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# Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage

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## ROCK-SALTING THE SLIPPERY SLOPE: WHY SAME-SEX MARRIAGE IS NOT A COMMITMENT TO POLYGAMOUS MARRIAGE

by James M. Donovan<sup>1</sup>

If gay marriage becomes  
socially and legally acceptable,  
then wil [sic] polygamy, too?<sup>2</sup>

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<sup>2</sup> Editorial, RICHMOND TIMES-DISPATCH, March 5, 2000, at F6.

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E.J. Graff has documented how any change in the marriage rules inevitably leads to predications of apocalyptic cries warning of "death of marriage and civilization itself."<sup>3</sup> The conservative fit over the possibility of the social acceptance of same-sex marriage therefore has an ancient if repetitive script.<sup>4</sup> Still, the "threat" of same-sex marriage poses for conservatives at least

<sup>3</sup> E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 32 (1999). Conservatives appear to be aware of how canned their protests can seem to listeners, leading them to initially insist that they are not being "apocalyptic," but only reasonable. When pressed, however, they easily fall back into their original extremist claims:

When [conservative law professor Dwight G.] Duncan maintained that he was far from "predicting the end of civilization" [if same-sex marriage were to become acceptable], he rebutted [Richard D.] Mohr's comments with several examples of the damage legal gay marriages might do to America.

"Why stop there?" he asked. "Why not polygamy? Why not incestuous relationships?"

As he was about to go on, College of William & Mary assistant professor Thomas J.D. Armbrrecht, 30, called out from the audience: "You mean the end of civilization?"

"Um," Duncan said, pausing. "Eventually. That's pretty much it."

John-Henry Doucette, *ODU Series Brings Debate on Legalizing Gay Marriage*, THE VIRGINIAN-PILOT & LEDGER STAR (NORFOLK, VA), Nov. 10, 2000, at B1.

<sup>4</sup> The following extended passage serves to demonstrate both how remarkably unoriginal are the objections to same-sex marriage, and the wonderful quality of Graff's book:

[C]onservatives are dragging out the rhetoric that has been hurled against every marriage change . . . . Allowing same-sex marriage would be like allowing married women to own property, "virtually destroying the moral and social efficacy of the marriage institution." Or it would be like legalizing contraception, which "is not what the God of nature and grace, in His Divine wisdom, ordained marriage to be; but the lustful indulgence of man and woman. . . . Religion shudders at the wild orgy of atheism and immorality the situation forbodes." Or it would be like recognizing marriage between the races, a concept so "revolting, disgraceful, and almost bestial" that it would lead directly to "the father living with his daughter, the son with the mother, the brother with his sister, in lawful wedlock"—and bring forth children who would be "sickly, effeminate, and . . . inferior." Or it would be like making

one atypical wrinkle. Unlike discussions of equal or even greater rancor, that raging over same-sex marriage forces its opponents to tread with special delicacy. In the case of abortion, opponents are able to argue in absolute terms: abortion is wrong, period, even if law requires that it be tolerated in some specific circumstances such as rape, incest, or health of the mother.<sup>5</sup> Same-sex marriage, however, requires its opponents to target their arguments toward the "same-sex" qualifier without in any way impugning "marriage" itself.<sup>6</sup> They must assume the difficult position of arguing simultaneously that marriage is an incomparable social good that must also be utterly denied to an entire class of persons due to their constitutional natures.<sup>7</sup> Such targeting—it if can be conscientiously accomplished at all—necessitates more sophisticated argumentation than that deployed in abortion arguments.

