 11-6-2 (2002) 91, 103

Rev. Unif. Partnership Act § 202, 6 U.L.A. 27 (1997) 154

S.C. CODE ANN. § 16-15-60 (2002) 91, 103

S.C. CODE ANN. § 16-15-10 (2003) 91

S.D. CODIFIED LAWS § 22-22-15 (2003) 91

TENN. CODE ANN. § 39-15-301 (2003) 91

TEX. BUS. & COM. CODE § 26.01 (b)(3) 41

TEX. PENAL CODE ANN. § 25.01 (West 2003) 91, 104

The Marriage Bill, No. 77 (2012), KENYA GAZETTE SUPPLEMENT NO. 179, available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2012/TheMarriageBill2012.PDF 8

U.C.C. § 2-305 (2005) § 2-308(a) 157

U.S. CONST. amend. I. 70

U.S. CONST. art. 4, § 3, cl. 1 151

1 U.S.C. § 7 (2000) 18, 79

42 USC § 402 (2000) 48

42 USC §§ 601-619 (2000) 48

42 USC § 3056 et seq. 44

UNIF. PREMARITAL AGREEMENT ACT § 1 (1983) 159

UNIF. PREMARITAL AGREEMENT ACT § 1-11, 9C U.L.A. 39 (1983) 159

UNIF. PREMARITAL AGREEMENT ACT § 2 (1983) 154

UNIF. PREMARITAL AGREEMENT ACT § 6 ..... 159, 161

UNIF. PREMARITAL AGREEMENT ACT § 7.02 161

15 UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2007) 76, 176

UTAH CODE ANN. § 76-7-101 (West 1999) 91, 104, 131

UTAH CODE ANN. § 76-7-103(1) (West 1999) 91, 103

UTAH CODE ANN. § 76-7-104 (2002) 91

UTAH CONST. art. III, § 1 151

2000 VT. ACTS & RESOLVES 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2001)) 61

VT. CONST. ch. I, art. 7 56

VT. R. EVID. §504 (2003) 59

VT. STAT. ANN. tit. 3, § 631 (1995) 59

VT. STAT. ANN. tit. 8, § 3811 (2001) 59

VT. STAT. ANN tit. 12, § 5431 59

VT. STAT. ANN. tit. 13, § 206 (1998) 91

VT. STAT. ANN. tit. 14, § 1492 (2002) 59, 168

VT. STAT. ANN. tit. 15, § 1201(4) (2002) 61

VT. STAT. ANN. tit. 15, § 1204(e) 62

VT. STAT. ANN. tit. 18 § 1852 (2002) 59, 169

VT. STAT. ANN. tit. 21, § 632 (1987) 59

VT. STAT. ANN. tit. 27, §§ 105-06, 141-42 (1998) 59

VA. CODE ANN. § 18.2-344 (2003) 91

VA. CODE ANN. § 18.2-18.365 (1996) 91, 103

VA. CODE ANN. § 20-38.1 (2001) 91

WASH. REV. CODE ANN. § 9A.64.010 (West 2000) 91

W. VA. CODE ANN. § 61-8-1 (West 2000) 91

W. VA. CODE ANN. § 61-8-3 (West 2000) 91, 103

WIS. STAT. ANN. § 944.05 (West 1996) 91

WYO. STAT. ANN. § 6-4-401 (West 2003) 91

TABLE OF CASES

Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, 8 (Haw. Cir. Ct. Dec. 3, 1996)72, 73

Baker v. Nelson, 409 U.S. 810 (1972) 150

Bark v. I.N.S., 511 F.2d 1200, 1202 (9th Cir. 1975) 178

Barlow v. Blackburn, 798 P.2d 1360 (Ariz. Ct. App. 1990) 151

Bashaway v. Cheney Bros., Inc., 987 So. 2d 93 (Fla. Dist. Ct. App. 1st Dist. 2008) 31

Boluk v. Holder, 642 F.3d 297, 303-04 (2d Cir. 2011), 178

Bowers v. Hardwick, 478 U.S. 186, 186, 205 (1986) 32, 33, 36

Boynton Beach v. Taylor, 813 So. 2d 1039 (Fla. 4th DCA 2002) 31

Braschi v. Stahl Ass'n, 543 N.E.2d 49 (N.Y. 1989) 30

Brause v. Bureau of Vital Statistics, No. 3AN–95–6562 CI, 1998 WL 88743 (Alaska Super. Ct., Feb. 27, 1998) 62

Brooks v. Brooks, 733 P.2d 1044, 1049-51 (Alaska 1987).....159, 180

Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954), supplemented sub nom., Brown v. Bd. of Educ., 349 U.S. 294 (1955) 64

C. v. G. & E., 225 N.Y.L.J., No. 9, at 29 (col. 4) (N.Y. Cnty. Sup. Ct. Jan 12, 2001).125

Carter v. Brodrick, 644 P.2d 850, 853–56 (Alaska 1983).....124

Cho v. Gonzales, 404 F.3d 96, 100, 103 (1st Cir. 2005)..... 178

Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) 34

Davis v. Beason, 133 U.S. 333 (1890) 88, 97, 118

DeLorean v. DeLorean, 511 A.2d 1257, 1259 (N.J. 1986) 159

Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) 30

Dunphy v. Gregor, 642 A.2d 372, 378 (1994) 169

Fairclaw v. Forrest, 130 F.2d 829 (D.C. Cir. 1942) 31

Farrey v. Sanderfoot, 500 U.S. 291, 303 (1991) 31

Ferry v. Ferry, 586 S.W.2d 782, 783 (Mo. Ct. App. 1979) 159

Freck v. I.R.S., 810 F. Supp. 597 (D. Pa. 1992), vacated, 37 F.3d 986 (3d Cir. 1994) .175

Friedman v Friedman, 24 Cal. Rptr. 2d 892, 901 (Cal Ct. App. 1993) 41

Gant v. Gant, 329 S.E.2d 106, 109 & n.1 (W. Va. 1985) 159

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) 7, 11, 20, 58, 67, 72, 76, 92

Gorman v. McMahon, 792 So. 2d 307 (Miss. Ct. App. 2001) 31

Griswold v. Connecticut, 381 U.S. 479, 486 (1965) 29, 34, 67, 68

Halpern v. Canada (A.G.), [2003] 225 D.L.R.4th 529, 566 (Can.) 58

In re Black, 283 P.2d 887, 912-13 (1955) 131

In re Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) 168

In re F., 406 A.2d 986, 989 (N.J. Super. Ct. Ch. Div. 1979) 126

In re Marriage Cases, S14799, available at: http://www.lc.org/media/9980/attachments/motion_stay_casct052908.pdf..... 94

In re Marriage of Boren, 475 N.E.2d 690, 694 (Ind. 1985) 180

In re McDevitt, 162 N.Y.S. 1032, 1033 (Sup. Ct. 1917) 126

In re Soriano, 19 I. & N. Dec. 764, 766 (B.I.A. 1988) 177

In re Succession of Jones, 6 So. 3d 331..... 93

In re Texas Dept. of Fam. & Protective Serv., 255 S.W.3d 613 (Tex. 2008) 131

Kerrigan v. Comm'r of Pub. Health, S.C. 17716 (Conn. 2006) 72

LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000) 125

Ladue v Horn, 720 S.W.2d 745, 747 (Mo. App. 1986) 30

Lewis v. Harris, 908 A.2d 196, 226-27 (N.J. 2006) 66, 67

Lewis v. Lewis, 748 P.2d 1362, 1364 (Hawaii 1988) 160

Lizalek v. Comm'r, 97 T.C.M. (CCH) 1639 (2009) (T.C. Memo 2009-122), available at 2009 WL 1530160.....175

Loving v. Virginia, 388 U.S. 1, 12 (1967) 34, 65, 150

Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003) 169

Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993) 88, 118

Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).....74, 75

Matter of Adoption of W.A.T., 808 P.2d 1083 (Utah 1991) 131

Maynard v. Hill, 125 U.S. at 210 157

McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) 30

Meister v. Moore, 96 U.S. 76 (1877) 75

Meyer v. Nebraska, 262 U.S. 390 (1923) 34

Moore v City of East Cleveland, 431 US 494, 496 (1977) 30, 130

Morales v. Davis Bros. Const. Co., Inc., 706 So. 2d 1048 (La. Ct. App. 4th Cir. 1998) 31

