Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement

Jaime M. Gher
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ABSTRACT

This article addresses the charged slippery slope accusation that permitting same-sex marriage will inevitably lead to the legalization of polygamy. While same-sex marriage advocates generally distance their cause from polygamy and its disparaging history when responding to such accusations, this article determines whether that response is appropriate, or alternatively, whether the same-sex marriage movement could benefit from linkages between polygamy and same-sex marriage. In conducting the analysis, this article presents a nuanced discussion of marriage and its varying forms. Specifically, it examines the United States’ historical regulation of polygamy, interrogates analogies between polygamy and same-sex marriage, compares cross-cultural practices and regulation of polygamy, and reviews the international human rights stance on polygamy and its implications for gender inequality. The article ultimately concludes that while polygamy and same-sex marriage may share some common ground, advocates should continue to distance same-sex marriage from plural marriage to avoid relinquishing the movement’s hard-earned cultural capital and societal support. In doing so, however, advocates should avoid maligning polygamy and playing into the cultural narrative that plural marriage is resoundingly barbaric and misogynistic, and instead, direct time and energy toward respecting diversity while fighting for equality.

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The denial of the right to marry forecloses one of life's most rewarding personal choices and withholds the most effective means to show one's beloved they are precious and irreplaceable.
— Kate Kendell, National Center for Lesbian Rights, September 3, 2004

INTRODUCTION

About eighty-three percent of human societies permit polygamy. Although the worldwide percentage of men with more than one wife is relatively minuscule, "as many as a third of the world's population belongs to a community that allows it." Polygamy is most prevalent in Muslim countries and in traditional or agrarian communities; however, it is estimated that as many as 30,000 people practice polygamy in the Western United States and Canada. As such, strict monogamy, defined in terms of sexual encounters, is likely more of a human ideal than an actual biological reality.

Polygamy in America was historically scorned as anti-democratic and a threat to modern social order. Over time, this perceived threat has died down, allowing practicing polygamists to generally go unnoticed. It appears, however, that the same-sex marriage movement

2. See David M. Buss, The Evolution of Desire: Strategies of Human Mating 178 (1994) (summarizing findings from a study of 853 cultures). Note the term "polygamy" is a gender-neutral term denoting a marriage with multiple partners, whereas "polygyny" refers to a marriage among one husband and multiple wives, and "polyandry" refers to a marriage between one wife and multiple husbands. American Heritage Dictionary of the English Language 1403-04 (3d ed. 1996). The term "polygamy," as used throughout this article, is somewhat of a misnomer, as most polygamous unions are, in fact, polygynous. Nevertheless, the term will be used for consistency with literature on the subject and common usage of the gender neutral term.
4. See id.
has brought polygamy to the forefront once again, by reigniting debates over the United States' criminal prohibition of plural marriage.

As the lesbian, gay, bisexual, transgender, and/or queer (LGBTQ) community advocates for access to civil marriage, opponents to the movement often assert perennial slippery slope arguments that legalizing same-sex marriage will inevitably lead to the legalization of bigamy, "adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." In reaction to these arguments, most same-sex marriage advocates zealously deny any connection between polygamy and LGBTQ relationships. They attempt to distinguish polygamy as steeped in patriarchy and fundamentalist Christianity, and contrarily, to present LGBTQ couples seeking access to marriage as merely two consenting adults engaging in monogamous intimacy, analogous to traditional heterosexual unions.

While same-sex marriage advocates generally distinguish same-sex marriage from polygamy, there is debate within the LGBTQ community regarding whether this is the appropriate response to charged analogies between same-sex marriage and polygamy. This debate, to some extent, stems from a deeper community-wide divide regarding whether the community can obtain true equality through access to civil marriage. While some believe same-sex marriage would

9. See David L. Eng, Out Here and Over There: Queerness and Diaspora in Asian American Studies, 15 SOC. TEXT, Fall/Winter 1997, at 31, 50 (1997) (explaining the term queer denotes that which is "other" than the normative, but not necessarily strictly that which is "other" than heterosexual. Thus, queers are not simply gay men and lesbians, or non-heterosexuals, but all people who do not fit into normative regimes and practices); see also Amy L. Brandzel, Queering Citizenship?: Same-Sex Marriage and the State, 11 GLQ: J. LESBIAN & GAY STUD. 171, 191 (2005) (advocating queer theory has the potential to bring together and advocate for all people who experience displacement from social norms and institutions).


12. See id. at 4 (emphasizing that similar to opposite-sex couples, many same-sex couples want the right to marry "because they are in love... and they want to honor their relationship in the greatest way our society has to offer, by making a public commitment to stand together in good times and bad, through all the joys and challenges family life brings"). Advocates of same-sex marriage also assert:

Granting same-sex couples the right to marry would in no way change the number of people who could enter into a marriage (or eliminate restrictions on the age or familial relationships of those who may marry). Marriage would continue to recognize the highest possible commitment that can be made between two adults, plain and simple.


radically transform traditional civil marriage and America's definition of families, thus ending discrimination against homosexuals, others consider the same-sex marriage movement as assimilationist and a wasteful use of resources for a cause that benefits only a portion of the community.

This article does not interrogate the propriety of advocating for same-sex civil marriage, but rather conducts a closer analysis of polygamy to determine whether the same-sex marriage movement should reconsider its response to proffered slippery slope arguments connecting same-sex marriage to polygamy. Specifically, it questions whether advocates should continue to distance same-sex marriage from polygamy and its disparaging history, or instead, attempt to find linkages between polygamy and same-sex marriage within the context of a more expansive and diversified family recognition movement.

To make this determination, Part I of this article provides an overview of the United States' historical regulation of civil marriage and recent federal and state legislation “to define and protect the institution of marriage,” or, rather, to exclude LGBTQ couples from civil marriage. It also summarizes debates within the LGBTQ community, regarding whether to advocate for access to civil marriage, and further, regarding the propriety of, and appropriate response to, analogies between polygamy and same-sex marriage. Part II reviews the United States' historical regulation of polygamous marriage, the practices and realities of polygamy in modern America, the current state of United States law and its enforcement against polygamists, the emerging movement to decriminalize polygamy, and the experience of women in plural marriages.

Part III compares cross-cultural practices and regulation of polygamy within Canada, Syria, Bhutan, and Zimbabwe and reviews the international human rights stance on polygamy and its implications for gender equality. Finally, Part IV considers reasons to align with and/or distinguish same-sex marriage from polygamy. This article ultimately concludes that same-sex marriage advocates should continue to distinguish same-sex marriage from polygamy, yet in a manner that does not malign polygamy and that is cognizant of certain linkages between the two relationship forms. Based on the above

18. See Brandzel, supra note 9, at 189.
analysis and the insight gained from cross-cultural and international human rights approaches to polygamy, the article culminates with a proposed response to same-sex marriage opponents' proffered slippery slope arguments.

I. REGULATION AND ACCESS TO CIVIL MARRIAGE IN THE UNITED STATES

Civil marriage in the United States is an institution shaped and created by the law. Moreover, the government has utilized the institution to engage in cultural regulation and mold its preferred citizenship. With the emergence of the same-sex marriage movement, federal and state governments have taken a step further by passing legislation to explicitly exclude LGBTQ individuals from civil marriage. Part I sets the groundwork for this article by summarizing the United States' historical regulation of civil marriage and recent federal and state legislative efforts to limit marriage to monogamous heterosexual couples, highlighting recent efforts by same-sex marriage advocates to obtain access to civil marriage. It also reviews debates within the LGBTQ community, regarding whether to advocate for same-sex marriage and the propriety of, and appropriate response to, analogies made between same-sex marriage and polygamy.

A. Historical Regulation of Civil Marriage

Marriage in the United States is a “complete creation of the law . . . . [that] did not and does not exist without the power of the state . . . . to establish, define, regulate and restrict it.” The United States has historically treated the model of marriage, or rather white, Christian-based heterosexual marriage, as essential to ‘civilizing’ and ‘Americanizing’ culturally diverse people. Marriage, foremost among other civil institutions, has been the site where the state created and actively orchestrated the “social and legal statuses for both men and women in highly raced and gendered terms.”

20. Nancy F. Cott, Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century, in U.S. HISTORY AS WOMEN’S HISTORY: NEW FEMINIST ESSAYS 107, 107 (Linda K. Kerber, Alice Kessler-Harris & Kathryn Kish Sklar eds., 1995) [hereinafter Cott, Marriage & the Public Order].
21. Id. at 107-08, 121.
22. See Brandzel, supra note 9, at 177.
23. See Cox, supra note 14, at 156 (referring to the Defense of Marriage Act).
26. Katherine M. Franke, Becoming a Citizen: Reconstruction Era Regulation of
Nancy Cott, in her history of public regulation of marriage, asserts that marriage has been a tool of “cultural regulation” and is the vehicle by which the state transforms the public order into a “gendered order.” It has also been asserted that “[m]arriage law is a primary site for the production of normative citizenship and a key mechanism by which the U.S. nation-state produces a properly heterosexual, gendered, and racialized citizenry.” Further, some radical feminists aver that marriage is a heteropatriarchal institution that oppresses women and bolsters heterosexuality. Specifically, it is “[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis . . . .”

Despite the great emphasis placed on marriage in the United States, Massachusetts recently became the first state to permit same-sex civil marriage. In response to the same-sex marriage movement’s growing momentum, such as in Massachusetts, the federal government passed the Defense of Marriage Act (DOMA) in 2000 allegedly “to define and protect the institution of marriage.”

27. Cott, Marriage & the Public Order, supra note 20, at 121; see also COTT, PUBLIC VOWS, supra note 25, at 17-18 ("Actual marriages of the proper sort were presumed to create the kind of citizen needed to make the new republic succeed."); Mary Lyndon Shanley, Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States, 27 LAW & SOC. INQUIRY 923, 924 (2002) (book review) ("[M]arriage law reform has served as a lightening rod for diverse and deeply held views of both personal and civic values and how some people have seen the fate of the nation at stake in the shape of marriage.").

28. Brandzel, supra note 9, at 177.

29. See Elizabeth Peel & Rosie Harding, Divorcing Romance, Rights and Radicalism: Beyond Pro and Anti in the Lesbian and Gay Marriage Debate, 14 FEMINISM & PSYCHOL. 588, 590 (2004). Note, however, that Peel and Harding assert that “feminist analyses of heterosexual and same-sex marriage are neither comparable nor compatible.” Id. They view heterosexism as a form of oppression separate from heteropatriarchy. Id. Specifically, “[l]esbian and gay subordination differs considerably from gender oppression because lesbians and gay men are displaced from the public sphere and have no legitimate place in civil society, and because lesbian and gay identities are privatized through their association with sexual acts.” Id.

30. Paula Ettelbrick, Since When Is Marriage a Path To Liberation?, in LESBIANS, GAY MEN, AND THE LAW 401, 402 (William B. Rubenstein ed., 1993); see also MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 23 (1995) [hereinafter FINEMAN, NEUTERED MOTHER] (asserting that the patriarchal family is an “assumed institution” with complementary roles — husband/head of household, wife/helpmate, child, and the assumed inevitability and primacy of this form reinforces patriarchy in that the male is deemed essential and dominant within the family).