One such special tactic is the slippery slope argument. In its crudest form, the argument opposes same-sex marriage on the ground that if *that* is allowed, then how could we not also allow other forms of deviant sexual practices? The trinity of deviant forms invariably conjured includes polygamy, incest, and bestiality.<sup>8</sup> This Article concentrates on the first, polygamy.<sup>9</sup>

### I. *The Linkage of Same-Sex Marriage to Polygamy*

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wives the equals of their husbands, a proposal that "criticizes the Bible . . . degrading the holy bonds of matrimony into a mere civil contract . . . striking at the root of those divinely ordained principles upon which is built the superstructure of society." Or it would be like allowing divorce, "tantamount to polygamy," thereby throwing "the whole community . . . into a general prostitution," making us all "loathsome, abandoned wretches, and the offspring of Sodom and Gomorrah."

GRAFF, *supra* note 3, at 251-52.

<sup>5</sup> See generally GRAFF, *supra* note 3.

<sup>6</sup> See generally GRAFF, *supra* note 3.

<sup>7</sup> This argument has produced the current odd result that a heterosexual man, convicted of brutally murdering his first (or fifth) wife cannot, even while sitting on death row, be denied his right to take another, but a homosexual man of the most remarkable virtue and civic responsibility cannot take even one person he desires as a marriage partner. This contrast is the one to keep in mind when opponents of same-sex marriage fervently defend against it by invoking the sanctity and sacramental quality of the institution as it presently stands. See generally GRAFF, *supra* note 3.

<sup>8</sup> The bestiality connection is especially emphasized in Robert H. Knight and Timothy J. Dailey, *A Man and His Horse: The Slippery Slope of Redefining Marriage*, FAMILY RESEARCH COUNCIL (visited Dec. 18, 2001) <<http://www.frc.org/>>.

<sup>9</sup> Although the rhetorical link between same-sex marriage and polygamy has a long history, it is likely to receive renewed interest due to the recent conviction for polygamy of Tom Green.

### A. The General Milieu

It is virtually impossible for any extended debate to occur between the opposing sides on the issue of whether to legalize same-sex marriage without the spectre of polygamy being invoked. Most such invocations are truly mere gestures, involving neither argument nor demonstration. For example, one-time Republican presidential candidate Gary Bauer baldly asserted that "If marriage can be redefined willy-nilly to encompass homosexual and lesbian relationships, then on what basis can we preserve the prohibitions against polygamy and incest? If a man is to be permitted to marry a man, then why not two women?"<sup>10</sup>

The connection is made in all media and contexts. Syndicated newspaper columnist Jeff Jacoby repeats the fear,<sup>11</sup> as does Janet Parshall, spokesperson for the Family Research Council, appearing on *Larry King Live*.<sup>12</sup> Parshall parrots the formal position the Family Research Council provides in its "talking points":

If marriage is no longer confined to a man and a woman, with "love" and "commitment" becoming the sole criteria, it becomes impossible to exclude virtually any "relationship: between two or more partners of either sex. Such criteria may eventually permit a host of sexual relationships, including bigamy, plural marriage, polygamy—even bestiality."<sup>13</sup>

Conservative politicians, either in office<sup>14</sup> or hoping to be,<sup>15</sup> can be reliably counted on to trot before the public's eye the presumed equation between same-sex marriage and polygamy.

We might not be too surprised that the boogey of polygamy has seeped into public discourse on the possibility of same-sex marriage. More disturbing

<sup>10</sup> Campaign for Working Families, *Bauer Issues Statement on Vermont's Same-Sex "Civil Unions" Legislation*, (visited Dec. 12, 2001) <[http://www.cwfpac.com/press\\_releases\\_03\\_17.htm](http://www.cwfpac.com/press_releases_03_17.htm)>.

<sup>11</sup> See Jeff Jacoby, *Just Another Nontraditional Family?*, BOSTON GLOBE, May 17, 2001.