Morone v Morone, 429 N.E.2d 592 (N.Y. 1992) 41

Motley v. Whitemore, 94 S.E.2d 466, 468 (1956) 31

Murphy v. Ramsey, 114 U.S. 15 (1885) 88

Nakamoto v. Ashcroft, 363 F.3d 874, 882 (9th Cir. 2004) 177, 178

Newman v. Newman, 653 P.2d 728, 732 (Colo. 1982) 180

North Carolina Baptist Hospitals v Harris, 354 S.E.2d 471 (N.C. 1987) 38

Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) 7

Osborne v. Osborne, 428 N.E.2d 810, 813 (1981) 159, 180

Perez v. Lippold, 198 P.2d 17, 29 (Cal. 1948) 63

Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) 34

Popham v. Duncan (In re Duncan's Estate), 285 757, 757-58 (Colo. 1930) 51

Posik v Layton, 695 So. 2d 759 (Fla. 5th DCA App 1997) 41

Posner v. Posner, 233 So. 2d 381, 385 (Fla. 1970) 159

Potter v. Murray City, 760 F.2d 1065, 1069-70 (10th Cir. 1985) 88, 92, 98

Reynolds v. United States, 98 U.S. 145 (1878).....1, 88, 89, 116, 117, 118

Rodgers v. Williamson, 489 S.W.2d 558, 560 (Tex. 1973).....126

Roe v. Wade, 410 U.S. 113, 153 (1973) 34

Romer v. Evans, 517 U.S. 620, 634 (1996) 1, 88, 151

Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987).....131

Scherer v. Scherer, 292 S.E.2d 662, 665 (Ga. 1982).....180

Scott v. Minneapolis Police Relief Ass'n, 615 N.W.2d 66, 75-76 (Minn. 2000) 176

Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969)..... 34

Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990) 159

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) 34, 56, 67, 98

Spencer v. Franks, 195 A. 306, 308 (Md. 1937).....126

Stanley v. Illinois, 405 U.S. 645 (1972) 126

State v. Holm, 137 P.3d 726 (Utah 2006) 176

State v. Green, 99 P.3d 820 (Utah 2004) 176

State v. Oakley, 629 N.W.2d 200, 201 (Wis. 2001) 98, 99

Surganova v. Holder, 612 F.3d 901, 905 (7th Cir. 2010) 177, 178

Tapley v Tapley, 449 A.2d 1218 (N.H. 1982)..... 41

Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) 125

Troxel v. Granville, 530 U.S. 57, 66 (2000) 34, 124

United States v. Chowdhury, 169 F.3d 402, 405-07 (6th Cir. 1999) 68, 177

United States v. Dedman, 527 F.3d 577, 591 (6th Cir. 2008) 175, 176

United States v. Islam, 418 F.3d 1125, 1127 (10th Cir. 2005) 177

United States v. Tagalicud, 84 F.3d 1180, 1185 (9th Cir. 1996) 178

U. S. v. Jones, 542 F.2d 661 (6th Cir. 1976) 31

United States v. Orellana-Blanco, 294 F.3d 1143, 1145 (9th Cir. 2002) 177

Volid v. Volid, 286 N.E.2d 42, 43-44 (1972) 160

Whorton v. Dillingham, 248 Cal. Rptr. 405, 407 (Ct. App. 1988) 160

Williams v. North Carolina, 317 U.S. 287, 303 (1942) 11

Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) 88

Zablocki v. Redhail, 434 U.S. 374, 384 (1978) 36, 67, 68

Bibliography

1 Medicare and Medicaid Claims and Procedures § 2:56 (4th ed. 2001).

3 Advising the Elderly Client § 27:25.

6 Encyclopedia of Religion (Lindsay Jones ed., 2005).

Abdelkader, Engy, *American Muslim Sister-Wives? Polygamy in the American Muslim Community*, Huffington Post Religion Blog (October 17, 2011, 10:07 AM), http://www.huffingtonpost.com/engy-abdelkader/american-muslim-sisterwiv_b_1001163.html.

Abrahams, I., Jewish Life in the Middle Ages (1932).

Abrams, Kerry, *Marriage Fraud*, 100 Cal. L. Rev. 1 (2012).

Abuse Not Unique to Polygamy, B.C. Court Told, The Canadian Press, December 15, 2010, *available at* http://www.cbc.ca/news/canada/british-columbia/story/2010/12/15/bc-polygamy-hearing.html.

Ahrons, Constance, We're Still Family: What Grown Children Have to Say About Their Parents' Divorce (2004).

Albrecht, Chris Albrecht & Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. Fam. Issues 86 (2004).

Alexandre, Michèle, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 Hastings Women's L.J. 3 (2007).

Alexandre, Michele, *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 (2007).

ALTMAN, IRWIN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY (1996).

AMATO, PAUL R. & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY (1997).

Amato, Paul R. & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191 (2005).

Ambrus, Attila, Erica Field & Maximo Torero, *Muslim Family Law, Prenuptial Agreements, and the Emergence of Dowry in Bangladesh*, 125.3 Q. J. ECON. 1349 (2010).

AMERICAN BAR ASSOCIATION, YOUR LEGAL GUIDE TO MARRIAGE AND OTHER RELATIONSHIPS (1989).

AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

AMERICAN PSYCHIATRIC ASSOCIATION COMMITTEE ON GAY, LESBIAN AND BISEXUAL ISSUES POSITION STATEMENTS OF THE AMERICAN PSYCHIATRIC ASSOCIATION: ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES, DOC. REF. NO. 200214 (2002), *available at* http://gbge.aclu.org/sites/default/files/images/stories/oppo12.pdf.

ANAPOL, DEBORAH, 5 POLYAMORY, THE NEW LOVE WITHOUT LIMITS (1997).

Anapol, Deborah, *The Upside of Polyamory*, PSYCH. TODAY, December 22, 2010, *available at* http://www.psychologytoday.com/blog/love-without-limits/201012/the-upside-polyamory.

Andersen, Kirsten, *Polyamory; The Next Civil Rights Movement?*, LIFE SITE NEWS (October 29, 2012, 4:50 PM), http://www.lifesitenews.com/news/polyamory-the-next-civil-rights-movement.

Anderson, Edward R. & Shannon M. Greene, *Beyond Divorce: Research on Children in Repartnered and Remarried Families*, 51 FAM. CT. REV. 119 (2013).

Anderson, Scott, *The Polygamists: An Exclusive Look Inside the FLDS*, NAT'L GEOGRAPHIC, Feb. 2010, at 50.

Anderson, Scott A., *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 748 (2002).

Angier, Natalie, *Mating for Life? It's Not for the Birds of the Bees*, N.Y. TIMES, Aug. 1, 1990, *available at* http://www.nytimes.com/1990/08/21/science/mating-for-life-it-s-not-for-the-birds-of-the-bees.html?pagewanted=all&src=pm.

Annas, George J., *The Health Care Proxy and the Living Will*, 324.17 NEW ENG. J. MED. 1210 (1991).

Appell, Annette R., *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995).

Appell, Annette Ruth, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73 (2010).

Appleton, Susan Frelich, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008).

ARAMAIC PAPYRI OF THE FIFTH CENTURY, B.C. (A. Cowley ed., 1967).

ARISTOTLE, POLITICA, *in* THE POLITICS OF ARISTOTLE (Ernest Barker trans. & ed., 1962).

ARSHAD, RAFFIA, ISLAMIC FAMILY LAW (2010).

Ashbee, Edward, *Polyamory, Social Conservatism and the Same-Sex Marriage Debate in the US*, 27.2 POLITICS 101 (2007).

Ashe, Marie, *Women's Wrongs, Religions' Rights: Women, Free Exercise, and Establishment in American Law*, 21 TEMP. POL. & CIV. RTS. L. REV. 163 (2011).

Atwood, Barbara Ann, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127 (1993).

Augustine, *A Treatise on the Grace of Christ, and on Original Sin*, *in* 5 A Select Library of Nicene and Post-Nicene Fathers of the Christian Church 213 (Philip Schaff ed., Peter Holmes et al. trans., reprinted ed. 1978) (A.D. 418).

Augustine, The City of God Against the Pagans bk. XV (R.W. Dyson trans. & ed., 1998).

Axinn, William G. & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 Demography 357 (1992).

Ayres, Ian & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L. J. 87 (1989).

Ayres, Ian & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan. L. Rev. 1591 (1999).

Badawi, Gamal A. , Polygamy in Islamic Law (1976).

Baham, Melinda E. et al., *Sibling Relationships in Blended Families*, *in* The International Handbook of Stepfamilies: Policy and Practice in Legal, Research, and Clinical Spheres 175 (2008).

Baker, Katharine K., *Biology for Feminists*, 75 Chi.-Kent L. Rev. 805 (2000).

Baker, Katharine K., *Bionormativity and the Construction of Parenthood*, 42 Ga. L. Rev. 649 (2008).

Baker, Katharine K., *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 Ohio St. L.J. 1523 (1998).

Baker, Lynn A. & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993).

Barash, David P. & Judith Eve Lipton, The Myth of Monogamy: Fidelity and Infidelity in Animals and People (2002).

Barash, David P., *Deflating the Myth of Monogamy*, The Chronicle of Higher Educ. (2001).

Barker, Meg & Darren Langdridge, Understanding Non-Monogamies (2010).

Barnes, Gill Gorell, *Stepfamilies*, *in* 4.1 Advances in Psychiatric Treatment 10 (1998).

Barnett, Randy E., *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821 (1992).

Barrett, Paul, American Islam (2007).

Bartlett, Katharine T., *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879 (1984).

Bartlett, Katharine T., *Saving the Family from the Reformers*, 31 U.C. Davis L. Rev. 809 (1998).

Basch, Norma, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982).

Battles, Jan, *Cork Opens Door to Gay Couples*, Sunday Times, Feb. 6, 2000.

Bayley, John, Marriage as It Is and As It Should Be (1857).

Becker, Gary S., Polygamy and Monogamy in Marriage Markets, in A Treatise on the Family (1991).

Beioley, Kate, *First Polygamous Civil Union Granted in Brazil*, The Arg. Indep. (August 29, 2012), *available at* http://www.argentinaindependent.com/currentaffairs/brazil-first-polygamous-civil-union-granted-in-brazil/.

Bell, Deborah H., *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115 (1997).

BELOVITCH, JEANNE, MAKING REMARRIAGE WORK (1987).
Belsky, Gary, *Living by the Rules*, MONEY, May 1, 1996.

Bennett, Jessica, *Only You. And You. And You*, NEWSWEEK, July 28, 2009, *available at* http:// www.thedailybeast.com/ newsweek/ 2009/ 07/ 28/ only-you-and-you-and-you.html.

BENNION, JANET, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM (2011).

Bennion, Janet, *The Many Faces of Polygamy: An Analysis of the Variability in Modern Mormon Fundamentalism in the Intermountain West*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES 173 (Cardell Jacobson & Laura Burto eds., 2011).

BENNION, JANET, WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGAMY (1998).

Bergman, Matthew P., *Status, Contract, and History: A Dialectical View*, 13 CARDOZO L. REV. 171 (1991).

Bernstein, Anita, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003).

Bernstein, Nina, *Could Your Marriage Pass the Test?*, CITY ROOM BLOG (June 11, 2010, 8:45 PM), http:// cityroom.blogs.nytimes.com/2010/06/11/marriage-test.