Federal DOMA purportedly gives states the “right” to refuse recognition of same-sex marriages solemnized in other states and defines “marriage” and “spouse,” for the purposes of federal law, as a “union between one man and one woman as husband and wife,” and “a person of the opposite sex who is a husband or a wife,” respectively. The Federal DOMA initiated a domino effect, leading state legislatures to mirror the federal government’s rhetoric and legislative efforts to thwart same-sex marriage advocacy. Under the guise of ‘democracy,’ state legislators try to defeat proposed same-sex marriage legislation and preempt judges from “redefining marriage.” They do so by accusing “activist courts” of stepping beyond their interpretative roles and then passing “baby DOMAs,” or laws that mirror the federal DOMA in language and effect. Same-sex marriage opponents have even gone as far as accusing the movement of attempting to destroy democracy.

B. Same-Sex Marriage Movement

Despite federal and state law prohibiting same-sex marriage and society’s disapproval of non-heterosexual expressions of sexuality, a movement has grown within the LGBTQ community to obtain access to civil marriage. The LGBTQ community is divided, however,

33. Id. at § 7. As the power to regulate marriage and family relations has historically been accorded to the States, it is within each State’s discretion to determine whether to give full faith and credit to marriages solemnized in other jurisdictions. See Cynthia M. Reed, Note, When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage, 28 COLUM. HUM. RTS. L. REV. 97, 102 (1996) (“[F]ederal policy historically supports and respects the Supreme Court view that ‘the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.’” (citing In re Burrus, 136 U.S. 586, 593-94 (1890))).

34. See Cox, supra note 14, at 157.

35. Id. (stating Congress has attempted to use the “democratic” process to prevent full citizenship to gay men and lesbians. The radical right has “redefined the notion of democracy itself so that it no longer centrally implies the pursuit of equality . . .”).; see also Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 VA. L. REV. 1535, 1541 (1993) [hereinafter Polikoff, We Will Get What We Ask For].


on whether its members can achieve equal rights through civil marriage and, further, whether the community should commit its limited resources to fighting for same-sex marriage.\textsuperscript{41} Outlined below are the leading arguments in favor of and against advocating for same-sex marriage.

1. \textit{Support for Same-Sex Marriage}

Proponents of same-sex marriage assert that LGBTQ inclusion will destabilize the gendered hierarchy of marriage, promote acceptance of diversity, and end discrimination.\textsuperscript{42} For example, same-sex marriage has been purported as good for both gay people and America, because “it civilizes gays and it civilizes America.”\textsuperscript{43} Specifically, integration of racial, ethnic, and religious outsiders in the United States has ultimately led to group acceptance and cooperation, replacing group hatred.\textsuperscript{44} By analogy, American society could “civilize,” or benefit from, inclusion of LGBTQ people by permitting same-sex marriage and “end[ing] all vestiges of legal discrimination against its homosexual population.”\textsuperscript{45}

It has also been asserted that legalization of same-sex marriage would lead to the most radical transformation of society’s definition of family.\textsuperscript{46} Barbara Cox asserts, on a personal level, that by publicly committing herself to her lesbian partner, she maintains her sexual outlaw status and participates in an “attempt to make our democracy more radical and plural.”\textsuperscript{47} Finally, some claim that legalizing same-sex marriage will destabilize marriage’s gendered definition

\textsuperscript{41} See Peel \& Harding, \textit{supra} note 29, at 588-89 (observing the polarized camps within same-sex marriage debates and asserting that in order to transcend these oppositional stances one must “delineate[e] common ground between ‘pro’ and ‘anti’ arguments, and detangle[e] divergence in feminist arguments against heterosexual marriage from discussion about same-sex partnership recognition”).

\textsuperscript{42} See \textit{supra} notes 15-17.

\textsuperscript{43} ESKRIDGE, \textit{supra} note 17, at 8. Eskridge utilizes various meanings of the term “civilize.” Specifically, he relies upon the legal meaning “changes from the criminal law to the civil law,” the broader meaning to “‘integrate into the law and customs of society’ or simply ‘educate,’” and the provocative meaning to “tame” or “domesticate.” \textit{Id.} Eskridge primarily utilizes the provocative “taming” definition when discussing lesbian and gay individuals, and same-sex marriage and asserts that the LGBTQ couples, particularly gay male couples, would be “civilized” or “tamed” because marriage would lessen promiscuity and promote interpersonal commitment. \textit{Id.} at 8-10.

\textsuperscript{44} See \textit{id.} at 10.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} See Cox, \textit{supra} note 14, at 165-66.

\textsuperscript{47} \textit{Id.}; see also Wolfson, \textit{supra} note 40, at 591. In a similar vein, same-sex marriage proponents Mary Dunlap and Evan Wolfson assert that same-sex relationships differ from different-sex relationships in ways that strike to the very core of the concept and nature of marriage. \textit{Id.} As such, “marriage is something that [LGBTQ couples] can shape.” \textit{Id.}
by disrupting the link between gender and marriage.48 In other words, same-sex marriage can be used as a means to subvert gender-based power differentials and the “assumption that marriage is a form of socially, if not legally, prescribed hierarchy.”49

2. Opposition to Same-Sex Marriage

Opponents of same-sex marriage argue that the movement is assimilationist and supports the wrong-headed notion that some families are better than others.50 Further, that marriage will not liberate lesbians and gay men, but rather, “will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of [the lesbian and] gay liberation.”51 While some opponents concede that LGBTQ people should have the right to marry, as a matter of civil rights, they assert that obtaining the “right does not always result in justice. . . . [and the right to marry] will result, at best, in limited or narrowed ‘justice’ for those closest to power at the expense of those who have been historically marginalized.”52 Alternatively, they assert that justice can only be achieved

49. Id. Hunter asserts that different-sex couples can attempt to ground their marriages in equality, but they cannot erase their individual statures as “male” and “female,” whereas “[s]ame-sex marriage could create the model in law for an egalitarian kind of interpersonal relation, outside the gendered terms of power, for many marriages.” Id. at 112-13; see also Katherine M. Franke, Commentary, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1421 (2004).

[T]he power to marry for African Americans in the immediate postbellum period had both symbolic and practical significance—symbolic in the sense that enjoyment of the power signaled acceptance into the moral community of civil society, and practical to the extent that social and economic benefits flowed from being legally married.

Id.

50. See Brandzel, supra note 9, at 189. Queer theorists, deeming same-sex marriage efforts problematic, assert that gay and lesbian identities are essentialized by appealing to the state in the name of minority status, to obtain marital rights. Queer theorists’ fears of assimilation may be well-founded. For example, the Massachusetts Supreme Court in Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003), recently struck down the state’s marriage limitation to different-sex couples. In doing so, it reasoned that extending marital rights to same-sex couples incorporates and assimilates gays and lesbians into mainstream society; see also Brandzel, supra note 9, at 194.

51. Ettelbrick, supra note 30, at 402. Ettelbrick also avers that marriage runs contrary to two of the lesbian and gay movement’s primary goals: affirmation of the LGBTQ identity and culture, and validation of various forms of relationships. Id.; see also Angela Onwuachi-Willig, The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. L. REV. 1647, 1662 (2005) (indicating that while post-bellum marriage of former slaves helped strengthen black families formerly fractured by slavery, it also reinforced patriarchy and “institutionalized the notion that men and women should inhabit separate spheres” (citing ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 87 (1988))).

52. Ettelbrick, supra note 30, at 402 (“[M]aking legal marriage for lesbian and gay
for the LGBTQ community when "we are accepted and supported in society despite our differences from the dominant culture and the choices we make regarding our relationships." 53

Others argue that it is problematic to expend vast resources on a movement that only benefits a few and simultaneously detracts from broader, more immediate issues such as anti-discrimination principles in employment, education, health, and welfare. 54 Further, when "attempting to obtain same-sex marriage rights, gays and lesbians are forced to ask for equal rights on the basis of their similarity to heterosexuals, which is tantamount to conceding that they deserve what heterosexuals have only as long as they look and behave like them." 55 In essence, gay men and lesbians seeking to obtain marital rights support and maintain heteronormativity. 56

On another note, some aver that "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism." 57 Additionally, opponents assert that same-sex marriage advocates' unrelenting demand for equal benefits and rights as conferred by heterosexual marriage solidifies differential treatment for married and unmarried people 58 and widens the gap between the status of marriage and the status of other personal adult relationships. 59 Finally, Martha Fineman calls for the abolition of couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct the power imbalances between those who are married (whether gay or straight) and those who are not.

53. Id.
54. See Brandzel, supra note 9, at 189.
55. Id. at 190.
56. See id. at 195 ("[M]arriage is a mechanism by which the state ensures and reproduces heteronormativity, and absorbing certain types of gay and lesbian relationships will only further this process.").
57. Polikoff, We Will Get What We Ask For, supra note 35, at 1536.
58. See Nancy D. Polikoff, Ending Marriage as We Know It, 32 Hofstra L. Rev. 201, 203 (2003) [hereinafter Polikoff, Ending Marriage as We Know It].
59. See id. at 227 ("When advocates for same-sex marriage invoke the very two-tiered structure that privileges marriage as a reason why lesbians and gay men must have access to the favored tier, they accept that two-tiered structure as a natural and unquestioned phenomenon."). Polikoff also promotes valuing all family forms equally and "just social policies that facilitate maximum economic well-being and emotional flourishing for all, not only for those who marry." Id. at 228; see also Nitya Duclos, Some Complicating Thoughts on Same-Sex Marriage, 1 L. & Sexuality Rev. Lesbian & Gay Legal Issues 31, 31 (1991) (suggesting the effects of same-sex marriage will not be felt uniformly throughout lesbian and gay communities and questioning whether it will exacerbate differences of power in privileges in those communities); Polikoff, We Will Get What We Ask For, supra note 35, at 1549. Polikoff further asserts that the fight for same-sex marriage "detract[s] from, [and] even contradict[s], efforts to unhook economic benefits from marriage and make[s] basic health care and other necessities available to all." Id.;
marriage as a legal category and proposes legal recognition of the Mother-Child Dyad as the foremost legally privileged family connection. Specifically, she proposes that regulation of relationships and benefits should be focused on caretakers and their dependents, not on husbands and wives. By doing so, one family form or family intimacy will not be bolstered over others.

3. Debates Regarding Polygamy within the Same-Sex Marriage Movement

Debates within the LGBTQ community regarding same-sex marriage advocacy similarly translate to disagreement over charged analogies between polygamy and same-sex marriage waged by conservative opponents. In rejecting same-sex marriage, opponents assume the difficult position of arguing that marriage is an incomparable social good which must be “denied to an entire class of persons due to their constitutional natures.” To meet this burden, same-sex marriage opponents attempt to draw a line by asserting that if same-sex marriage is allowed, then “how could we not also allow other forms of deviant sexual practices?” Put another way, “if the barrier that limits marriage to two sexes is dismantled, the [sic] all that the barrier excluded becomes acceptable, including polygamy.”