<sup>12</sup> See *Larry King Live: Should Same-Sex Couples Get the Same Rights and Recognition as Straight Ones?*, (CNN television broadcast, May 2, 2000). ("[M]arriage is so much more than just feelings, Larry, if we predicated marriage just on feelings, then you could feel for having more than one wife at one time, or you could feel for marrying someone that was, oh, a child. We can't predicate it on feelings."). Parshall's denial that modern marriage is not fundamentally grounded in "feelings" such as romantic love are contradicted by serious scholarship on the social institution of marriage, which has progressed from an original basis as an economic contract, to one of reproduction, to today's emotional foundation. See generally LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1979); E.J. GRAFF, *WHAT IS MARRIAGE FOR?* (1999). The important role of romantic love in this discussion will be emphasized later in this article.

<sup>13</sup> Family Research Council, *Talking Points: How Homosexual "Civil Unions" Harm Marriage* (visited Dec. 18, 2001) <<http://www.frc.org>>.

<sup>14</sup> See, e.g., Mark Paschall, *Til Laws Do Us Part: Anything Other than One Man Marrying One Woman is Wrong*, DENVER POST, Apr. 9, 2000, at G1. ("Should the state of Colorado open the door to 'different' marriages? If so, just how open should our policies be? Should marriage be open to anyone? Would restrictions on the number of 'significant others' be considered divisive and mean-spirited?"). Paschall at this time was a state Representative. *Id.*

<sup>15</sup> See, e.g., Ron Unz, *Gay Marriages Today, Polygamy Tomorrow?*, SAN FRANCISCO CHRONICLE, Oct. 8, 1999, at A25. ("If our common legal structures were to be bent or stretched to accommodate one, they must be made to accommodate others as well. Legalizing gay marriages today means legalizing polygamy or group marriages tomorrow."). When Unz made this statement, he was a candidate for the U.S. Senate. *Id.*

has been its appearance in official legal opinion. For example, attorney general advisory opinions from North Carolina unhesitantly (and unnecessarily) conjoin the two issues.<sup>16</sup> Worse, U.S. Supreme Court Justice Scalia, in his dissent in *Romer v. Evans*,<sup>17</sup> could not resist spending several pages of his opinion arguing that, if Colorado could not politically ostracize homosexuals, how were we to continue barring polygamy?<sup>18</sup>

These snippets illustrate two broad points. First, the rhetoric of same-sex marriage opponents consistently asserts a link between same-sex marriage and polygamy.<sup>19</sup> Second, for a very large part none of these assertions attempts to argue the point, or to demonstrate its rationality. Instead, they rely upon the seeming self-evidency of the one leading to the other, and because the other (polygamy) is unquestionably a social evil, the first (same-sex marriage) must be defended against at all costs. Two writers—Hadley Arkes and Stanley Kurtz—distinguish themselves by their efforts to argue this point in detail. The next section examines the results.

## B. *Specific Arguments Asserting the Link*

### 1. *Hadley Arkes: Marriage for Procreation*

In his 1996 testimony before Congress, then debating the Defense of Marriage Act, Hadley Arkes expressed the following opinion:

The categories of the Constitution must be filled in with the substance of what we're talking about, and it becomes impossible to speak about marriage and sexuality in these cases without using the "N" word: "nature." We understand that this is not about love. There are abiding relations of love between brothers and sisters, parents and children. And in the nature of things, those loves cannot be diminished as loves because they're not attended by penetration or because they're not expressed marriage [sic]. Marriage has something to do preeminently with the establishment of a framework of lawfulness and commitment for the begetting and nurturance of children. This is the plainest connection between the idea of marriage and what has been called the natural teleology of the body, the fact that we are all, as the saying goes, engendered. We are men and women; and only two people, not three, only a man and a woman, can beget a child.... [I]f we detach marriage from that natural teleology of the body, on what ground of principle could the law confine marriage to couples?<sup>20</sup>

<sup>16</sup> See North Carolina Attorney General advisory opinions 1996 NC AG LEXIS 37 and 1996 NC AG LEXIS 39 (advising that the full faith and credit clause of the United States Constitution did not require North Carolina to recognize same sex marriage performed legally in other states since solemnization does not mandate yielding to other states' policy determinations, pointing to polygamy as an example).