Bernstein, Nina, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES, March 23, 2007, *available at* http:// www.nytimes.com/ 2007/ 03/ 23/ nyregion/ 23polygamy.html? pagewanted = all.

BIALE, RACHEL, WOMEN AND JEWISH LAW THE ESSENTIAL TEXTS, THEIR HISTORY & THEIR RELEVANCE FOR TODAY (1984).

Bilge, Barbara & Gladis Kaufman, *Children of Divorce and One-Parent Families: Cross-Cultural Perspectives*, FAM. REL. 59 (1983).

BISHOP, JOEL, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION (1891).

Bishop, William, *Is He Married? Marriage as Information*, 34 U. Toronto L. J. 245 (1984).

Bix, Brian H., *Choice of Law and Marriage: A Proposal*, 36 Fam. L.Q. 255 (2002).

Bix, Brian H., *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 Duke J. Gender L. & Pol'y 231 (2001).

Blair-Stanek, Andrew, *Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints*, 24 Touro L. Rev. 31 (2008).

Boggs, Will, *Assisted Reproduction Rates Increasing Worldwide*, Reuter's Health, June 4, 2009, *available at* http://www.reuters.com/article/2009/06/04/us-assisted-reproduction-idUSTRE5536KG20090604.

Borenstein, Severin & Paul N. Courant, *How to Carve a Medical Degree: Human Capital Assets in Divorce Settlements*, Am. Econ. Rev. 992 (1989).

Borten, Laurence Drew, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L. Rev. 1089 (2002).

Bowman, Craig A. & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164 (1992).

Bowman, Cynthis Grant, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Or. L. Rev. 709 (1996).

Bradstreet, Anne, *To My Dear and Loving Husband*, *in* The Complete Works of Anne Bradstreet 180 (Joseph R. McElrath, Jr. & Allan P. Robb eds., 1981) (1678).

Braham, Daphne, *Tradition of Monogamous Marriage Traced in Polygamy Hearing*, Vancouver Sun, January 11, 2011, *available at* http://stoppolygamyincanada.wordpress.com/2011/01/11/tradition-of-monogamous-marriage-traced-in-polygamy-hearing-by-daphne-bramham/.

Braithwaite, Dawn et al., *Becoming a Family: Developmental Processes Represented in Blended Family Discourse*, 29.3 J. Applied Comm. Res. 221 (2001).

Brines, Julie & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, AM. SOC. REV. 333 (1999).

Brinig, Margaret F. & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403 (2004).

Brinig, Margaret F., *Domestic Partnership and Default Rules*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 269 (Robin Fretwell Wilson ed., 2006).

Bronner, Ethan, *Adultery, An Ancient Crime That Remains on Many Books*, N.Y. TIMES, November 14, 2012, *available at* http://www.nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html?_r=0.

Brown, Susan L. & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 675 (1996).

Brown, Susan L., *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004).

Brown, Susan L., *Relationship Quality Dynamics of Cohabiting Unions*, 24 J. FAM. ISSUES 583 (2003).

Brown, Susan L., *Union Transitions Among Cohabiters: The Significance of Relationship Assessment and Expectations*, 62 J. MARRIAGE & FAM. 833 (2000).

Browning, Frank, *Why Marry?*, *in* SAME-SEX MARRIAGE: PRO AND CON 133 (Andrew Sullivan ed., 1997).

Broyde, Michael J. & Mark Goldfeder, *Contemporary Jewish Religious Movements: Orthodox*, *in* THE OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW (Charlotte E. Barmash, Clare Rothschild, Jeffrey Stackert & John Witte eds., 2013).

Brunson, Samuel D., *Taxing Polygamy*, WASH. U. L. REV. (forthcoming).

Buckley, F. H. & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561 (2001).

Bumpass, Larry & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29 (2000).

Bumpass, Larry L. et al., The Role of Cohabitation in Declining Rates of Marriage, 53 J. MARRIAGE & FAM. 913 (1991).

Burke, Cormac, *Does Homosexuality Nullify a Marriage? Canon Law and Recent Developments in Psychology and Psychiatry*, *in* SAME-SEX ATTRACTION; A PARENTS' GUIDE (John F. Harvey & Gerald V. Bradley eds., 2003).

Burks, Kristine L., *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223 (1994).

Burnette, W. Brian, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 93 (1998).

BUSINESS ENCYCLOPEDIA DICTIONARY, http://www.economist.com/encyclopedia/Dictionary.cfm (last visited Jan. 19, 2004).

Cahn, Naomi, *Looking at Marriage*, 98 MICH. L. REV. 1766 (2000).

Cahn, Naomi, *Perfect Substitutes or the Real Things?*, 52 DUKE L. J. 1077 (2003).
Cahn, Naomi R., *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997).

Cain, Patricia A., *Imagine There's No Marriage*, 16 Q.L.R. 27 (1996).

CAIRNCROSS, JOHN, AFTER POLYGAMY WAS MADE A SIN (1974).

CALHOUN, CHESHIRE, MAKING UP EMOTIONAL PEOPLE: THE CASE OF ROMANTIC LOVE, IN THE PASSIONS OF LAW (Susan A. Bandes ed., 1999).

CALVIN, JOHN, INSTITUTES OF THE CHRISTIAN RELIGION (Henry Beveridge trans., 1989) (1536).

Campaign Against Polygamy And Women Oppression International, *History of Polygamy*, POLYGAMYSTOP (2005), http://www.polygamystop.org/history.html.

Campbell, Angela, *Wives' Tales on Research in Bountiful*, 17 IUS GENTIUM 247 (2012).

CANSDALE, LENA, QUMRAN AND THE ESSENES: A RE-EVALUATION OF THE EVIDENCE (1997).

Capeheart, Jonathan, *'Sorry' Bill Clinton Didn't Say More About DOMA*, WASH. POST, March 8, 2013, *available at* http://www.washingtonpost.com/blogs/post-partisan/wp/2013/03/08/sorry-bill-clinton-didnt-say-more-about-doma/.

Carbone, June, Morality, *Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267 (1996).

CARLSON, MARCY ET AL., UNMARRIED BUT NOT ABSENT: FATHERS' INVOLVEMENT WITH CHILDREN AFTER A NONMARITAL BIRTH (2007).

CARRINGTON, CHRISTOPHER, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN (1999).

Carrol, Al, *Peopling North America*, *in* NATIVE AMERICA: FROM PREHISTORY TO FIRST CONTACT (Rodney P. Carlisle & J. Geoffrey Golson eds., 2007).

Cart, Julie, *Utah Paying a High Price for Polygamy*, LOS ANGELES TIMES, September 9, 2001, *available at* http://www.rickross.com/reference/polygamy/polygamy69.html.

Case, Mary Anne, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

CASPER, LYNNE M. & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY (2001).

Caster, Austin, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43 (2010).

Cepko, Roberta, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122 (1993).

Chambers, David L., *For the Best of Friends and for Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347 (2001).

Chambers, David L., *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

CHAPMAN, AUDREY, MAN SHARING (1986).

Charmaz, Kathy, *Grounded Theory: Objectivist and Constructivist Methods*, *in* HANDBOOK OF QUALITATIVE RESEARCH 509 (N.K. Denzin & Y. S. Lincoln eds., 2d ed. 2000).

CHERLIN, ANDREW J., THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY (2010).

Christensen, Craig W., *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699 (1998).

Clarke, Victoria, Celia Kitzinger & Jonathan Potter, *Kids Are Just Cruel Anyway: Lesbian and Gay Parents' Talk About Homophobic Bullying*, 43.4 BRITISH J. SOC. PSYCHOL. 531 (2004).

Cohen, Benyamin, *The Prince and I*, AMERICAN JEWISH LIFE, March/April 2007, *available at* http://www.ajlmagazine.com/content/032007/blackhebrews.html.

Cohen, Sandy, *Untying the Knot, Celeb-Style*, VENTURA COUNTY STAR, Dec. 20, 2005, Life, Arts & Living, at 1.

Cohn, David L., *Are Americans Polygamous?*, A. MONTHLY, Aug. 1947, at 30.

Cole, Michelle, *Benefits Bill Follows Measure 36*, OREGONIAN, May 29, 2005, at B01.

Collett, Teresa Stanton, *Benefits, Nonmarital Status, and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379 (2002).

Collins, Andrew W., *More Than Myth: The Developmental Significance of Romantic Relationships During Adolescence*, 13.1 J. RES. ON ADOLESCENCE 1 (2003).

COMMISSION ON GAY AND LESBIAN ISSUES, AMERICAN PSYCHOANALYTIC ASSOCIATION, POSITION STATEMENT ON GAY AND LESBIAN PARENTING (2002).

Constable, Nicole, *A Transnational Perspective on Divorce and Marriage: Filipina Wives and Workers*, 10.2 Identities: Global Stud. in Culture & Power 163 (2003).

Constantine, Larry & Joan Constantine, Group Marriage: A Study of Contemporary Multilateral Marriage (1973).

Constantine, Larry & Joan Constantine, Group Marriage: Marriages of Three or More People, How and Why They Work (1973).

Cook, Elaine, *Commitment in Polyamory*, Elec. J. Hum. Sexuality 8 (2005).

Coolidge, David Orgon & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 Harv. J.L. & Pub. Pol'y 623 (2001).

Coontz, Stephanie, *Historical Perspectives on Family Diversity*, *in* American Families Past and Present: Social Perspectives on Transformations 65 (Susan M. Ross ed., 2006).

Coontz, Stephanie, The Way We Never Were: American Families and the Nostalgia Trap (1992).

Corneal, Devon A., *Limiting the Right to Procreate: State v. Oakley and the Need for Strict Scrutiny of Probation Conditions*, 33.2 Seton Hall L. Rev. (2003), *available at* http://erepository.law.shu.edu/shlr/vol33/iss2/5.

Cott, Nancy F., Public Vows: A History of Marriage and the Nation (2000).