Peel and Harding, supra note 29, at 593 (explaining the term “marriage” is “less important than the legal substance of partnership recognition”). Peel and Harding assert that declining to take on the “marriage” label may also avert the institution’s historical, political, and ideological baggage. Id.

60. Nancy D. Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman, 8 AM. U. J. GENDER SOC. POLY & L. 167, 172 (2000) [hereinafter Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman] (criticizing “custody, paternity, support, and welfare laws that elevate the importance of the father, while simultaneously denigrating the work of mothering done overwhelmingly by women”); see also FINEMAN, NEUTERED MOTHER, supra note 30, at 228-36.

61. See FINEMAN, NEUTERED MOTHER, supra note 30, at 228-36. See id. at 229-30. Fineman’s proposed eradication of marriage as a legal category would equalize heterosexual and homosexual relationships, in that neither relationship would receive legal recognition or be subject to legal regulation. Id. Further, it would provide protection for LGBTQ people as primary caretakers. Id. Note, however, Fineman’s radical position does not squarely align with or support notions underlying same-sex marriage debates that all adult intimate relationships should be protected and accorded equal status. By elevating caretaking relationships, Fineman bolsters interpersonal hierarchies inherent in some relationships, and leaves little room for recognition of intimate relations not involving children, elderly, or other parties necessitating “care.” See id. at 231-32.


63. Id. at 523.

64. Id. at 523.

65. Id.

66. Id. at 542.
Slippery slope objections to same-sex marriage and LGBTQ advocacy are commonplace. Questions arise, such as “[w]ouldn’t pedophiles, polygamists, and incestuosexuals have the same kind of civil rights” which same-sex couples are seeking?\(^7\) Even Supreme Court Justice Antonin Scalia, in his dissent to *Romer v. Evans*,\(^6\) analogized polygamy to homosexuality as similarly “reprehensible” conduct to which the state could exhibit “animus.”\(^7\) Justice Scalia also made similar “slippery slope” references in his scathing dissent to *Lawrence v. Texas*,\(^7\) where the Supreme Court struck down sodomy laws as an infringement on the right to liberty under the Due Process Clause, and precluded government intrusion into individuals’ private lives regardless of sexual orientation.\(^2\) Scalia criticized the majority’s purportedly flawed decision and asserted that it would lead to the demise of “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality and obscenity . . .”.\(^73\)

Disagreement within the same-sex marriage movement and the larger LGBTQ community regarding the merits of polygamy/same-sex marriage analogies may hinge on the larger disagreement over same-sex marriage advocacy (or more specifically, individual notions of multiple partnering, whether it be polygamy and/or polyamory) and the propriety of government regulation of interpersonal relationships. For example, some same-sex marriage advocates assert that such analogies and “slippery slope” arguments “should . . . be seen as mere rhetorical flourishes.”\(^74\) Further, such parallels are arguably asserted with little support for the exclusionary statements and, rather, speak

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68. Id.
69. See 517 U.S. 620 (1996). The United States Supreme Court struck down Colorado’s statutory bar to legislation protecting LGBTQ individuals as a class, because singling out a class of people based on moral disapproval alone, does not satisfy as a legitimate state interest sufficient to pass rational basis scrutiny. *Id.*
70. *Id.* at 644 (Scalia, J., dissenting).
73. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting). Some assert that since Scalia’s dissent in *Lawrence*, the issue of polygamy will inevitably be raised before the United States Supreme Court. *See Gibeaut, supra* note 5, at 31. Utah Attorney General Mark L. Shurtleff anticipates the United States Supreme Court’s review of polygamy bans and asserts that “[e]ver since Scalia’s dissent [to the majority in *Lawrence*], we knew th[e] question [of polygamy] would have to be answered someday.” *Id.*
to people's heterosexist and xenophobic biases. Other advocates make a principled distinction between polygamy and same-sex marriage by asserting that same-sex marriage does not pose the same threat to American political ideals or have anti-democratic and unequalitarian consequences, such as the perception of Mormon polygamous unions.

On the other hand, some, presumably opposed to same-sex marriage, emphasize the linkages between polygamy and LGBTQ and/or polyamorous relationships. For example, some polyamory enthusiasts consider Mormon fundamentalist polygamists a part of the polyamorous community, as the two relationship forms are legally prohibited under the same criminal polygamy statutes. In fact, some have gone as far as aligning with polygamists by renaming polyamory the postmodern polygamy.

On another note, former Lambda Legal Defense Attorney, Suzanne Goldberg, asserts that Lawrence "clearly protects the rights of adults to make decisions about intimate relationships," and, thus, the extent to which polygamists engage in private extramarital relationships should be protected by constitutional privacy guarantees.

Therefore, opinions vary widely within the LGBTQ community regarding the relationship between same-sex marriage and polygamy. It may behoove same-sex marriage advocates to explore polygamy to clarify the relationship, if any, and then attempt to bridge the divide within the LGBTQ community regarding this issue for a stronger, more unified movement.

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75. See id. at 59-60. Chambers makes the above assertion based on his observations of Congressional debates regarding the Federal DOMA where various polygamy/same-sex marriage analogies were waged. Id.
76. See Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501, 1593-94 (1997) [hereinafter Strassberg, Distinctions of Form or Substance].
77. See Strassberg, Considering Polyamory, supra note 7, at 439-43, 444-65; Strassberg, Crime of Polygamy, supra note 7, at 355 (defining "polyamory" as a postmodern form of multi-partner relationships unburdened by patriarchal gender roles, heterosexual constraints, or monogamous exclusivity").
78. See Strassberg, Crime of Polygamy, supra note 7, at 355 (citing Ryan Nearing, Mormons on TV, 8 LOVING MORE 35, 35 (1996)). But see Lorraine Hutchins, Bisexuality, 11 LOVING MORE 8, 10 (1997) (calling for excluding polygyny from the polyamory category because of its sexism and heterosexism).
81. Id.
II. REALITIES OF POLYGAMOUS MARRIAGE IN THE UNITED STATES

To craft an accurate and effective response to analogies between polygamy and same-sex marriage, it is essential to gain a better understanding of polygamy. This section provides a comprehensive overview of polygamy in the United States to determine if there are linkages between same-sex marriage and polygamy that may, in fact, bolster same-sex marriage advocacy. Specifically, it reviews the United States' historical regulation of polygamy with the rise of the Church of Jesus Christ of Latter-day Saints (LDS Church), the practice and realities of polygamy in modern America, the current state of United States law and its enforcement against polygamists, the emerging movement to decriminalize polygamy, and the experience of women in plural marriages.

Despite significant numbers of practicing polygamists in the United States, the government takes a harsh stance with respect to plural marriage. Political parties spanning from the conservative religious right to the ultra-liberal left express a unified hostility towards polygamy. American disdain for plural marriage culminated with the rise of the LDS Church in the nineteenth century, which permitted, practiced, and celebrated plural or “celestial” marriage. Considering polygamy destructive to Western civilization and linking it to political despotism, the federal government tried to stomp out the practice and weaken the Church’s political power by revoking the LDS Church’s charter, hinging Utah’s statehood on the prohibition of polygamy within the territory and denying civil rights to admitted polygamists.

82. See Chambers, supra note 74, at 53-54.
83. Id. at 54.
84. KIMBALL YOUNG, ISN'T ONE WIFE ENOUGH? 50 (1954). In 1852, Church Apostle Orson Pratt prepared a speech entitled “Celestial Marriage,” to defend the practice of polygamy. Pratt characterized women’s place in the family by stating that “[t]he husband is the head of the family, and it is his duty to govern his wife or wives, and the children, according to the laws of righteousness; and it is the duty of the wife to be subject unto him in all things, even as the church is subject unto Christ.” Id.
85. See Reynolds v. United States, 98 U.S. 145, 166 (1878).
87. After persecution in New York and other eastern states, LDS followers migrated west to find sanctuary and to separate themselves from the larger society. They eventually settled in Utah. See Utah Enabling Act, ch. 138, 28 Stat. 107, 107-08 (1894). The United States Congress also hinged statehood on inclusion of anti-polygamy provisions in Arizona, New Mexico, and Oklahoma’s state constitutions. See Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 269 (1906).
A. Historical Regulation of Polygamy

The United States historically took the stance that polygamy thwarts social order and is contrary to well-functioning democratic governance. Specifically, polygamy purportedly “fail[ed] to produce critical building blocks of liberal democracy, such as autonomous individuality, robust public and private spheres, and affirmative reconciliation of individuality and social existence . . . .” Traditional practices of “polygamy among Native Americans, informal cohabitation and separation among former slaves, and arranged marriage among Asian immigrants generated suspicion and hostility,” and represented a threat to America’s hierarchical social order.

At the advent of the LDS Church, its practitioners, Mormons, suffered great persecution. “Their beliefs, in direct revelation and the sacred origin of the Book of Mormon, threatened mainstream Protestant hegemony.” The LDS Church formed in 1839 in upstate New York, but soon thereafter its followers were forced to seek refuge from persecution by heading west to Ohio and Missouri. “Within a period of eight years, persecutions drove the entire body of the Church temporarily into northwestern Missouri,” only to face an extermination order issued by Missouri Governor Lilburn W. Boggs. Governor Boggs’s order required the state militia to treat Mormons “as enemies” and to exterminate or drive them from the state “if necessary for the public [good].” The Mormons eventually headed westward to settle in what today is known as Salt Lake City, Utah.

89. See supra notes 15-17.
90. Strassberg, Crime of Polygamy, supra note 7, at 356.
92. See COTT, PUBLIC VOWS, supra note 25, at 10-11.
94. Chambers, supra note 74, at 62.
95. See generally GEORGE Q. CANNON, LIFE OF JOSEPH SMITH: THE PROPHET 258-81 (1986) (detailing the early history of the Mormon religion). The LDS Church’s founding prophet, Joseph Smith, was eventually assassinated in June 1844 in Carthage, Missouri. Id. at 520-27.
96. Milne, supra note 93, at 263.
97. Id.
98. RICHARD LYMAN BUSHMAN, JOSEPH SMITH: ROUGH STONE ROLLING 365 (2006) (quoting a letter from Lilburn W. Boggs, Governor, State of Missouri, to John B. Clark, the general of the State Militia of Missouri (Oct. 27, 1838)).
so that they could "freely establish a distinctive way of life," one which other communities found threatening and offensive. 99

Interestingly, Mormons' religious oppression pre-dated the LDS Church's adoption of "celestial" or plural marriage. 100 However, once the LDS Church condoned polygamy, the persecution intensified, 101 and the Church became a political force with which to be reckoned. Foremost, Mormons rejected tolerance of others' beliefs and successfully exerted political control over their occupied territory. 102 Mormon leaders also "defended polygamy as a positive religious command, . . . designated [as] 'the Principle,' and attacked monogamy as evil and unnatural." 103 Friction between the United States government and the LDS Church intensified as a result. 104 Amidst this political strife, Mormons' "practice of polygamy . . . became the principle articulated grounds of the political efforts to cripple them, and, in truth, it was polygamy, more than any other single practice or belief, that placed them outside the mainstream of American culture." 105

Over time, Congress enacted several laws criminalizing polygamy, including the Morrill Act of 1862 106 and the Edmunds Act of 1882, 107 both banning polygamy in the territories. The Edmunds-Tucker Act of 1887, hinged men's eligibility to vote on confirming under oath


100. LDS Church leaders did not declare polygamy ordained by God until 1852. See PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 69 (1994). Joseph Smith, founder of the LDS Church, supposedly had "[a] revelation in 1843 that Mormons were to practice plural marriage as a component of a new and everlasting covenant whereby marriages would last throughout eternity . . . . Bigamy was publicly announced in 1852 after which time tension rose between 'Mormon Saints' and the wider society." Id.; see also GORDON, supra note 93, at 20 ("By the time polygamy became a topic of national attention in the early 1850s, Mormonism was two decades old.").