<sup>17</sup> 517 U.S. 620 (1996).

<sup>18</sup> See *id.* at 648-51 (Scalia, J., dissenting).

<sup>19</sup> See *infra* section IV.

<sup>20</sup> *Defense of Marriage Act: Hearings on H.R. 3396, Before the House Comm. on the Judiciary*

Arkes denies that marriage is fundamentally a matter of positive law.<sup>21</sup> If it were, he concedes that it could take any shape that society wished.<sup>22</sup> But instead, marriage is, in his thinking, a product of natural law.<sup>23</sup> The sense of nature Arkes invokes is not that associated with biology or physics, but with moral order: Sexual genitalia are the way they are not because of an evolutionary, historical past, but because of a divine design for a future. Any use of them that diverts from this intended use is immoral. Arkes supplies an additional precept that it is a legitimate function of civil government to enforce the moral order preordained by natural law, ultimately arriving at his conclusion that same-sex marriage must be prevented. Failure to do so will result in all kinds of other corruptions of the moral order, including polygamy.

Arkes's philosophical argument against same-sex marriage has the merit of containing a substance lacking in the simple conclusory assertions of most conservative opponents. It fails, however, for two reasons. First, as a matter of philosophy it is simply wrong. Second, even if philosophically viable, the argument presumes erroneously that it is the business of general secular law to buttress a specifically sectarian metaphysics.

#### a. *Aquinian Natural Law*

Arkes does not, in these writings, identify the variant of natural law he would impose upon the American public. His appeal to the "natural teleology of the body," however, marks him as working in the tradition of natural law formulated by Thomas Aquinas.<sup>24</sup> The sections of Thomas Aquinas' *Summa Theologica* which deal with law (questions 90-97)<sup>25</sup> are generally regarded as the chartering statements for the modern theory of natural law. Although persons wrote in this tradition earlier than Aquinas, he was the one who formulated the thesis into a philosophically defensible and consistent position.

The structure of Aquinas's discussion is well reasoned: He first inquires into the "essence of law" (Q.90), concluding with his definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated" (Q.90, a.4). Natural law meets this definition because God has promulgated "it into man's mind so as to be known by him naturally." Q.91 outlines the kinds of law, including natural law which is the "participation of the eternal law in the rational creature" (Q.91, a.2). From this

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104th Cong. 87-88 (May 15, 1996) (testimony of Hadley Arkes) [hereinafter "Hearings"]. To the list of fears of inevitable results of allowing same-sex marriage, Arkes will add a new one. Not only will we see polygamy, incest and bestiality, but then also would it be possible for "a man, much taken with himself, to marry himself." *Id.* at 97.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> The conclusion that Arkes works in the tradition of Aquinas's natural law is supported by a statement he makes elsewhere: "We do not make our way to the 'natural' simply by generalizing upon the mixed record of our species." Hadley Arkes, *The Closet Straight*, 45(13) NATIONAL REVIEW 43 (July 5, 1993). This may be a criticism of John Finnis, who attempts an alternative version of natural law by just such reason from anthropological and sociological facts. Finnis is discussed *infra* note 29 and accompanying text.

<sup>25</sup> All references to Thomas Aquinas's *Summa Theologica* are from the 1915 translation of the Fathers of the English Dominican Province, reprinted in GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 132 (2d ed., 1995).

argument it is clear that "natural law" is different than "the law of nature," since by definition only rational (e.g., human) creatures participate in the former, while any creature (or thing) is subject to the latter. The referent of natural law, in other words, is only to those elements of life which pertain to the living of rational—and not merely living—creatures.

The function of natural law is the "ordering of all human affairs" (Q.91, a.3), presumably *qua* human (i.e. rational). That qualification means that natural law is intended to guide in moral development. The remaining sections of Aquinas's exposition clarifies how this result is achieved.