Cowan, J. Robert, Note, *The New Family Plan: Employee Benefits and the Non-Traditional Spouse*, 32 U. Louisville J. Fam. L. 617 (1994).

Cowley, A., Aramaic Papyri of the Fifth Century, B.C. (1967).

Cox, Frank D., Human Intimacy: Marriage, the Family, and its Meaning (2005).

Crews, Jami L., *When Mommy's A Minor: Balancing the Rights of Grandparents Raising Grandchildren Against Minors' Parental Rights*, 28 L. & Psychol. Rev. 133 (2004).

Cruz, David B., *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001).

Dailey, Anne C., *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955 (1993).

DAUBE, DAVID, THE NEW TESTAMENT AND RABBINIC JUDAISM (1956).

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

Davis, Christine, Note, *Til Debt Do Us Part: Premarital Contracting Around Community Property Law—An Evaluation of Schlaefer v. Financial Management Service, Inc.*, 32 ARIZ. ST. L.J. 1051 (2000).

Davis, Cynthia M., *The Great Divorce of Government and Marriage: Changing the Nature of the Gay Marriage Debate*, 89 MARQ. L. REV. 795 (2006).

Delaney, Elizabeth A., *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991).

DEN OTTER, RONALD C., IS THERE REALLY ANY GOOD ARGUMENT AGAINST PLURAL MARRIAGE? (2009).

Deutsch, Stuart L. & Carol Amadio, *Open Adoption: Allowing Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59 (1984).

Dickerson, Mechele, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961 (1998).

DIFONZO, J. HERBIE, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997).

Difonzo, James Herbie, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31 (2003).

DIXON-SPEAR, PATRICIA, WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGYNY BY CONSENT xxxi (2009).

DOHERTY, WILLIAM ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2d ed. 2005).

Donovan, James M., *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1 (2001).

Donovan, Patricia, *The Decline of the Traditional Family*, U. BUFFALO REP., Feb. 4, 1999, at 6, available at http://www.buffalo.edu/reporter/vol30/vol30n19/n7.html.

DOUGLAS, GILLIAN, AN INTRODUCTION TO FAMILY LAW (2004).

Drobac, Jennifer A. & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007).

Duncan, Emily J., *The Positive Effects of Legalizing Polygamy: Love Is a Many Splendored Thing*, 15 DUKE J. GENDER L. & POL'Y 315 (2008).

Duncan, William C., *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961.

Duncan, William C., *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003).

Dunfey, Julie, *Living the Principle of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century*, 10 FEMINIST STUD. 523 (1984).

Dunifon, Rachel & Lori Kowaleksi-Jones, *Who's in the House? Race Difference in Cohabitation, Single Parenthood, and Child Development*, 73 CHILD DEV. 1249 (2002).

Dwyer, James G., *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147 (2000).

Eckholm, Erick, *Push Expands for Legalizing Same-Sex Marriage*, N.Y. Times, November 12, 2012, *available at* http://www.nytimes.com/2012/11/13/us/advocates-of-gay-marriage-extend-their-campaign.html?pagewanted=all&_r=0.

Egan, Timothy, *The Persistence of Polygamy*, N.Y. Times, Feb. 28, 1999, *available at* http://www.nytimes.com/1999/02/28/magazine/the-persistence-of-polygamy.html.

Eisenberg, Ronald L., The JPS Guide to Jewish Traditions (2004).

Eisenman, Robert, James the Brother of Jesus: The Key to Unlocking the Secrets of Early Christianity and the Dead Sea Scrolls (1997).

Eliasberg, Kristin, *Sodomy Flaw: How the Courts Have Distorted the History of Anti-Sodomy Laws in America*, Slate, March 25, 2003, *available at* http:// www.slate.com/ articles/ news_and_politics/ jurisprudence/ 2003/ 03/ sodomy_flaw.html.

Ellis, John W., *Yours, Mine, Ours?-Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code*, 42 Tex. Tech L. Rev. 987 (2010).

Ellman, Ira Mark, Paul M. Kurtz & Elizabeth S. Scott, Family Law: Cases, Text, Problems (3d ed. 1998).

Elrod, Linda D. & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 Fam. L.Q. 381 (2008).

Elrod, Linda D. & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 Fam. L.Q. 607 (2001).

Emanuel, Linda L. et al., *Advance Directives for Medical Care—A Case for Greater Use*, 324.13 New Eng. J. Med. 889 (1991).

Embry, Jessie L., Mormon Polygamous Families (1987).

Emens, Elizabeth F., *Monogamy's Law: Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277 (2004).

EPSTEIN, LOUIS M., MARRIAGE LAWS IN THE BIBLE AND THE TALMUD (1942).

EPSTEIN, LOUIS M., THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF THE WOMAN IN JEWISH LAW (2005).

ERIKSON, ERIK, CHILDHOOD AND SOCIETY (1950).

Ertman, Martha, *Contract Sports*, 48 CLEV. ST. L. REV. 31 (2000).

Ertman, Martha, *Race Treason: The Untold Story of America's Ban on Polygamy*, COLUM. J. GENDER & L. (2010).

Ertman, Martha M., *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

Eskridge, William N., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853 (2001).

Eskridge, William N., *The Emerging Menu of Quasi-Marriage Options*, FINDLAW'S WRIT, July 7, 2000, http://writ.news.findlaw.com.

Evans Stake, Jeffrey & Michael Grossberg, *Roundtable: Opportunities for and Limitation of Private Ordering in Family Law*, 73 IND. L.J. 535 (1998).

FALK, ZE'EV W., JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES (1966).

FARNSWORTH, SONJA, FROM POLYGAMY TO MONOGAMY: MORMONISM ON GENDER, MARRIAGE, AND THE FAMILY (1999).

FINEMAN, MARTHA ALBERTSON, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

Fineman, Martha Albertson, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).

Fineman, Martha, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 22.2 FAM. L.Q. 279 (1989).

Forbes, Jack D., *What is Marriage? A Native American View*, NEWS FROM INDIAN COUNTRY, May 3, 2004, *available at* http:// www.westgatehouse.com/ art161.html.

FOSTER, LAWRENCE, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY (1981).

Franklin, Kris, *A Family Like Any Other Family: Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1990).

Freeman, M. D. A., *Not Such a Queer Idea: Is There a Case for Same Sex Marriages?*, 16 J. APPLIED PHIL. 1 (1999).

FREIMANN, A., SEDER KIDDUSHIN VE-NISSU'IN AḤAREI ḤATIMAT HA-TALMUD VE-AD YAMEINU (1945).

Friedman, Andrew H., *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOWARD L.J. 173 (1991).

Friedman, Lawrence M., *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340.

Fry, Amy, *Polygamy in America: How the Varying Legal Standards Fail to Protect Mothers and Children from Its Abuses*, 54 ST. LOUIS U. L.J. 967 (2010).

Fuller, Lon, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

Furstenburg, Frank F. et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319 (1995).

FURUKAWA, STACY, U.S. DEP'T OF COMMERCE, SERIES P70, NO. 38, THE DIVERSE LIVING ARRANGEMENTS OF CHILDREN: SUMMER 1991 (1994).

Gallagher, Maggie, *Fatherless Son Champions Marriage*, N.Y. POST, Sept. 1, 2000, *available at* http:// www.allianceformarriage.org/press/MaggieGallager.htm.

GALLAGHER, MAGGIE, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996).

Garnett, Richard W., *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000).

Garrison, Marsha, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005).

Garrison, Marsha, *Marriage Matters: What's Wrong with the A.L.I.'s Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY: CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305 (Robin Fretwell Wilson ed., 2006).

Garrison, Marsha, *Reviving Marriage: Should We? Could We?* (Brooklyn Law Sch. Legal Stud. Research Paper No. 43, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829825.

Garrison, Marsha, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491 (2007).

GAY & LESBIAN ADVOCATES & DEFENDERS, CIVIL MARRIAGE VERSUS CIVIL UNIONS: WHAT'S THE DIFFERENCE? (2013), *available at* www.glad.org/uploads/docs/publications/cu-vs-marriage.pdf.

GERTH, H. & C. MILLS, CHARACTER AND SOCIAL STRUCTURE II (1953).

Gher, Jaime M., *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008).

Ginther, Donna K. & Robert A. Pollak, *Family Structure and Children's Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41.4 DEMOGRAPHY 671 (2004).

Girgis, Sherif, Robert George & Ryan Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245 (2010).

GLASER, BARNEY & ANSLEM STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH (1967).

Glendon, Mary Ann, *The New Marriage and the New Property*, *in* Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change (John M. Eekelaar & Sanford N. Fetz eds., 1980).

Glendon, Mary Ann, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe (1989).

Goetz, Charles J. & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Calif. L. Rev. 261 (1985).

Goffman, E., Stigma: Notes on the Management of Spoiled Identity (1963).

Goffman, E., The Presentation of the Self in Everyday Life (1959).

Goitein, S.D., A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza, Vol. I: Economic Foundations (2000).

Goitein, S.D., The Jews in Egypt and in Palestine Under the Fatimid Caliphs, 2 Volumes in One, With Preface and Reader's Guide (1970).

Goldberg, David J. & John D. Rayner, The Jewish People: Their History and Their Religion (1992).

Goldfeder, Mark & Elisabeth Sheff, Children of Polyamorous Families; A First Empirical Look, 4 J. Soc. Deviance 150 (2013).

Goldfeder, Mark & Ira Bedzow, *Early Modern Period: Jewish Law*, *in* The Oxford Encyclopedia of the Bible and Law (Pamela Barmash, Charlotte E. Fonrobert, Clare Rothschild, Jeffrey Stackert & John Witte eds., 2013).

Goldstein, Joseph et al., The Best Interests of the Child: The Least Detrimental Alternative (1996).