102. See Chambers, supra note 74, at 62-63 (citing KLAUS J. HANSEN, MORMONISM AND THE AMERICAN EXPERIENCE 125-29, 162-63 (1981)). Mormons controlled the Utah territorial legislature and "used their political power to support the practice of plural marriage." Id. at 63. In fact, "while the legislature never declared plural marriages legal[ ] . . . it enacted laws to accommodate the lives of plural-marriage families." Id.

103. GORDON, supra note 93, at 85 (noting that Mormon leaders asserted that children of polygamous marriages were physically superior).


105. Chambers, supra note 74, at 63; see also JOAN SMYTH IVerson, THE ANTIPOLYGAMY CONTROVERSY IN U.S. WOMEN'S MOVEMENTS, 1880-1925: A DEBATE ON THE AMERICAN HOME 4 (1997). In addition to scorning Mormons' practice of polygamy, the American majority opposed Mormons' aggressive missionizing abroad, encouragement of immigration, the Church's economic and political power, and the Church's influence and power over its faithful followers. Id.


that they did not cohabitate with more than one woman and barred polygamists from jury service and political office.\textsuperscript{106}

Through this discriminatory legislation, the government vigorously prosecuted Mormons for violations of the above-referenced laws.\textsuperscript{109} During the 1880s, over 1300 polygamist Mormons were subjected to "federal indictments, arrests, prosecutions, and imprisonments."\textsuperscript{110} Finally, in 1887 Congress resorted to more drastic measures by abrogating the LDS Church's charter, dissolving its corporate status, and confiscating Church property.\textsuperscript{111} Three years later, the Church renounced the practice and Utah's territory was "admitted into the Union in 1894 on the condition that 'polygamous or plural marriages [were] forever prohibited.'"\textsuperscript{112}

In 1878, the prosecution of George Reynolds under the Morrill Act offered the United States Supreme Court the opportunity to bless the nation's polygamy ban.\textsuperscript{113} In Reynolds v. United States, the Court considered whether the federal statute was a proper exercise of congressional authority.\textsuperscript{114} The Court held that constitutional limitations on Congress's ability to infringe on the free exercise of religion did not cover legislation banning polygamy.\textsuperscript{115} In upholding Reynolds's conviction, the Court made a doctrinal distinction between religious beliefs and religious acts, and confirmed that free exercise protections only pertain to the former.\textsuperscript{116} The Court reasoned that, despite America's guarantee of religious freedom, "it is impossible to believe that . . . [such protection] was intended to prohibit legislation in respect to this most important feature of social life [i.e., marriage]."\textsuperscript{117}

In rendering its decision, the Court relied on Francis Lieber's philosophies to assert that a society built upon plural marriage inherits patriarchal political principles leading to despotism, whereas

\begin{itemize}
\item \textsuperscript{109} See Chambers, supra note 74, at 65.
\item \textsuperscript{110} D. MICHAEL QUINN, SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS: A MORMON EXAMPLE 282 (1996).
\item \textsuperscript{111} See Edmonds-Tucker Act, §§ 13, 17, 18, 24 Stat. 635, 637, 638; Strassberg, Crime of Polygamy, supra note 7, at 353; see also Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 45, 64-66 (1890) (holding that Congress had the power to repeal the charter incorporating the Church and confiscate the Church's assets, other than its places of worship, parsonages, and burial grounds for public use, in order to obliterate the practice of polygamy).
\item \textsuperscript{112} See Strassberg, Crime of Polygamy, supra note 7, at 353-54 (citing Utah Enabling Act, Pub. L. No. 53-138, §§ 1, 3, 28 Stat. 107, 108 (1894)).
\item \textsuperscript{113} See Reynolds v. United States, 98 U.S. 145, 161-67 (1878).
\item \textsuperscript{114} Id. at 166.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 165.
\end{itemize}
a foundation based on monogamy is inherently antithetical to such despotism and, rather, nurturing of democratic principles. The Court also exposed its holding's racist underpinnings by stating that, "[p]olygamy 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." *Reynolds v. United States* continues to be a binding landmark decision for issues of polygamy.

After the LDS Church officially denounced polygamy, many families continued the practice with clandestine Church support. By the 1920s, however, the Church took a hard stance and excommunicated anyone who continued the practice, leading to a split in the Church, with fundamentalist groups splintering off into rural communities in Southern Utah and Arizona.

**B. Modern-Day Polygamy**

"Today, there are ten times as many Mormon fundamentalists living in polygynous marriages as there were in the original Mormon community in 1862." In fact, there are estimates of 8000 to 10,000 people currently living in polygamous relationships in the United States. These families tend to be cloistered in insular communities in Utah, Arizona, and parts of Idaho, perhaps due to wide-scale societal disapproval and the criminal nature of their relationships.

In addition to fundamentalist Mormons, it is suspected that there are a significant number of immigrant families engaging in polygamy in the United States. There is little reliable information,
however, regarding the prevalence of polygamy within immigrant communities.\textsuperscript{127} Collection of accurate statistics is difficult because the United States does not recognize more than one wife for immigration and naturalization purposes,\textsuperscript{128} thus pushing polygamous practices underground.\textsuperscript{129} Immigrant men likely operate under the radar by bringing second and third wives to the United States as “sisters” or “daughters” and keeping quiet about their private family dynamics.\textsuperscript{130}

\textbf{C. Current State of the Law}

While there are a significant number of people engaging in polygamy in America, the practice is currently illegal in all fifty states.\textsuperscript{131} Polygamy is also explicitly prohibited under Utah, Arizona, New Mexico, Oklahoma, and Idaho’s state constitutions.\textsuperscript{132} More recently, the Utah state legislature enacted the Child Bigamy Amendment, increasing the punishment for bigamy carried out with a minor.\textsuperscript{133}

Under federal immigration law, the United States only recognizes monogamous marriages for immigration and naturalization purposes.\textsuperscript{134} Section 212(a)(11) of the Immigration and Naturalization Act, codified as 8 U.S.C. Section 1182(a)(11), provides that immigrants coming to the United States who practice polygamy are “classes of

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\textsuperscript{127} See, e.g., id.


\textsuperscript{129} See supra notes 122-25.


\textsuperscript{131} Id.

\textsuperscript{132} Congress required anti-polygamy provisions within Arizona, New Mexico, Oklahoma and Utah’s constitutions, as a condition to statehood, and Idaho adopted a similar constitutional prohibition on its own accord. See Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910); New Mexico Enabling Act, ch. 310, 36 Stat. 557, 558 (1910); Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 269 (1906); Act of Admission of Idaho, ch. 26 Stat. 215 (1); see also Romer v. Evans, 517 U.S. 620, 648 (1996).


aliens [who] shall be ineligible to receive visas . . . or admission.” Similarly, the United States Citizenship and Immigration Service will not grant citizenship or a Permanent Residence Card to anyone lacking “good moral character,” and practicing polygamy renders applicants “not moral” under the law.

1. Enforcement of Anti-Polygamy Law

Although polygamy is banned throughout the United States, enforcement of anti-polygamy laws tends to be lax; compared to thousands of prosecutions and imprisonments of polygamous couples during the nineteenth century, prosecutors and police today generally leave polygamous families alone. Instead, prosecutors concentrate more on “serious crimes” occurring in polygamous communities, as opposed to merely the polygamous nature of their relationships.

For example, Utah Attorney General Mark L. Shurtleff recently charged Warren Jeffs, a self-proclaimed prophet for the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), as an accomplice in rape and other related criminal acts for “using his position as a religious leader to force [a girl] into an underage marriage in which she was repeatedly sexually assaulted.” Jeffs and two of his brothers were also accused of repeatedly molesting their nephew and have been described as “‘dangerous child molesters, serial predatory pedophiles and/or child rapists that posed a constant, serious and ongoing threat to children.’” Jeffs is currently standing trial for these charges.

Although Jeffs’ criminal conduct occurred within a polygamous context, the government is purportedly more concerned with the child abuse, not the polygamous nature of the relationships involved. However, Jeffs’ defense lawyer, Walter F. Bugden, asserts that while polygamy will not be raised in the criminal proceedings, the prosecution of his client “is nothing but religious persecution,” and he

135. In re Man, 16 I & N Dec. at 544 n.3.
137. See Chambers, supra note 74, at 71.
138. Id.; see also BRADLEY, supra note 122, at 182-83.
139. Gibeaut, supra note 5, at 31.
141. Gibeaut, supra note 5, at 28.
143. See Gibeaut, supra note 5, at 28.
expects to use arguments of religious freedom in Jeffs' defense. The state and counsel for the civil plaintiffs assert that their cases "have nothing to do with polygamy or [Jeffs'] beliefs." However, in a different context, Attorney General Shurtleff has linked child abuse and polygamy by averring that, "taken as a whole, the FLDS belief system and lifestyle — including polygamy and the overall treatment of women — enable what amounts to institutionalized child rape and other forms of abuse."

There are various reasons for waning enforcement of anti-polygamy laws. In Utah, it is likely a matter of state resources as "the state has so many polygamists that it simply can't afford to prosecute them for practicing plural marriage alone without evidence of other, more serious crimes." The emerging non-intervention trend and society's generalized indifference toward polygamy are also likely due to "Americans . . . chang[ing] their views about the role of the criminal law in the context of nonviolent sexual behavior." Perhaps it is a matter of both liberalizing views toward alternative relationships and a shifting allocation of government time and resources.

2. Movement to Decriminalize Polygamy

As attitudes toward non-marital and/or extra-marital sex and same-sex relationships have liberalized, the criminalization of polygamy has been called into question. Civic and democracy-based arguments historically waged against polygamy also appear to fall short in our modern, more liberalized society. Statehood is now firmly established and "contemporary polygyny can no longer be said to threaten our national ambitions." Further, while the expanding

144. Id. at 29.
145. Id. at 28-29.
146. Id. at 29.
147. Id.
148. Chambers, supra note 74, at 71.
149. An additional factor may be the emergence of polyamory, as discussed supra note 77. Polyamory is a "post-modern form of multi-partner relationships unburdened by patriarchal gender roles, heterosexual constraints, or monogamous exclusivity." Strassberg, Crime of Polygamy, supra note 7, at 355. "Polyamory can be viewed as less objectionable than polygyny because it is an extension of the liberal emphasis on individuality and creates intimate and social relationships that are radically different from the rigidly hierarchical and gendered private and public world created by patriarchal polygyny." Id. at 356; see also Strassberg, Considering Polyamory, supra note 7, at 453 (suggesting polyamory may be the culmination of many of the same liberal principles justifying same-sex marriage and flexible gender roles in opposite sex marriage).
150. Strassberg, Crime of Polygamy, supra note 7, at 354.
151. See discussion supra Part II.A.
152. Strassberg, Crime of Polygamy, supra note 7, at 356.
Mormon population may have historically posed a social and political threat during the rapid progression of Western territories, today's scattered pockets of fundamentalist Mormon sects do not pose the same threat.\textsuperscript{153}

The strongest arguments in favor of decriminalizing polygamy, however, are constitutional claims for religious freedom, Due Process, and Equal Protection.\textsuperscript{154} Developments in constitutional jurisprudence since \emph{Reynolds v. United States}\textsuperscript{155} may provide greater support for polygamists' contention that polygamy bans fail to meet constitutional muster.\textsuperscript{156} For example, Utah's criminal bigamy statute was recently challenged on various constitutional grounds by defendant Rodney Holm.\textsuperscript{157} Holm was legally married to one woman but claimed to have had two other "spiritual wives" sealed in FLDS ceremonies.\textsuperscript{158} Holm was convicted of unlawful sex with a minor, as one of his "wives" was only sixteen.\textsuperscript{159}

Holm argued in his appeal to the Utah Supreme Court that \emph{Reynolds v. United States} should be overturned as "nothing more than a hollow relic of the bygone days of fear, prejudice, and Victorian morality."\textsuperscript{160} He further asserted that his bigamy conviction violated his constitutional right to free exercise of religion, his liberty interest as protected by the Fourteenth Amendment's Due Process Clause, his Fourteenth Amendment Equal Protection right to not be unfairly targeted for his religion, and his First Amendment right to Free Association.\textsuperscript{161}

The court affirmed the "continuing vitality" of \emph{Reynolds v. United States} and denied Holm's Free Exercise claim.\textsuperscript{162} The court also denied Holm's attempt to shield his unlawful conduct (i.e., sex with a minor) from state interference based on the liberty interest protected in \emph{Lawrence v. Texas}.\textsuperscript{163} The court confirmed that, despite

\begin{itemize}
  \item 153. See id. at 363-64.
  \item 154. Id. at 356.
  \item 155. 98 U.S. 145 (1898).
  \item 156. See Strassberg, \emph{Crime of Polygamy}, supra note 7, at 356. For discussion of Reynolds, see discussion supra Part II.A.
  \item 158. Id. at 730.
  \item 159. Id.
  \item 160. Id. at 741.
  \item 161. Id. Holm also asserted that the term "marry," as used in Utah's bigamy statute and unlawful sexual conduct with a minor statute, was unconstitutionally vague. Id. at 731.
  \item 162. Id. at 740.
\end{itemize}
Lawrence’s “seemingly sweeping language,” its holding was actually quite narrow.\textsuperscript{164} In fact, Lawrence set forth a litany of contexts to which its holding did not apply, issues pertaining to minors being one of them.\textsuperscript{165} The court also denied Holm’s equal protection claim because Utah’s bigamy statute was neutral in its language and application and did not make an unconstitutional distinction between religious and non-religious motivated conduct.\textsuperscript{166}

Finally, the court denied Holm’s Free Association claim on two bases.\textsuperscript{167} First, Utah’s bigamy statute did not infringe on his right to “intimate association,” as “polygamous behavior was not encompassed within the ambit of [constitutional] individual liberty protections.”\textsuperscript{168} Second, the statute did not violate Holm’s right to “instrumental associations,” because it merely prohibited polygamous conduct and did not prevent Holm from “associating with a group advocating the social and spiritual desirability of a polygamous lifestyle.”\textsuperscript{169} Holm filed a petition for United States Supreme Court review, but certiorari was denied on February 26, 2007.\textsuperscript{170}

At first blush, State v. Holm seems to extinguish any hope for constitutional protection of polygamy. However, Chief Justice Durham wrote a lengthy dissent to the Utah Supreme Court decision, averring that Holm’s bigamy conviction should be overturned because, under Lawrence, the Fourteenth Amendment’s Due Process clause protects private relationships between consensual adults.\textsuperscript{171} Holm’s counsel, Rodney R. Parker, similarly argued that “consensual sexual acts between people of the same gender and polygamy are not distinguishable.”\textsuperscript{172} Interestingly, former Lambda Legal Defense Attorney, Suzanne Goldberg, similarly asserts that Lawrence clearly protects adult decisions regarding intimate relationships, and, thus, the extent to which Holm engaged in a private relationship outside of his

\textsuperscript{164} See Holm, 137 P.3d at 743 n.10 (citing, among other things, Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) and holding that “Lawrence . . . did not announce . . . a [constitutionally protected] fundamental right . . . to engage in all manner[s] of consensual sexual conduct, specifically in this case, of incest”).

\textsuperscript{165} Lawrence, 539 U.S. at 560 (“[This] case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle.”).

\textsuperscript{166} See Holm, 137 P.3d at 744.

\textsuperscript{167} Id. at 745-46.

\textsuperscript{168} Id. at 746 (emphasis added).

\textsuperscript{169} Id.


\textsuperscript{171} See Holm, 137 P.3d at 758 (Durham, J. dissenting) (asserting Utah’s bigamy statute is unconstitutional).

\textsuperscript{172} Ward, Polygamous Union Sparks Split, supra note 80.
marriage should be protected by constitutional privacy guarantees. Thus, the fact that Reynolds and polygamy bans have been seriously questioned once again, and that leading thinkers analogize some forms of polygamy to private consensual conduct between adults, may foreshadow a legitimate movement to decriminalize polygamy.

3. Experience of American Women in Plural Marriages

While the criminalization of polygamy has been discussed at length, the experience of women in plural marriages is often not addressed within these discourses. In fact, little is known about women's experiences of polygamous marriages in America. It is thus imperative to conduct a more nuanced analysis of polygamy contextualizing women's experiences to fully comprehend its implications for gender equality. This analysis can then be relied upon to determine where to place polygamy within same-sex marriage debates.

It is estimated that “ninety percent of contemporary polygyny [in the United States] takes place within several different organized and cohesive polygynous groups, while ten percent involves either free-standing single families or a few associated families” and has a distinct culture. Research further indicates that women's experiences of polygamy are extremely varied and highly dependent upon the socio-cultural context in which their marriages are situated and the relationships within their family units.

Similar to Canada, America's polygamous families tend to be cloistered in insular communities in Utah, Arizona, and parts of Idaho. This is likely due to wide-scale societal disapproval and the criminal nature of their relationships. The isolation of polygamous communities can be problematic for women for two reasons. First, individuals may “lose the perspective and ability needed to make informed, autonomous life choices.” Second, individuals' psychological and geographical isolation from mainstream society may hinder government efforts to monitor abuse and provide support.

173. See id.
175. See Campbell, supra note 133, at 34; see also Kahlile Mehr, Women's Response to Plural Marriage, 18 DIALOGUE: J. MORMON THOUGHT 84, 84 (1985) (surveying historical women's narratives regarding their experience of polygamy and observing that some LDS women ardently accepted polygamy as a divine principle, others viewed it as unwelcome but necessary to reach salvation, and others loathed it).
176. Bala et al., supra note 125, at 6.
177. Id. According to Bala, polygamous families in Canada are similarly isolated from mainstream society. Id.
178. Campbell, supra note 133, at 7 (emphasis omitted).
179. Id.
Polygamy has particular deleterious effects on women and children’s economic security. For example, by analogy, women in Bountiful, British Columbia, tend to have limited access to resources and education and face economic exploitation by their husbands. If they can secure employment, they face depressed wages and long hours since group leaders control employment. As such, many women rely on government subsidies to support their families. Further, they may suffer even greater economic hardship should they leave a polygamous marriage and community. These facts are instructive because America’s cloistered polygamous communities are similar to those in Canada.

With respect to polygamy’s effect on women’s psychological, reproductive, and sexual health, women’s experiences vary. Some women face low self-esteem, a sense of failure, and loss of autonomy, while others report a higher standard of psychological well-being. Nevertheless, there is great concern regarding polygamy’s effects on women’s fertility and risk for obtaining the human immunodeficiency virus (HIV) or other sexually transmitted diseases.

On a social level, women’s experience of plural marriages may be similar to those in monogamous marriages. Women living in polygamous communities are generally required to obey their husbands and bear many children. While women and their allies have fought against such subordination, many religious tenets call for submission and strict division of gender roles, and many families ascribe to hierarchical delineations. Similarly, the fact that women in polygamous marriages may not wield power and authority, alone, is insufficient to deem polygamy unquestionably harmful to women, because patriarchy exists within most conservative American religious and civic

180. See id. at 17.
181. See id. at 17-18.
182. Id. at 16.
183. Id.
184. See id. at 17. Women living in polygamous communities generally have had “limited contact with institutions and individuals beyond their group.” Id. As such, they may distrust the outside community and not have the resources to navigate it to seek resources. Id. Further, these women may have little education or skills to obtain employment within the larger community. Id.
185. See generally, Bala et al., supra note 125 (detailing the status of Mormons and the practice of polygamy in a cross-cultural comparison).
186. See Chambers, supra note 74, at 19.
187. See id. at 20. There is even greater concern in Africa, where women are contracting HIV in uncontrollable numbers. Id.
188. See Gibeaut, supra note 5, at 29 (quoting the defendant’s wife, “It was what we lived for . . . It was our mission.”).
189. See Chambers, supra note 74, at 82.
Further, although research indicates that women in polygamous marriages often face sexual, physical, and emotional abuse at the hands of their husbands, such abuse similarly occurs within monogamous heterosexual and LGBTQ, married and unmarried relationships.

Polygamous immigrant women likely experience plural marriages differently than Mormon women engaging in polygamy. Foremost, polygamy among immigrants is likely grounded in the Islamic faith or other entrenched cultural norms, rather than fundamentalist Mormonism. Thus, in addition to struggling as an immigrant and navigating the interpersonal trials of plural marriages, these women face the contradiction of their marriages being an integral part of their culture and/or religion, yet scorned by American society. In other words, polygamous immigrant women face additional levels of oppression when compared to their polygamous Mormon counterparts.