Golubock Watson, Beccah, *Beyond Marriage: Love and the Law*, Nation, Jan. 29, 2007, *available at* http:// www.thenation.com/doc/20070212/watson.

GOODMAN, PHILIP & HANNA GOODMAN, THE JEWISH MARRIAGE ANTHOLOGY (1965).

Gordon, Sarah Barringer, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28.1 J. S. CT. HIST. 14 (2003).

Gottlieb, Claire, *Varieties of Marriage in the Bible and Their Analogues in the Ancient World* (unpublished Ph.D. diss., New York University 1989).

Gove, Walter R., Michael Hughes & Omer R. Galle, *Overcrowding in the Home: An Empirical Investigation of its Possible Pathological Consequences*, AM. SOC. REV. 59 (1979).

Gray, J. Patrick, *Ethnographic Atlas Codebook*, *in* 10.1 WORLD CULTURES 86 (1998).

Gray, Kevin, *Florida Judge Approves Birth Certificate Listing Three Parents*, REUTERS, Feb. 7, 2013, *available at* http://ca.news.yahoo.com/florida-judge-approves-birth-certificate-listing-three-parents-233555185.html.

Green, Adam, *Until Death Do Us Part? The Impact of Differential Access to Marriage on a Sample of Urban Men*, 49.2 SOC. PERSP. 163 (2006).

Greene, Jamal, *Divorcing Marriage from Procreation*, 114 YALE L.J. 1989 (2005).

Greenspahn, Daniel S., *A Constitutional Right to Learn: The Uncertain Allure of Making A Federal Case Out of Education*, 59 S.C. L. REV. 755 (2008).

GREGORY, JOHN DE WITT ET AL., UNDERSTANDING FAMILY LAW § 4.05 (2d ed. 2001).

GREVEN, PHILIP, THE PROTESTANT TEMPERAMENT: PATTERNS OF CHILD-REARING, RELIGIOUS EXPERIENCE, AND THE SELF IN EARLY AMERICA (1988).

GROSSBERG, MICHAEL, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

Grossman, Joanna, *The New Jersey Domestic Partnership Law*, FINDLAW'S WRIT, Jan. 13, 2004, http://writ.news.findlaw.com (comparing New Jersey's recent statute with other domestic partnership laws).

Gudel, Paul J., *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763 (1998).

Guggenheim, Martin, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759 (2009).

Haddock, David D. & Daniel D. Polsby, Family as a Rational Classification, 74 WASH. U. L.Q. 15 (1996).

Hafen, Bruce C., *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989).

Hagerty, Barbara Bradley, *Philly's Black Muslims Increasingly Turn Toward Polygamy*, NAT'L PUB. RADIO (May 28, 2008), http://www.npr.org/templates/story/story.php?storyId=90886407.

Haggard, Melissa Ash, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469 (1998).

Halley, Janet, *Behind the Law of Marriage (i): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1 (2010).

Hao, Lingxin, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269 (1996).

HARDY, B. CAMERON, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE (1992).

Haritaworn, Jin, Chin-ju Lin & Christian Klesse, *Poly/logue: A Critical Introduction to Polyamory*, 9.5 SEXUALITIES 515 (2006).

HARRIS, LESLIE JOAN, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW (4th ed. 2010).

Harris, Paul, *Forget Monogamy and Swinging: We are Seriously Polyamorous*, OBSERVER, Nov. 13, 2005, at 21.

Haslam, M.D., Kenneth R., *The 12 Pillars of Polyamory*, POLYAMOROUS PERCOLATIONS, May 15, 2008 (adapted from a lecture given to Polyamorous NYC on 19 March 2008), *available at* http://www.polyamoryonline.org/articles/12pillars.html.

Heaton, Tim B., *Marital Stability Throughout the Child-Rearing Years*, 27.1 DEMOGRAPHY 55 (1990).

Heimdal, Kristen R. & Sharon K. Houseknecht, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525 (2003).

HENSHAW, JOHN, WHY POLYGAMY IS ILLEGAL WHEN MONOGAMY IS NOT PART OF NATURAL LAW, *available at* http://www.thefreeresource.com/polygamy-why-its-illegal-when-monogamy-not-part-of-natural-law.

Hill, John Lawrence, *What Does It Mean to Be A "Parent"? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

Hirsch, Adam J., *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031 (2004).

HOEBEL, EDWARD ADAMSON, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1954).

Hofferth, Sandra L. & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213 (2003).

HOLDSWORTH, WILLIAM, A HISTORY OF ENGLISH LAW (3d ed. 1945).

Honig, Bonnie, *Complicating Culture*, BOSTON REV., Oct/Nov. 1997, at 30.

Horne, Jennifer E., *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073 (1993).

HOULGATE, LAURENCE D., FAMILY AND STATE (1988).

HOWE, TASHA R., MARRIAGES AND FAMILIES IN THE 21ST CENTURY: A BIOECOLOGICAL APPROACH (2011).

HUM. RTS. CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS (2001).

Hymowitz, Kay S., *I Wed Thee . . . and Thee . . . and Thee*, WALL ST. J., Oct. 18, 2004, *available at* http://online.wsj.com/article/SB109805785552147645.html.

IRENAEUS, AGAINST HERESIES, BOOK I, 28:2.

Irvin, McKinley, *32 Shocking Divorce Statistics*, FAMILY LAW BLOG (October 30, 2012), http://www.mckinleyirvin.com/blog/divorce/32-shocking-divorce-statistics/.

Is Monogamy Dead?, PARK CITY FLIPSIDE, Jan. 26-Feb. 9, 2006.

Isaak, Misha, *"What's in a Name?": Civil Unions and the Constitutional Significance of "Marriage"*, 10 U. PA. J. CONST. L. 607 (2008).

Iversen, Joan, *Feminist Implications of Mormon Polygyny*, 10 FEMINIST STUD. 505 (1984).

Jacobs, Melanie B., *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002).

Jacobs, Melanie B., *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007).

Jankowiak, William & Emilie Allen, *Adoring the Father: Religion and Charisma in an American Polygamous Community*, *in* ANTHROPOLOGY AND THEOLOGY: GOD, ICONS, AND GOD-TALK 293 (Walter Randolph Adams & Frank Salamone eds., 2000).

Jankowiak, William & Monique Diderich, *Sibling Solidarity in a Polygamous Community in the USA: Unpacking Inclusive Fitness*, 21.2 EVOLUTION & HUM. BEHAV. 125 (2000).

Janofsky, Michael, *Conviction of a Polygamist Raises Fears Among Others*, N.Y. TIMES, May 24, 2001, at A14.

Jeske, John C., *Genesis*, *in* THE PEOPLE'S BIBLE (Roland Cap Ehlke ed., 1991).

JEWISH MARRIAGE (P.Elman, ed., 1975).

Johnson, Greg, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

Johnson, Kirk, *In Polygamy Country, Old Divisions Are Fading*, N.Y. TIMES, Sept. 10, 2007, at A18.

Joseph, Elizabeth, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31.

Kalmijn, Matthijs, *Father Involvement in Childrearing and the Perceived Stability of Marriage*, 61 J. MARRIAGE & FAMILY 409, 409-421 (1999).

Karst, Kenneth L., *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

Keen, Lisa, *Petraeus Scandal Conjured Recent LGBT Legal Skirmishes*, WINDY CITY TIMES, Nov. 21, 2012, at 4, *available at* http://www.windycitymediagroup.com/images/publications/wct/2012-11-21/current.pdf.

Kelly, John F., *Virginia Adultery Case Roils Divorce Industry: Conviction Draws Attention to Little Used Law*, WASH. POST, Dec. 1, 2003, at B1.

KENT, JAMES, COMMENTARIES ON AMERICAN LAW (John M. Gould ed., 14th ed. 1896).

Kessel, William, *Address at the AZ District Pastoral Conference First Lutheran Church, Prescott, AZ* (May 5-6, 1998).

Kiernan, Kathleen, *European Perspectives on Union Formation*, *in* TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 84 (Linda Waite et al. eds., 2000).

KILBRIDE, ROBERT, PHILIP L. KILBRIDE & DOUGLAS R. PAGE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? (Kindle ed. 2012) (1994).

Kinsley, Michael, *Abolish Marriage*, WASH. POST, July 3, 2003, at A23.

Klein, Diane J., *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33 (2010).

Klesse, Christian, *Polyamory and its 'Others': Contesting the Terms of Non-Monogamy*, 9.5 SEXUALITIES 565 (2006).

Knaplund, Kristine S., *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006).

Koppelman, Andrew, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

Kornhauser, Marjorie E., *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

Kruk, Edward, *Promoting Co-Operative Parenting After Separation: A Therapeutic/Interventionist Model of Family Mediation*, 15.3 J. FAM. THERAPY 235 (1993).

Kurdek, Lawrence A., *A 1-Year Follow-Up Study of Children's Divorce Adjustment, Custodial Mothers' Divorce Adjustment, and Postdivorce Parenting*, J. APPLIED DEVELOPMENTAL PSYCHOL. 315 (1988).

Kurtz, Stanley, *Beyond Gay Marriage*, 8.45 THE WEEKLY STANDARD 26 (2003).

Kurtz, Stanley, *Here Come the Brides*, WEEKLY STANDARD, Dec. 26, 2005, at 19.

Kurtz, Stanley, *Marriage's Best Chance*, NAT'L REV. ONLINE (Aug. 16, 2001), http://www.nationalreview.com/contributors/kurtz081601.shtml.

Kuykendall, Mae, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. PA. J. CONST. L. 377 (2012).

L. COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), *available at* http://ssrn.com/abstract=1720747.

LAING, R., THE POLITICS OF THE FAMILY AND OTHER ESSAYS (1969).

LaRossa, Ralph, *Grounded Theory Methods and Qualitative Family Research*, 67 J. Marriage & Fam. 837 (2005).

Larson, Jeffry H., *The Marriage Quiz: College Students' Beliefs in Selected Myths About Marriage*, Fam. Rel. 3 (1988).