In the end, women's experience of polygamy may not stray too far from women's experiences of monogamous marriages. In fact, some research indicates that women in American polygamous communities "benefit from the female companionship and friendship that polygamy affords, as well as the sharing of child rearing and household responsibilities." Therefore, the experience of women in plural marriages

190. Id.
192. See Rhonda Copelon, Intimate Terror: Understanding Domestic Violence as Torture, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116 (Rebecca J. Cook ed., 1994) ("[A]buse of women by their male partners is among the most common and dangerous forms of gender-based violence.").
194. Hassouneh-Phillips, supra note 191, at 736 (describing the cultural change women coming from cultures where it is legal to practice polygamy experience).
195. Id.
196. Id. at 736-38.
197. Campbell, supra note 133, at 5 (citing Stephanie Forbes, Why Just Have One? An Evaluation of Anti-Polygamy Laws Under the Establishment Clause, 39 HOUSTON L. REV. 1517, 1542-43 (2003)); Chambers, supra note 74, at 74. Anthropologist Janet Bennion's research indicated there is no more likelihood of criminal abuse or neglect of wives or children in polygamous families, when compared to mainstream monogamous families,
should not be essentialized. Each marital union must be analyzed individually, based on the economic, psychological, reproductive, and social effects it has on the women involved.

With respect to gender equality, there is a general consensus that polygamous marriages are patriarchal in structure, contrary to principles of gender equality. It is thus questionable whether true equality can be achieved within a plural union. However, individuals may assert to the contrary.

III. GLOBAL PRACTICES, EXPERIENCES, AND INTERPRETATIONS OF POLYGAMOUS MARRIAGE

In addition to examining polygamy on a domestic level, when fashioning an appropriate response to analogies between same-sex marriage and polygamy, it is important to conduct a cross-cultural analysis of polygamy and consider the international human rights stance on the practice. This section compares cross-cultural practices and regulation of polygamy within Canada, Syria, Bhutan, and Zimbabwe and reviews the international human rights stance on polygamy and its implications for gender equality. Conducting this analysis aims to broaden the discussion by incorporating global perspectives regarding polygamy.

A. Cross-Cultural Analysis of Polygamy

In-depth research was conducted in 2005, analyzing the cross-cultural legal and policy approaches to polygamy and “illuminat[ing] the ways in which participation in polygamous marriages affects women’s social and economic status, as well as their overall health and well-being.” Researchers concluded that global approaches to polygamy do not account for the diversity of these women. Specifically, the approaches are generally premised on one of two presumptions: that polygamy is universally harmful to women, or contrarily,
that polygamy is benign to women. From that point, countries either ban the practice according to secular civil law (which legally condones it based on Islamic law), personal status law, or apply a combination of customary law (which permits polygamy within customary marriages) and civil law (which prohibits polygamy in civil marriages).

"While regulation of marriage and the family in Europe and North America is the province of secular law, religious and customary family law retains its authority in many other parts of the world." In many cultures, issues relating to family are regulated by a complex matrix of customary law, tribal law, religious, and/or secular civil law. Further, "[w]ithin a single legal and religious tradition, there may be substantial variations in religious or customary family law." The result is a more pluralistic type of "family law."

With respect to embracing polygamous marriages formed abroad, countries are generally willing to give effect to polygamous marriages formed by persons domiciled outside of the country and according to the laws of the place where the marriage was celebrated. More conservative approaches, however, have been adopted in the context of dealing with immigration of polygamous families. For example, some countries recognize the plural unions for purposes of marriage relief but decline to accept or embrace the union for immigration purposes.

"[G]iven the diversity within the global community of women in polygamous marriages, it is extremely difficult to draw a single, unqualified conclusion as to how women experience polygamy."
Further, although cross-cultural approaches to polygamy vary with respect to tolerance and regulation of the practice, they all have one thing in common—they fail to encompass a nuanced understanding of the diverse needs and experiences of women and children within polygamous families.212

To obtain a deeper understanding of the cross-cultural realities of polygamy and consider the possible linkages between same-sex marriage and polygamy, below is a short summary of four diverse approaches to polygamy within Canada, Syria, Bhutan, and Zimbabwe.

1. Canada

Canada’s approach to polygamy is strikingly similar to that of the United States. Canadian Criminal Code Section 293 criminalizes plural marriage within the territories, yet polygamous families and communities continue to exist with little threat of prosecution.213 Since 1892, there have only been a few reported prosecutions of polygamy involving Aboriginal people, occurring over a century ago.214 To date, not one prosecution has been brought against polygamists in Canada’s most sizeable polygamous community, Bountiful (British Columbia), where it is estimated that about 1000 Fundamentalist Mormons engage in plural marriage.215 Researchers on behalf of the Status of Women Canada suggest that this lack of law enforcement may be due to “concerns about the constitutional validity of Canada’s laws on polygamy.”216

Under the Immigration and Refugee Protection Act of 2001, a party to a polygamous marriage does not qualify as a “spouse” for purposes of immigration.217 Similar to American immigrants, however, Muslims and Fundamentalist Mormons likely gain admission into Canada using other immigrant categories.218 Further, “foreign polygamous marriages that were validly entered into are accorded limited legal recognition in Ontario” for the purposes of separation and succession.219

212. Id.
213. See Canada Criminal Code, R.S.C., ch. C 46, §293 (1985); see also Campbell, supra note 133, at 1. Canadian Criminal Code Section 293 bans polygamy, however it does not “focus on the act of ‘marriage’ per se, but rather on the status of having more than one spouse, or being in a conjugal union with more than one person, simultaneously.” Id.
214. Bala et al., supra note 125, at 3.
215. Id.; see also Campbell, supra note 133, at 6.
216. Bala et al., supra note 125, at 3.
217. Id.
218. See id.
219. Id. (“Under provincial law in Ontario, the definition of ‘spouse’ for purposes of separation and succession law includes those in polygamous marriages, if the marriage is valid in the foreign jurisdiction in which it was celebrated.”).
In 1985, Canada's Law Reform Commission called for the repeal of Section 293 after concluding that polygamy was "a marginal practice which corresponds to no meaningful legal or sociological reality in Canada." The repeal was denied at that time. In 2005, the Federal Government commissioned the Federal Justice Department and Status of Women Canada to conduct a study into the legal and social ramifications of polygamy. The research was intended to assist the government with, among other things, determining the government policy regarding polygamy. Upon completion of the research, it was found imperative to focus on the "social, psychological and economic impact" of polygamy on women and children when determining whether to decriminalize polygamy. This recommendation was based on findings "that polygamy is often exploitative of women," and that "contrary to notions of gender equality that are fundamental to Canadian society . . . children of polygamous families are more likely to experience emotional difficulties and have lower educational achievement than children in monogamous families." Despite these sobering realities, some of the study's analysts took the position that Canada should consider legalizing the practice, as the statutory ban may be unconstitutional. Contrarily, other analysts asserted that "there is no justification for changing the Canadian polygamy laws." At present, Canada remains undecided as to whether it should maintain its polygamy ban or lead the way for Western nations in liberalizing polygamy policies and regulations.

2. Syria

Syria is a secular Arab Republic that is recently experiencing an Islamic revival. While there is no official state religion, a majority

220. Id.
221. Id. Although the LRC proposed repealing the law, polygamy is still illegal in Canada. Id.
222. Id. at 1.
223. ANGELA CAMPBELL ET AL., POLYGAMY IN CANADA, supra note 125, at Preface.
224. Bala et al., supra note 125, at iii.
225. Id.
226. Id.
228. Bala et al., supra note 125, at 44.
of Syrian citizens are Sunni Muslims. Further, the constitution requires a Muslim president and deems Islamic jurisprudence the principal source of legislation.

Polygamy, as well as marriage, divorce and other personal relations, falls within the province of Syria's personal status law. Personal status law is law governed by an individual's religion and enforced in religious courts separate from the country's civil court system. For example, Sunni and Shiite Muslims face law enforcement in Shari'ah courts, and likewise, Druze in Druze courts, and Christians and Jews in Ruhi courts.

Islam is the only religion in Syria that expressly permits polygamy, and Sunnis engage in polygamy to a greater degree than Shiites. Under Shari'ah law a man may have up to four wives, so long as he can provide for them and treat them justly. Many argue that verse 4:129 of the Qur'an confirms that men are incapable of treating multiple wives justly. In 1953, Syria enacted the Syrian

(Syrian women are increasingly donning Islamic head scarves to confirm their religious piety) [hereinafter Women's Rights Activists Face Resistance].

See BACKGROUND NOTE: SYRIA, supra note 229. Syria's religious population is comprised of 74% Sunni Muslims, 12% Alawis, 10% Christians, 3% Druze, and "small numbers of other Muslim sects, Jews, and Yazidis." Id.

Id.; see also Interview with Samar Mazloum, Associate Legal Protection Officer, United Nations Human Rights Counsel and Fulbright Scholar (Feb. 21, 2007) [hereinafter Mazloum Interview].


See Mazloum Interview, supra note 231.

THE KORAN WITH PARALLEL ARABIC TEXT 4:3 (N.J. Dawood tr., 2000) [hereinafter THE QUR'AN].

If ye fear that ye shall not
Be able to deal justly
With the orphans,
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, or (a captive)
That your right hands possess.
That will be more suitable,
To prevent you
From doing injustice.

Id.

See THE QUR'AN 4:129 ("Ye are never able [to be fair and just [as between women, [even if it is [y]our ardent desire."); see also Gamal Badawi, Polygamy in Islam, http://www.polygamy.com/articles/templates/?a=52 (last visited Mar. 21, 2008) ("Unlike Judaism, Christianity and perhaps other religions as well, Islam deals with the issue more clearly and provides certain legal requirements and restraints that amount to the discouragement
Personal Status Code, which permits men to marry up to four wives and to divorce them through repudiation, yet also empowers judges to refuse permission if a man cannot prove that he can meet the statutory conditions (i.e., support the multiple wives equally). In practice, however, judges rarely utilize this discretion, and the statutory limits are rarely enforced.

United Nations Associate Legal Protection Officer and Syrian native, Samar Mazloum, confirms that the polygyny conditions codified under Shari'ah personal status law are rarely observed by Muslim men or enforced by Shari'ah courts. According to Mazloum, “[p]olygamy has turned into an arbitrary practice... [resulting in] negative effects on women, families and... society as a whole.”

There are currently no official statistics, or even estimates, confirming the number of polygamous unions in Syria. While polygamy was more common in the 1960s, rising costs appear to be making the practice and supporting multiple wives less tenable. Nevertheless, polygamy in Syria still remains more common than divorce.

As a general rule, polygamy is looked down upon in Syria and is not practiced among well-educated people residing within higher socio-economic classes. While most Syrian women do not support polygamy, they generally endure plural marriages to safeguard of such a practice.

Despite Tunisia and Turkey's majority Muslim populations, the countries have passed laws banning polygamy. Ridarson Galingging, Restricting or Banning Polygamy, Human Rights Values Must Stand, JAKARTA POST, Jan. 12, 2007, at 6, available at http://www.law.northwestern.edu/news/article_full.cfm?eventid=3027. "Iraq prohibited polygamy in 1959 and specified imprisonment and fines for any violator. Due to strong opposition the law was revised in 1963 and the article prohibiting polygamy was removed." Id.

238. See Campbell, supra note 133, at 23-24.
239. Id.; Galingging, supra note 237.
240. See Mazloum Interview, supra note 231.
241. See id.
244. See id.
245. Id. (D)ivorced women suffer greatly in Syrian society. A divorced woman is perceived as a financial burden on her family’s house — where she inevitably retreats — and has little chance of remarrying. Divorced mothers are also accused of deserting their children. Under common law boys after age seven can choose his live-in parent, while at age nine the girl is required to live with her father.