Law Comm'n of Can., Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships (2001), *available at* http://collection.nlc-bnc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pd.

LecLaire, Jennifer, *Survey Pinpoints Root of Broken Families*, Childhood Poverty Charisma News, Nov. 18, 2011, *available at* http://www.charismanews.com/culture/32380-survey-pinpoints-root-of-broken-families-childhood-poverty.

Leslie, Melanie B., *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. Rev. 551 (1999).

Letter from Barry R. Bedrick, Associate General Counsel, General Accounting Office, to Henry J. Hyde, Chairman, House of Representatives Committee on the Judiciary 1-2 (Jan. 31, 1997).

Levmore, Saul, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58.2 L. & Contemp. Probs. 221 (1995).

Lewin, Tamar, *Among Nuptial Agreements, Post- Has Now Joined Pre-*, N.Y. Times, July 7, 2001, at A1.

Lillard, Lee A. et al., *Premarital Cohabitation and Subsequent Marital Dissolution: A Matter of Self-Selection?*, 32 Demography 437 (1995).

Lisotta, Christopher, *California Bill Upgrades Gay Partner Rights* (Jan. 28, 2003), http:// www.gay.com/news/article.html?2003/01/28/1.

Lloyd, R. Scott, *BYU Professor Speaks on LDS Polygamy*, Deseret News, May 24, 2009, *available at* http://www.deseretnews.com/article/705306225/BYU-professor-speaks-on-LDS-polygamy.html?pg=all.

LOFLAND, JOHN & LYNN LOFLAND, OBSERVATION AND ANALYSIS (1995).

LOPEZ, ROBERT OSCAR, THE WITHERSPOON INSTITUTE, GROWING UP WITH TWO MOMS; THE UNTOLD CHILDREN'S VIEW (2012), *available at* http://www.thepublicdiscourse.com/2012/08/6065/.

LOVING MORE, http://www.lovemore.com/aboutus/ (last visited May 12, 2013).

Lundberg, Shelly & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSP. 3 (2007).

Mace, David, *A Year with Civil Unions*, TIMES ARGUS, July 1, 2001.

MACKAY, JUDITH, GLOBAL SEX: SEXUALITY AND SEXUAL PRACTICES AROUND THE WORLD, FIFTH CONGRESS OF THE EUROPEAN FEDERATION OF SEXOLOGY (2000), *available at* http://www2.hu-berlin.de/sexology/.

Macneil, Ian R., *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

MAILLU, DAVID G., THE WHITEMAN'S POLYGAMY, IN OUR KIND OF POLYGAMY (1988).

MAINE, SIR HENRY SUMNER, ANCIENT LAW 163 (1884).

MALINOWSKI, BRONISLAW, SEX, CULTURE, AND MYTH (1962).

Manning, Wendy D. & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876 (2003).

MANNING, WENDY E. & RONALD D. BULANDA, PARENTAL COHABITATION EXPERIENCES AND ADOLESCENT BEHAVIORAL OUTCOMES (2006), *available at* http://www.bgsu.edu/organizations/cfdr/research/pdf/2006/2006-15.pdf.

Marks, Nadine F., *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5 (1995).

Marquardt, Elizabeth, *When 3 Really Is a Crowd*, N. Y. TIMES, July 16, 2007, *available at* http://www.nytimes.com/2007/07/16/opinion/16marquardt.html?_r=0.

Marquis, Christopher, *Total of Unmarried Couples Surged in 2000 U.S. Census*, N.Y. Times, Mar. 13, 2003, at A22.

Marriage As Contract and Marriage As Partnership: The Future of Antenuptial Agreement Law, 116 Harv. L. Rev. 2075 (2003).

Marriage Definition, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/marriage (last visited June 2, 2013).

Marriage Movement, A Statement of Principles (2000), available at http://www.marriagemovement.org/html/report.html (last visited Dec. 21, 2003).

Marsiglio, William, *When Stepfathers Claim Stepchildren: A Conceptual Analysis*, 66 J. Marriage & Fam. 22 (2004).

Martin, Jessica, *Can U.S. Law Handle Polygamy*, States News Serv., June 21, 2011, *available at* http://www.highbeam.com/doc/1G1-259353349.html.

Martin, Jorge, *English Polygamy Law and the Danish Registered Partnership Act: A Case for Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 Cornell Intl. L.J. 419 (1994).

Martinez, Florentino Garcia, The Dead Sea Scrolls Translated: The Qumran Texts in English (Wilfred G.E. Watson trans., 1994) (1992).

Matthews, Victor Harold & Don C. Benjamin. Old Testament Parallels: Laws and Stories from the Ancient Near East 47 (1997).

McClain, Linda C. & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 Chi.-Kent L. Rev. 301 (2000).

McGinnis, Kaitlin R., *Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?,* 19 Vill. Sports & Ent. L.J. 249 (2012).

McLanahan, Sara & Gary Sandefur, Growing Up With A Single Parent: What Helps (1994).

Mead, Margaret, *Anomalies in American Postdivorce Relationships*, *in* Divorce and After 97 (Paul Bohannan ed., 1970).

Mead, Margaret, Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation (1928).

Mead, Margaret, Male and Female: A Study of the Sexes in a Changing World (1949).

Meezan, William & Joan F. Shireman, Care and Commitment: Foster Parent Adoption Decisions (1985).

Mehta, Juhi, Note, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Problem of Teen Pregnancy*, 5 Cardozo Women's L.J. 121 (1998).

Meighan, Katherine Wells, *For Better or for Worse: A Corporate Finance Approach to Valuing Educational Degrees at Divorce*, 5 Geo. Mason L. Rev. 193 (1997).

Meyer, David D., *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 Vill. L. Rev. 891 (2006).

Mielziner, M., Jewish Law of Marriage and Divorce 28 (1901) (1884).

Mielziner, Moses, The Jewish Law of Marriage and Divorce (1884).

Miller, Jeremy M., *A Critique of the Reynolds Decision*, Western St. Univ. L. Rev. 178 (1984).

Miller, Leon & John Milton, Among the Polygamophiles (1974).

Milton, Don, *John and Charles Wesley's Sister Married a Polygamist*, Christian Marriage, September 24, 2006, *available at* http://www.christianmarriage.com/home/index.php?name=News&file=article&sid=115.

Minow, Martha L., *Redefining Families: Who's in and Who's Out?*, 62 U. COLO. L. REV. 269 (1991).

Moller, Valerie & Gary John Welch, *Polygamy, Economic Security, and Well-Being of Retired Zulu Migrant Workers*, 5 J. CROSS-CULTURAL GERONTOLOGY 205 (1990).

Montanari, Ingalill, *From Family Wage to Marriage Subsidy and Child Benefits: Controversy and Consensus in the Development of Family Support*, 10.4 J. EUR. SOC. POL'Y 307 (2000).

Monte, Lindsay M., *Blended But Not The Bradys: Navigating Unmarried Multiple Partner Fertility*, *in* UNMARRIED COUPLES WITH CHILDREN 183 (2007).

Moore, Marvin M., *The Significance of a Divorced Father's Remarriage in Adjudicating A Motion to Modify His Child Support Obligations*, 18 CAP. U. L. REV. 483 (1989).

Morris, Alex, *The Cuddle Puddle of Stuyvesant High School*, N.Y. MAGAZINE, Feb. 6, 2006, *available at* http:// newyorkmetro.com/news/features/15589/ (last visited Mar. 11, 2006).

MORRIS, DESMOND, THE NAKED APE: A ZOOLOGIST'S STUDY OF THE HUMAN ANIMAL (1967).

Motro, Shari, *Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, at WK15.

Nastich, Summer L., *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114 (2003).

Nichols, Joel A., Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998).

Nicolas, Peter, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931 (2011).

Nishimoto, Ryan, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage: The Gay Rights Question in Contemporary American Law*, 23 B.C. THIRD WORLD L.J. 379 (2003).

Nixon, Christopher T., *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41 (1998).

Nock, Steven L., *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53 (1995).

NOCK, STEVEN L., MARRIAGE IN MEN'S LIVES: A COMPARISON OF MARRIAGE AND COHABITATION (1998).

Note, *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003).

Nussbaum, Martha C., *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994).

O'Connor Udell, Collin, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231 (1998).

O'Brien, Raymond C., *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163 (1995).

Oldham, J. Thomas, *A.L.I. Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801.

Olsen, Frances E., *The Family and The Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

Olsen, Frances E., *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

OSTLING, RICHARD N. & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE (1999).

Otto, R. Michael, Note, *Wait 'Til Your Mothers Get Home: Assessing The Rights of Polygamists As Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881.

Pallotta-Chiarolli, Maria, Border Sexualities, Border Families in Schools (2010).

Pallotta-Chiarolli, Maria, Peter Haydon & Anne Hunter, These Are Our Children: Polyamorous Parenting, LGBT-Parent Families 117 (2013).

Pallotta-Chiarolli, Maria, *Polyparents Having Children, Raising Children, Schooling Children*, 7.1 Lesbian & Gay Psych. Rev. 48 (2012).

Parker, K., A Portrait of Stepfamilies, Pew Research Ctr. (2011), *available at* http://pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/.

Pashigian, Melissa J., *The Womb Infertility and the Vicissitudes of Kin-Relatedness in Vietnam*, 4.2 J. Viet. Stud. 34 (2009).

Pearl, Chaim, Marriage Forms, in Jewish Marriage (Peter Elman, ed., 1968).

Perkins, William, *Christian Oeconomy or a Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures*, *in* 3 The Work of William Perkins (Ian Breward ed., 1970).

Perrin M.D., Ellen C., et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (2002), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics; 109/2/341 (last visited Jan. 16, 2004).

Perry, Twila L., *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 Fam. L.Q. 77 (1990).

Philips, Abu Ameenah Bilall & Jameelah Jones, Polygamy in Islam (2005).

Phillips, Harry & Sean Dooley, *Modern Polygamist Family: Why They're Risking Jail*, ABC News (Nov. 16, 2011), http://abcnews.go.com/US/modern-polygamist-family-risking-jail/story?id=14956226.

Philo of Alexandria, On Virtues: Introduction Translation, and Commentary (Walter Wilson trans., 2011).

Pingree, Gregory C., *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy*, 14 J. Gender, Social Policy & L. 314 (2006).

Plato, Republic, *in* The Collected Dialogues of Plato, Including the Letters 575 (Edith Hamilton & Huntington Cairns eds., 1961).

Plato, Symposium 25-31 (Alexander Nehamas & Paul Woodruff trans., Hackett 1989).

Polikoff, Nancy D., *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Am. U. J. Gender Soc. Pol'y & L. 167 (2000).

Pomfret, John, *Polygamists Fight to Be Seen As Part of Mainstream Society*, Wash. Post, Nov. 21, 2006, at A1.

Posner, Eric A., Family Law and Social Norms, in The Fall and Rise of Freedom of Contract 256 (F.H. Buckley ed., 1999).

Posner, Richard A., Sex and Reason (1992).

Post, Stephen G., More Lasting Unions: Christianity, The Family, and Society (2000).

Pound, Roscoe, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177 (1916).

Principles of the Law of Family Dissolution: Analysis & Recommendations § 6.03(2) (Tentative Draft No. 4, April 10, 2000).

Project MUSE, http://muse.jhu.edu (last visited Mar. 3, 2013).

Pulakos, Joan, *Correlations Between Family Environment and Relationships of Young Adult Siblings*, 67.3f Psychol. Rep. 1283 (1990).

Qian, Zhenchao & Samuel H. Preston, *Changes in American Marriage, 1972 to 1987: Availability and Forces of Attraction by Age and Education*, 58 Am. Soc. Rev. 482 (1993).

Quayle, Dan & Diane Medved, The American Family: Discovering the Values that Make Us Strong (1996).

RADIN, MARGARET JANE, CONTESTED COMMODITIES (1996).

Rasmusen, Eric & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998).

Rauch, Jonathan, *Conventional Wisdom: Rediscovering the Social Norms that Stand Between Law and Libertianism*, REASON, Feb. 2000, at 37.

RAUCH, JONATHAN, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004).

REGAN, MILTON C., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999).

Regan, Milton C., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).
REGAN, MILTON C., FAMILY LAW AND THE PURSUIT OF INTIMACY (1993).

Relationship LLC, Marriage Perfected, http:// www.relationshipllc.com (last visited Feb. 11, 2006).

Renee, Leane, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343 (1997).

Rhoads-Weaver, Barbara J. & Heather E. Rhoads-Weaver, *In the Pursuit of Happiness: One Lesbian Couple's Thoughts on Marriage*, 2 SEATTLE J. FOR SOC. JUST. 539 (2004).

RIBAR, DAVID, WHAT DO SOCIAL SCIENTISTS KNOW ABOUT THE BENEFITS OF MARRIAGE? A REVIEW OF QUANTITATIVE METHODOLOGIES (2004), *available at* ftp.iza.org/dp998.pdf.

RIBSTEIN, LARRY E. & ROBERT R. KEATINGE, RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES (2d ed. 2004).

Ribstein, Larry E., *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005).

RIBSTEIN, LARRY E., THE RISE OF THE UNCORPORATION (2010).

Richardson, Alan, *Rethinking Romantic Incest: Human Universals, Literary Representation, and the Biology of Mind*, 31.3 NEW LITERARY HIST. 553 (2000).

RIDLEY, MATT, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE (1993).

Robbennolt, Jennifer K. & Monica Kirkpatrick Johnson, Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Therapeutic and Preventative Approach, 41 Ariz. L. Rev. 417 (1999).

Robinson, Blaine, *Polygamy*, BLAINE ROBINSON (Feb 17, 2013), http://www.blainerobison.com/concerns/polygamy.htm.

Robinson, Victoria, *My Baby Just Cares For Me: Feminism, Heterosexuality and Non-Monogamy*, 6.2 J. GENDER STUD. 143 (1997).

Rock-Salting the Slippery Slope: Why Same-Sex Marriage Is Not A Commitment to Polygamous Marriage, 29 N. Ky. L. Rev. 521 (2002).

Rose, Carol M., *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

Rosencraft, Michael, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186 (2002).

Rower, Alyssa, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711 (2004).

Rubenfeld, Jed, *The Right of Privacy*, HARV. L. REV. 737 (1989).

Ruskola, Teemu, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

Rust, Paula C., *Monogamy and Polyamory: Relationship Issues for Bisexuals*, *in* BISEXUALITY: THE PSYCHOLOGY AND POLITICS OF AN INVISIBLE MINORITY 127 (Beth A. Firestein ed., 1996).

Ruth, Abigail, *Pennsylvania Court Finds Three Adults Can Have Parental Rights*, Lancaster (May 01, 2007, 8:13 PM), http://culturecampaign.blogspot.com/2007/05/pennsylvania-court-finds-three-adults.html.

Ryan, Russel K., And Then There Was One: An Analysis and Comparison of Polygamy Among Jews and Mormons 209 (1991).

Sassler, Sharon & James McNally, *Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-examination Using Multiple Imputation Techniques*, 32 Soc. Sci. Res. 553 (2004).

Satlow, Michael L., Jewish Marriage in Antiquity (2001).

Scharnberg, Kristen & Manya A. Brachear, *Where the Polygamists Have White Picket Fences*, L.A. Times, Oct. 15, 2006, at A12.

Scheidel, Walter, *Monogamy and Polygyny in Greece, Rome, and World History*, *in* Rome & World Hist. (2008).

Schiffman, Lawrence H., From Text to Tradition: A History of Second Temple and Rabbinic Judaism (1991).

Schilling, Chelsea, *Love, American Style: Polygamy Gets Sizzle*, WND (Aug 20, 2012, 8:08 PM), http://www.wnd.com/2012/08/love-american-style-polygamy-gets-sizzle/.

Schneider, Carl E., *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985).

Schneider, Carl E., *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992).

Schouler, James, A Treatise on Husband and Wife (1882).

Schulz, F., Classical Roman Law (1951).

Schwartz, Pepper, Peer Marriage: How Love Between Equals Really Works (1994).

Scott, Elizabeth S. & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

Scott, Elizabeth S., *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

Scott, Elizabeth S., *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

Scott, Elizabeth, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225.

Scott, Robert, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J.L. STUD. 597 (1990).

Sealing, Keith E., *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001).

Seltzer, Judith A., *Families Formed Outside of Marriage*, 62.4 J. MARRIAGE & FAM. 1247 (2004).

Seminara, David, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon*, BACKGROUNDER (2008), *available at* http://www.cis.org/marriagefraud.

Shalleck, Ann, *Foundational Myths and the Reality of Dependency: The Role of Marriage*, 8 AM. U. J. GENDER SOC. POL'Y & L. 197 (2000).

Shanley, Mary Lyndon, *Review Essay, Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 L. & SOC. INQUIRY 923 (2002).

Sheff, Elisabeth, *Poly-Hegemonic Masculinities*, 9.5 SEXUALITIES 621 (2006).

Sheff, Elisabeth, *Polyamorous Families, Same-Sex Marriage, and the Slippery Slope*, 40.5 J. CONTEMP. ETHNOGRAPHY 487 (2011).

Sheff, Elisabeth, *Polyamorous Women, Sexual Subjectivity, and Power*, 34.3 J. CONTEMP. ETHNOGRAPHY 251 (2005).

Sheff, Elisabeth, *Strategies in Polyamorous Parenting*, *in* UNDERSTANDING NON-MONOGAMIES (Meg Barker & Darren Langdridge eds., 2010).

Shostak, Arthur B., *Singlehood*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 355 (Marvin B. Sussman & Suzanne K. Steinmetz eds., 1987).

Shultz, Marjorie Maguire, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982).

Siegel, Martin J., *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45 (1991).

Siegel, Reva B., *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

Sigle-Rushton, Wendy & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY 116 (Daniel P. Moynihan et al. eds., 2004).

Sigman, Shayna M., *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006).

Silverman, Rachel Emma, *Don't Like Your Prenup? Blame Barry Bonds*, WALL ST. J., Apr. 9, 2003, at D1.

SIMMONS, TAVIA & MARTIN O'CONNELL, CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000, U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf.

Singer, Jana B., *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994).

Singer, Jana B., *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

'Sister Wives' Bigamy Prosecution Would Be Rare, FOX NEWS, Oct. 8, 2010, http://www.foxnews.com/entertainment/2010/10/08/sister-wives-bigamy-case-stats-dont-lie/.

Slater, Pam, *Prelude to Partnership*, SACRAMENTO BEE, June 13, 1996, at C1.

Slovenko, Ralph, *The De Facto Criminalization of Bigamy*, 17 J. FAM. L. 297 (1978).

Smearman, Claire A., *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L L. 382 (2009).

Smith, Rebekah J., *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151 (2006).

Smock, Pamela J., *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1 (2000).

Stacey, Judith & Tey Meadow, *New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States*, 37.2 POLITICS & SOCIETY 167 (2009).

STACEY, JUDITH, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA (1990).

STACEY, JUDITH, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996).

Stanley, Scott M., *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496 (2004).

Stark, Barbara, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001).

Stewart, Monte Neil, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313 (2008).

STEWART, SUSAN D., BRAVE NEW STEPFAMILIES: DIVERSE PATHS TOWARD STEPFAMILY LIVING (2007).

Stokes, Trevor, *Love Thy Neighbor? For The Fans of Polyamory, They Count the Ways*, ALBANY TIMES UNION, Feb. 16, 2006, at A4.