Id.
246. See Mazloum Interview, supra note 231.
their children's welfare and protect their status in society.247 One Syrian commentator asserts that, "[w]hile polygamy enhances a man's perception of himself sexually, for almost all first wives polygamy means untold misery and disgrace to their sense of pride, integrity and a feeling of sexual rejection."248

3. Bhutan

Polygamy in Bhutan is practiced within a starkly different context due to the country's emphasis on gender equality.249 Bhutan is a unique country in that its motto for development is "Gross National Happiness."250 The country stresses individual development, irrespective of gender,251 and thus, in contrast to many developing nations, "Bhutanese women enjoy freedom and equality in many spheres of life with a relatively high status."252 Women have the same legal rights as men, and NGOs reported that women faced no conspicuous discrimination and had equal access to health care, education, and public services.253 Bhutan ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on August 31, 1981, without any reservations and "the Government ha[s] taken consistent steps to progressively comply with the letter and spirit of that Treaty, despite constraints in resources and institutional capacity."255 Nevertheless, Bhutan continues to deal with indirect forms of gender bias.256

248. Id.
250. Id.
251. Id.
252. Id.
255. Women's Anti-Discrimination Committee, supra note 249, at 1.
256. See id. at 3 (stating that no Bhutanese law "explicitly prohibits discrimination against women, including unintentional and/or indirect discrimination, nor is there a national definition of discrimination against women congruent with the Convention").
Women's equality is most apparent in their ability to hold land and engage in major life decision-making. People in Western and Central Bhutan ascribe to a matrilineal family system and follow traditional Buddhist inheritance laws stipulating that daughters inherit family land. As of 2005, sixty percent of rural women held land registration titles. Bhutanese tradition also "dictates that the most capable member of the family runs the household," which is often deemed the mother or the eldest daughter. Women also make major household decisions with their husbands and share the productive workload. Thus, "the head of a household was not a gender-specific domain." Note, however, "[w]omen's participation in the labour force, particularly in the modern sector, remains modest . . . . [and women are] underrepresented in block and district development committees, as well as in national government."

With respect to marriage, "[t]he traditional practice [of] arranged marriages based on family and ethnic ties, has been replaced in the late twentieth century with marriages based on mutual affection." Once married, Bhutanese brides do not necessarily move into their husband's household. In fact, it is common for husbands to reside with the wife's family. Sexual and intimate relations in Bhutan are also more lax than most other societies. Little social stigma is attached to women with children outside of marriage, and "[m]ultiple
concurrent relationships and casual sexual encounters appear to be common . . . .”

With respect to polygamy, men can legally engage in polygyny and have as many as three wives, provided that the first wife gives permission. In many cases of polygamy in Bhutan, “multiple wives are sisters and multiple husbands are brothers, or they are persons closely related to the first spouse.” In general, “marriages result in the exchange of work force between families,” and contrary to Muslim countries, Bhutan’s approval of polygamy is “not on the basis of any apparent religious normative order.” Arguably, plural marriages are more akin to distribution of labor, as opposed to an imposition of patriarchal order on women.

In 2004, the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed concern over the continued existence of polygamy in Bhutan and encouraged elimination of the practice in compliance with General Recommendation 21. In response to the CEDAW Committee, a Bhutanese representative asserted that the practice of polygamy and polyandry was no longer widespread in Bhutan. Further, others assert that while the law permits polygamy, such practices are fast declining due to socio-economic changes and advances in education.

4. Zimbabwe

Polygamy in Zimbabwe is intertwined with the country’s unstable economy, civil warfare, and complex tribal marriage systems. Once one of Africa’s strongest economies, Zimbabwe has recently struggled with civil unrest, strapping the country with severe inflation, political factionalism, and persistent violence. The situation escalated in

268. Id. (explaining that Bhutan’s Marriage Act also protects unmarried women who become pregnant). “The man who is responsible must pay for all medical expenses, and provide 20 percent of his monthly income as child support allowance.” Id.

269. See BHUTAN MARRIAGE & FAMILY LIFE, supra note 264; see also Culture of Bhutan, supra note 265.

270. RELIGION & CULTURAL FACTORS: BHUTAN, supra note 257.

271. Id.


275. See id.

276. See, e.g., infra note 293.

2005, “when the government initiated a campaign to dismantle informal shops and homes in urban and suburban areas.”278 As a result, 700,000 of Zimbabwe’s poorest citizens were affected, and 40,800 female-headed families lost their homes.279 As citizens struggle for resources and socio-economic status, polygamy thus could serve as a tool for survival in some instances.

Marriage is held in high regard in Zimbabwe and is determinant of women’s status in society.280 This is demonstrated by the country’s complex marriage system.281 There are three types of marriages in Zimbabwe—civil marriage, registered customary marriage, and unregistered customary marriage.282 The legal status of a woman’s marriage determines her rights after divorce or becoming widowed.283 Customary marriages appear to be the site where women are most vulnerable in Zimbabwe.284 These are “traditional unions, which are sometimes registered, but which often remain informal.”285

With respect to polygamy, Zimbabwe’s Marriage Act, governing civil marriages, only recognizes monogamous unions, whereas Zimbabwe’s African Marriages Act, governing customary marriages, recognizes polygamous or potentially polygamous marriages.286 Most marriages in Zimbabwe are unregistered customary marriages,287 and it is estimated that eighteen percent of women are in plural marriages.288 Due to societal stigma against unmarried women, some women prefer polygamy over divorce or being single, where they might otherwise be socially excluded due to their unmarried status.289

Women in plural marriages face various problems. Foremost, they suffer greater risk of HIV infection, because they are sharing sexual partners.290 HIV-AIDS related deaths also leave many second and third wives without means to support themselves after their husbands die.291 Further, due to the non-registered status of plural marriages and/or other discriminatory property laws, plural wives likely have no legal claim to family assets or resources.292

278. Id.
279. See id.
280. See id.
281. See id.
282. See id.
283. See id.
284. Id.
285. Id.
287. See id. at 68.
288. See Why Zimbabwe?, supra note 277.
289. Id.
290. Id.
291. Id.
Similar to Bhutan and Syria, polygamy may be declining in Zimbabwe due to the country's economic downturn and men's inability to support multiple wives and their children. Polygamy has also recently come under fire by many of the country's religious leaders. While Zimbabwe has a secular government, seventy to eighty percent of its populace belongs to mainstream Christian denominations such as Roman Catholic, Anglican, and Methodist churches. Leaders of two of Zimbabwe's Christian sects have recently emerged to foster collaboration between faith groups and the government. Within these groups, traditional practices such as polygamy, child marriage, and brothers' inheritance of widows have been criticized, and followers have called for the abandonment of such practices. Note, however, that the primary motivation behind these demands is to prevent HIV transmission, as opposed to advancement of gender equality.

B. International Human Rights Analysis

With a growing recognition of "the importance of gender equality and increasing concerns about the effects of polygamy on women and children, there has been a clear [human rights] trend over the past century towards the enactment of laws to abolish polygamy." At present, polygamy is not explicitly prohibited under any international treaty; however, it arguably violates the right to protection of the dignity of women, the right to equality within the family, and the right to equal protection for women under the law.


296. See Leaders of Zimbabwean Religious Sects, supra note 294.

297. See id. ("[T]he Union for the Development of Apostolic Churches in Zimbabwe, which is an umbrella group of Apostolic and Zionist churches made up of more than 70 bishops from each of the country's 10 provinces," drafted a document calling for the abolition of polygamy, child marriage and inheritance of brothers' widows to reduce the spread of HIV.).

298. Bala et al., supra note 125, at 20.

299. See id. at 21.
It is also widely accepted that polygamy contravenes Article 16(1) of the Universal Declaration on Human Rights (UDHR),\(^{300}\) which provides that men and women are entitled to equal rights as to marriage, and Article 16(1)(b) of CEDAW,\(^{301}\) which guarantees the right to freely choose a spouse and enter into a marriage with free and full consent.\(^{302}\) Further, condoning polygamy is likely inconsistent with Article 23(4) of the International Covenant on Civil and Political Rights (ICCPR),\(^{303}\) which requires state parties to take appropriate steps to ensure spouses' equal rights and responsibilities within marriage.\(^{304}\)

In 1994, the CEDAW Committee issued General Recommendation 21, addressing equality in marriage and family relations.\(^{305}\) While the CEDAW Committee acknowledged that forms and concepts of marriage can vary, it was emphatic that polygamy was unacceptable as a violation of women's right to equality with men,\(^{306}\) and called for an elimination of the practice due to its serious emotional and financial consequences on women and their dependants.\(^{307}\) The CEDAW Committee also expressed concern that some States Parties whose constitutions guarantee equal rights permit polygamous marriage under personal or customary law.\(^{308}\) This reality is in stark violation of Article 5(a) of CEDAW, which requires State Parties to work toward the elimination of practices founded on sex-based prejudice or stereotypes.\(^{309}\)

Therefore, while the issue of polygamy is hotly debated among nations, much of the human rights community considers the practice contrary to human rights principles and deems it irreconcilable with notions of gender equality.


\(^{301}\) See CEDAW, supra note 254, at art. 16, ¶ 1(b).

\(^{302}\) See Bala et al., supra note 125, at 21.


\(^{304}\) Id.

\(^{305}\) See id.

\(^{306}\) Id.

\(^{307}\) Id.

\(^{308}\) Id.

\(^{309}\) See CEDAW, supra note 254, at art. 5(a).
IV. STRATEGICALLY FRAMING SAME-SEX MARRIAGE IN RELATION TO POLYGAMY

A. Should Same-Sex Marriage Advocates Embrace Polygamy?

Marriage is “one of the most dominant, idealized, heavily mediated (and mediating) of American cultural narratives.” Thus, same-sex marriage advocates must be strategic when seeking access to this socially and politically entrenched institution. Among other things, same-sex marriage advocates must be armed with a well-crafted response to slippery slope arguments that link, and arguably conflate, same-sex marriage and polygamy.

This section takes into account the historical and contemporary backdrop of polygamy presented in earlier sections of this article, to flush out potential reasons for the same-sex marriage movement to align with, or alternatively distance itself from, polygamy and pro-polygamy debates when seeking access to civil marriage. It then proposes a reasoned response to same-sex marriage opponents’ slippery slope analogies between same-sex marriage and polygamy, asserted, in part, to thwart the same-sex marriage movement.

1. Reasons to Align Same-Sex Marriage Debates with Pro-Polygamy Debates

There are various plausible rationales for same-sex marriage advocates to align with supporters of polygamy. For example, the two groups arguably have a similar interest in reducing government regulation of extra-marital sex. While same-sex marriage advocates seek access to marriage, coming from a diverse sexual community, they are presumably also invested in ensuring that their fellow LGBTQ community members are not criminalized or punished for their sexual conduct. Further, some same-sex marriage advocates and polygamy allies may have a similar interest in building a larger alternative family recognition movement, thus making room for more diverse family forms, not just ones mirroring monogamous heterosexuality. Simply emulating heteropatriarchal marriage through same-sex marriage may solidify differential treatment for unmarried people, force LGBTQ individuals’ assimilation, and perpetuate

311. See Polikoff, Ending Marriage as We Know It, supra note 58, at 203.
312. See Ettelbrick, supra note 30, at 14.
heteronormativity.\textsuperscript{313} In that regard, perhaps same-sex marriage advocates should re-think seeking access to civil marriage as it is currently conceived.