STORY, JOSEPH, COMMENTARIES ON THE CONFLICT OF LAWS (Morton J. Horowitz & Stanley N. Katz eds., 1972).

Strassberg, Maura I., *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

Strassberg, Maura I., *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. UNIV. L. REV. 439 (2003).

Strassberg, Maura, *Distinguishing Polygamy and Polyamory Under the Criminal Law*, *in* EXPLODING THE NUCLEAR FAMILY IDEAL (Daniela Cutas & Sarah Chan eds., 2012), *available at* http://www.bloomsburyacademic.com/view/Families-Beyond-the-Nuclear-Ideal/chapter-ba-9781780930114-chapter-011.xml.

Strassberg, Maura, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003).

Strasser, Mark, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (2000).

Stratton, Traci Shallbetter, Note, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767 (1998).

Stricherz, Mark, *Polyamorist Group Wants Legal Recognition for Multiple Marriages*, THE COLO. OBSERVER, March 21, 2013, *available at* http://thecoloradoobserver.com/2013/03/polyamorist-group-wants-legal-recognition-for-multiple-marriages/.

Stueck, Wendy, *B.C. Supreme Court Judge to Rule on Landmark Polygamy Case*, The Globe & Mail, Nov 22, 2011, *available at* http://www.theglobeandmail.com/news/national/bc-supreme-court-judge-to-rule-on-landmark-polygamy-case/article4184093/.

Stumbo, Bella, *No Tidy Stereotype; Polygamists: Tale of Two Families*, L.A. Times, May 13, 1988.

Sullivan, Andrew, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, New Republic, Aug. 28, 1989, at 20.

Sullivan, Andrew, *State of the Union*, New Republic, May 8, 2000, *available at* http://www.newrepublic.com/article/politics/state-the-union-0.

Sullivan, Andrew, *Why "'Civil Union'" Isn't Marriage*, New Republic, May 8, 2000, *available at* http://igfculturewatch.com/2000/05/08/why-civil-union-isnt-marriage/.

Sullum, Jacob, *Gay 'Marriage' vs. 'Civil Unions': What's in a Name?*, Reason (May 10, 2012, 12:43 PM), http://reason.com/blog/2012/05/10/gay-marriage-vs-civil-unions.

Swank, Drew A., *The National Child Non-Support Epidemic*, 2003 Mich. St. DCL L. Rev. 357 (2003).

Taylor, Emily, Note, *Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws*, 28 Ohio N.U. L. Rev. 171 (2001).
Teachman, Jay D. et al., *Legal Status and the Stability of Coresidential Unions*, 28 Demography 571 (1991).

Ryan D. Tenney, *Tom Green, Commonlaw Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. Pub. L. 141 (2002).

Tibbetts, Lana, Commitment in Monogamous and Polyamorous Relationships 1 (2001), *available at* http://www.picucci.net/Star/Relationships/polypaper.html.

Trebilcock, Michael, *Marriage as a Signal*, *in* The Fall and Rise of Freedom of Contract 245 (F.H. Buckley, ed., 1999).

Tribe, L., American Constitutional Law (1978).

Tsahai, Empress, Polygamy as a Choice for the Black Family (2002), *available at* http://www.rastafarispeaks.com/newspapers/articles/polygamy2002.html.

Tweedy, Ann E., *Polyamory As A Sexual Orientation*, 79 U. Cin. L. Rev. 1461 (2011).

Twiford, J. Rainer, *Joint Custody: A Blind Leap of Faith?*, 4.2 Behav. Sci. & L. 157 (1986).

Tying the Knot, Globe & Mail, July 15, 2003, at A9.

U.S. Census Bureau, 2007 American Community Survey tbl. B13002B (2007), available at https://www.socialexplorer.com/pub/ReportData/metabrowser.aspx?survey=ACS2010_5yr&ds=ACS10_5yr&header=True.

U.S. Census Bureau, 2008 American Community Survey (2008), *available at* http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=datasets_2&_lang=en&_ts= (last visited Apr. 13, 2010).

U.S. Census Bureau, Households and Families 2000, Census 2000 Brief 2 (2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf.

U.S. Census Bureau, Statistical Abstract of the United States: 2000 47, tbl.46 (2002).

U.S. Census Bureau, Summary of Statistics on Marriage, Divorce and Remarriage after Divorce (2007), *available at* http://www.remarriage.com/Remarriage-Facts/remarriage-after-divorce.html.

Unger, R., Knowledge and Politics (1975).

Useem, Andrea, *What To Expect When You're Expecting a Co-Wife*, On Faith: Religion Blog of the Wash. Post (July 24, 2007, 12:12 PM), http://www.slate.com/articles/life/faithbased/2007/07/what_to_expect_when_youre_expecting_a_cowife.2.html.

Vallely, Paul, *The Big Question; What's The History of Polygamy And How Serious A Problem Is It In Africa?*, The Indep., January 6, 2010, *available at* http://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html.

VERNIER, CHESTER, AMERICAN FAMILY LAWS (1931).

Waaldijk, Kees, *Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 455 (Robert Wintemute & Mads Andenaes eds., 2001).

Waite, Linda J. & Evelyn L. Lehrer, *The Benefits from Marriage and Religion in the United States: A Comparative Analysis*, 29.2 POPULATION & DEV. REV. 255 (2004).

WAITE, LINDA J. & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2001).

Waite, Linda J., *Does Marriage Matter?*, 32 DEMOGRAPHY 483 (1995).

Wald, Michael S., *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291 (2001).

WALDECK, VAL, MORMONS: WHAT DO THEY BELIEVE? (Kindle ed. 2011).

WALLERSTEIN, JUDITH S. & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1996).

Ward, Cassiah M., 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 (2004).

Wardle, Lynn D., *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2000).

Ware, Helen, *Social Influences on Fertility at Later Ages of Reproduction*, J. BIOSOCIAL SCI. 75 (Supp. VI 1979).

Warren, Jenifer, *Protections Added to Prenuptial Pacts*, L.A. TIMES, Sept. 13, 2001, pt. 2, at 1.

Weich, Cecile C., *Love on the Dotted Line: Craft a Prenuptial Agreement Carefully to Withstand Any Future Challenges*, A.B.A. J. 50 (1994).

Weis, David L., *Adult Heterosexuality*, *in* 3 International Encyclopedia of Sexology 1498 (Robert T. Francoeur ed., 1997), available at http://www2.hu-berlin.de/sexology/.

Weitzman, Geri et al., What Psychology Professionals Should Know About Polyamory (2009).

Weitzman, L., The Marriage Contract (1981).

Weitzman, Lenore J., *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181 (1980).

Weitzman, Lenore J., The Marriage Contract: Spouses, Lovers, and the Law (1981).

West, Robin, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 Fla. St. U. L. Rev. 705 (1998).

West, Stuart A., *The Nuzi Tablets: Reflections on the Patriarchal Narratives*, Bible and Spade 10, n.3-4 (1981).

Westfall, David, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 Notre Dame L. Rev. 1467 (2001).

Weston, Katherine, Families We Choose: Lesbians, Gays, and Kinship (1999).

What Are the Key Elements Necessary for a Valid Agreement?, FreeAdvice.com, http://familylaw.freeadvice.com/pre_marital_agreement/key_elements.htm (last visited Jan. 19, 2004).

White, Gayle, *Weighing the Pros & Cons of Marriage: Con: Shift Focus to Caretakers, Dependents*, Atlanta J. Const., Mar. 29, 2003, at B1.

Whitehead, Barbara Dafoe, *Dan Quayle Was Right*, Atlantic Monthly, Apr. 1993, at 47.

WHITEHEAD, BARBARA DAFOE, THE DIVORCE CULTURE (1997).

Whitehead, Barbara Dafoe, *The Failure of Sexual Education*, ATLANTIC MONTHLY, Oct. 1994, at 55.

Whitty, Tyler S., Comment, *Eliminating the Exception? Lawrence v. Texas and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813 (2005).

WILLIAMS, JOAN, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

Williams, T.L., *Polyamory vs. Swinging . . What's the Difference?*, LALA LAND (June 27, 2011, 5:30 PM), http://ladaewillims.blogspot.com/2011/06/polyamory-vs-swinging-whats-difference.html.

Wilson, Robin F., *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

Wilson, Robin F., *Undeserved Trust: Reflections on the A.L.I.'s Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY (2006).

Wing, Adrienne Katherine, *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, 858 (2001).

Winner, James M., *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073 (1998).

Winslow, Ben, *Utah Co. Prosecutors Want to See 'Big Picture' of Prosecuting Reality TV Polygamists*, FOX 13 NEWS, Sept. 28, 2010, *available at* http://www.fox13now.com/news/local/kstu-sister-wives-stars-investigated-bigamy,0,6323096.story.

Witte, John & Thomas C. Arthur, *The Three Uses of Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (1994).

WITTE, JOHN, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2012).

Witte, John, *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001).

Woodhouse, Barbara Bennett, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569 (1996).

WORDEN, SCOTT, MICROPAYMENTS AND THE FUTURE OF THE WEB (1998), *available at* http://cyber.law.harvard.edu/fallsem98/final_papers/Worden.html.

WRIGHT, ROBERT, THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY (1994).

Yip, Pamela, *Married? Consider a Postnup*, SEATTLE TIMES, Mar. 16, 2003, at F6.

Young, Alison Harvison, *This Child Does Have 2 (Or More) Fathers—Step-Parents and Support Obligations*, 45 MCGILL L.J. 107 (2000).

Yuracko, Kimberly A., *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889 (2005).

ZEITZEN, MIRIAM, POLYGAMY: A CROSS-CULTURAL ANALYSIS (2008).

Zelenak, Lawrence, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1993).

Zelig, Kaylah Campos, *Putting Responsibility Back Into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223 (1993).

Zelinsky, Edward A., *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006).

Zielinski, Debbie, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281 (1999).

Zierdt, Candace M., *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497 (1993).