Same-sex marriage advocates and pro-polygamists may also be similarly vested in overturning legislation that regulates and/or criminalizes relationships. For example, these groups might seek to promote enforcement of laws that appropriately target feared harms (i.e., child abuse, neglect, domestic violence, sexual assault), which can occur within all relationships, and prohibit enforcement of laws that criminalize the relationships themselves. In other words, same-sex marriage advocates and polygamy supporters, alike, may take issue with the use of relationships as a legal proxy for societal evils, as it leads to unmerited persecution and perpetuates prejudice.

Finally, as noted above, polygamy is not merely an anomaly in Western cultures. Polygamy is practiced around the world, as well as within many American communities.\textsuperscript{314} Perhaps embracing the aspects of polygamy that present interests parallel to those held by LGBTQ individuals seeking access to marriage, will broaden the possibilities for promoting diversity on many fronts. As the LGBTQ community is vastly diverse in its own right, it may behoove same-sex marriage advocates to err on the side of tolerance and acceptance and to build bridges with other shunned minority communities.

2. Reasons to Distinguish Same-Sex Marriage Debates from Pro-Polygamy Debates

While there may be justifications for same-sex marriage advocates to align with polygamy supporters, there are more reasons for the same-sex marriage movement to continue to distance itself from polygamy. Foremost, polygamy presents an extremely complex and tarnished history.\textsuperscript{315} The practice was historically deemed anti-democratic and analogous to slavery.\textsuperscript{316} For instance, the first Republican Party platform in 1856 proclaimed that Congress had the right and the imperative duty to prohibit, in the Western territories, the twin relics of barbarism — polygamy and slavery.\textsuperscript{317} These images do nothing to

\begin{footnotes}
\item[313] See Brandzel, supra note 9, at 190.
\item[315] See, e.g., COTT, PUBLIC VOWS, supra note 25, at 73-75.
\item[316] See Reynolds v. United States, 98 U.S. 145, 166 (1878); see also COTT, PUBLIC VOWS, supra note 25, at 73-75.
\item[317] See COTT, PUBLIC VOWS, supra note 25, at 73-75; see also Kirk Harold Porter & Donald Bruce Johnson, NATIONAL PARTY PLATFORMS, 1840-1960, at 27 (1961).
\end{footnotes}
bolster the same-sex marriage movement and, in fact, could require expenditure of much needed time and resources to overcome such negative perceptions.

Also, as noted in discussions above regarding polygamy in Canada, Syria, Bhutan, Zimbabwe, and the United States, polygamy can be extremely harmful to women. \textsuperscript{318} It also appears that polygamy is only practiced in a minority of communities and/or is becoming outmoded due to financial strains. Moreover, polygamy arguably violates the right to protection of the dignity of women, the right to equality within the family, and the right to equal protection for women under the law. \textsuperscript{319} In encouraging the United States to support human rights initiatives and foster greater acceptance of LGBTQ individuals under international human rights law, it may behoove the same-sex marriage movement to align with human rights advocates, as opposed to polygamists.

On a related note, a large portion of society remains staunchly opposed to same-sex marriage. \textsuperscript{320} The same-sex marriage movement should thus be weary of relinquishing its hard-earned cultural capital and societal support by siding with a population that is arguably even more scathed. Within hierarchical society, people are often defined in relation to their proximity to a dominant group. \textsuperscript{321} Individuals generally seek acceptance within a group they want to include them, and/or they attempt to fit within roles that society has constructed as appropriate for them. \textsuperscript{322} Therefore, joining forces with polygamists, who are likely perceived inferior to the norm, LGBTQ couples may further distance themselves from the power center — heterosexual couples.

\footnotetext{318}{See discussion supra Parts II.A.3 (United States), III.A.1 (Canada), III.A.2 (Syria), III.A.3 (Bhutan), and III.A.4 (Zimbabwe).}
\footnotetext{319}{See PORTER & JOHNSON, supra note 317, at 21.}
\footnotetext{320}{See Pingree, supra note 310, at 366-67 (quoting Pat Boone, Wedded to the Original, WASH. TIMES, Apr. 23, 2004, at A20):
We’re at war. And I’m not talking about the war against terrorism . . . .

I’m talking about the civil — and increasingly uncivil — culture war [about same-sex marriage] now raging across America . . . .

. . . .

If we win, we may be able to rebuild the institution of marriage as the sacred bedrock of American society. If [same-sex marriage advocates] win, we will have moral anarchy.}
\footnotetext{321}{See Angela Onwuachi-Willig, Undercover Other, 94 CAL. L. REV. 873, 897 (2006).}
\footnotetext{322}{Id. (referencing similarities between passing by people involved in interracial relationships and passing by people in same-sex relationships, whereby the individuals seek to fit within socially-constructed definitions of sexuality or authentic blackness choose to conceal their choice of partners, to bolster race and sexuality analogies in same-sex marriage debates).}
Finally, when deciding whether to align with pro-polygamists, it is important to consider implications of gender equality. In that regard, it is debatable whether polygamy is conducive to promoting gender equality. For example, while the gender-neutral term of polygamy is used to characterize plural marriages, the practice is overwhelmingly comprised of men having multiple wives (e.g., polygyny).\footnote{23} It is questionable whether gender equality can exist in societies that allow men to engage in polygyny but prohibit women from engaging in polyandry.\footnote{24} It is also doubtful that women can freely and actively "choose" to engage in polygamy.\footnote{25} It is hard to conceive of women actively and knowingly "consenting" to polygamous marriage given their relative social isolation and religious indoctrination.\footnote{26} The real issue may be "not whether [women] choose plural marriage, but rather whether life in a polygynous relationship inevitably subjects them to a victimization to which they did not consent."\footnote{27} Further, when teenage girls as young as fourteen marry men many years their senior, the issue of consent becomes even more attenuated.\footnote{28}

The same issues of gender inequality are arguably not present within monogamous LGBTQ relationships. Same-sex partners generally operate on similar playing fields with respect to their gender status. While issues of race, religion, or class may stratify LGBTQ couples' relative power dynamics, this reality is not any different from what occurs in monogamous or polygamous heterosexual couples. Thus, the issue that most distinguishes monogamous LGBTQ couples from polygamous couples is their relative gender sameness.

In the end, the balance seems to tip against an alliance between the same-sex marriage movement and polygamy. While the LGBTQ community and polygamists may have a similar interest in reducing government regulation and persecution of their intimacy and relationships, this commonality is more akin to a larger alternative family recognition movement, as opposed to the more narrow same-sex


\footnote{24. See Campbell, supra note 133, at 9 ("[W]e might ask whether a union in which two or more women must 'share' a husband who in turn enjoys plural sexual and domestic partners, is inherently discriminatory.").}

\footnote{25. See id.}


\footnote{27. See Strassberg, Crime of Polygamy, supra note 7, at 394.}

\footnote{28. See Ward, I Now Pronounce You Husband and Wives, supra note 326, at 149. But see Forbes, supra note 197, at 1544-45 (suggesting that young women engaging in polygamous marriages do so willingly, in accord with their religious views and values).}
marriage movement. It may call into question the propriety of the same-sex marriage movement and whether the LGBTQ community should be committing its resources to fight for civil marriage. However for purposes of this article, the linkage does not necessarily benefit the same-sex marriage movement.

Further, polygamy's tainted past and general lack of societal approval would likely detract from, as opposed to strengthen, the same-sex marriage movement by relinquishing the support of those in favor of same-sex marriage yet staunchly opposed to polygamy. Lastly, international human rights and notions of gender equality count against the same-sex marriage movement collaborating with polygamy advocates. One of the LGBTQ community's selling points is that same-sex relationships have the potential to disrupt heteropatriarchal gender roles, whereas polygamy continues to be steeped in patriarchy. As same-sex marriage has the potential to radically transform society's definition of family and break down barriers for more diverse and inclusive family forms, polygamy, arguably, does not.

B. Proposal

While same-sex marriage advocates should not necessarily align with polygamists, the above discussion reveals that certain aspects of polygamy parallel issues faced by the LGBTQ community. Namely, polygamists and LGBTQ people are both subordinated minority groups in American society, based on their relationship forms. In that regard, same-sex marriage advocates' well-crafted responses to slippery slope arguments should, to the extent possible, avoid slandering polygamy at the expense of lifting up the cause for same-sex marriage.

A suggested response to the allegation that same-sex marriage paves the way for legalized polygamy could be to emphasize that the same-sex marriage movement seeks to liberalize marriage rules, not open marriage to anyone and everyone. Fears that polygamy would be legalized similarly arose during the movement to overturn antimiscegenation laws, yet notably, that alleged threat never came to pass. Advocates should next emphasize that same-sex marriage is both good for individuals in that it confirms their love and protects them legally and is good for society, as it supports nurturing compassionate bonds and creates a foundation for strong healthy families.

329. See Cox, supra note 14, at 165-66; see also Hunter, supra note 15, at 112.
332. Id. (noting that "people who live in stable, committed couples are healthier, happier, and wealthier than those who are single").
Finally, in allaying fears regarding potential connections between same-sex marriage and polygamy, advocates should clarify that any linkage between the two relationship forms revolves around a broader opposition to government regulation of private lives, a stance unrelated to the LGBTQ community’s discrete movement for access to civil marriage, which arguably accedes to government regulation.

The above suggested response is merely a starting point. The underlying message is that same-sex marriage advocates should be cognizant of the plausible linkages between same-sex marriage and polygamy, and that polygamists within the United States continue to be discriminated against in their own right. While same-sex marriage advocates can distance LGBTQ relationships from polygamy, they should avoid maligning polygamists, while simultaneously allaying fears that liberalized marriage laws will lead to widespread polygamy. In today’s society, women have equal access to advanced education and economic independence and social value apart from the status or wealth of a husband, and, thus, it is hard to imagine droves of modern women consenting to polygamous marriages.

**CONCLUSION**

It is important when building a civil rights movement to be cognizant of analogous struggles faced by other minority populations and attempt to build bridges with other subordinated groups. The LGBTQ and polygamous communities face different struggles and present varying harms; however, they are similarly persecuted for their interpersonal relationships. In this regard, same-sex marriage advocates should carefully tread around slippery slope arguments to ensure that they do not play into the cultural narrative that polygamy is resoundingly barbaric and misogynistic. As polygamy is practiced worldwide, women and men likely enter plural unions for significantly different reasons and likely have wide-ranging experiences. As such, polygamous relationships should not be essentialized as harmful and evil. In the end, the LGBTQ community should avoid building its cause by demeaning another and, instead, direct its time and energy toward respecting diversity while fighting for equality.