Humans participate in the eternal law in one of two ways:

[F]irst, by partaking of the eternal law by way of knowledge; secondly, by way of action and passion, i.e., by partaking of the eternal law by way of an inward motive principle: and in this second way, irrational creatures are subject to the eternal law . . . but since the rational nature, together with that which it has in common with all creatures, has something proper to itself inasmuch as it is rational, consequently it is subject to the eternal law in both ways; because while each rational creature has some knowledge of the eternal law, . . . it also has a natural inclination to that which is in harmony with the eternal law. (Q.93, a.6)

The principles of natural law revealed through this dual mechanism of reasoning and innate disposition are both self-evident (Q.94, a.2) and indemonstrable.

Aquinas proceeds to itemize some of these self-evident tenets of natural law: "Good is to be done and ensued, and evil is to be avoided." This first principle, upon which "all other precepts of the natural law are based," conceives of the *good* as an *end*, something to be done or avoided.<sup>26</sup> The *good* is not, as some philosophers might argue, a *state* or virtue of the actor,<sup>27</sup> but is rather the teleology of an *action*. Since all creatures possess "natural inclinations" as a result of their participation in the eternal law, and presuming the eternal law to be the perfect standard of what is "good," then necessarily the realization of these inclinations is what constitutes for humans the "good."

Aquinas's theory of morality is summarized in the statement that "Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law." To strive to realize our natural inclinations is to act in accordance with the natural law, and this development from potential to actuality is what constitutes the "good."

Unpacking Arkes's invocation of the "natural teleology of the body," then, we find that (1) moral good is the fulfillment of natural potential, while moral evil is the blocking of that potential; (2) the body is designed for heterosexual procreation by nature; (3) therefore heterosexual marriage is a moral good, but *only* because it is the vehicle of procreation. Further, (4) homosexuality is a moral evil because it blocks the fulfillment of natural heterosexual potential, and (5) same-sex marriage is also a moral evil because it

<sup>26</sup> See also ARISTOTLE, THE NICOMACHEAN ETHICS 9 (J.E.C. Welldon trans., 1987) ("[T]he good has been well defined as that at which all things aim").

<sup>27</sup> An overview of virtue ethics can be found in Michael Slote, *Virtue Ethics, in THREE METHODS OF ETHICS* 175 (1997).

would not only condone homosexuality, an evil in itself, but would also sever marriage from procreation. If the initial premises of Aquinas's natural law are granted, Arkes's argument makes good sense philosophically—although we, as a society, would not necessarily endorse a marriage scheme that adhered strictly to it. If the only good of marriage is procreation, such that homosexual marriage is an oxymoron, then so to must heterosexual sterility, whether the result of natural causes or of artificial conception, be a ban to marriage. Some legal systems that adhere closely to this theory (such as Roman Catholic canon law<sup>28</sup>) have reached just this result. So if Arkes's argument is effective against same-sex marriage, he must bear the burden to show why the same argument does not also preclude nonprocreative heterosexual marriages.<sup>29</sup>

The major difficulty with Arkes's argument, however, is that at least one of his basic premises is false. The overview of Aquinas's primary text hopefully suffices to allow the reader to appreciate the following synopsis of the key philosophical elements of Aquinas's theory:

By way of a schematic summary, the five central necessary conditions for natural law theory in Aquinas are:

1. A theory of essence or natural kind;
2. An interpretation of natural kind containing dispositional and not static necessary properties;
3. A metaphysics of finality determining the obligatory ends;
4. An epistemological machinery adequate to provide veridical intentional content of an essence or natural kind;
5. A theory of practical reason undertaking the ends to be pursued in terms of the requirements of human nature.<sup>30</sup>

The possible points of criticism within this model are many. For present purposes, however, we restrict our attention to the first of these five conditions. "The central issue in Aquinas's theory of natural law," Lisska concludes, "is to elucidate clearly his account of an essence which determines a natural kind."<sup>31</sup> Why this is the case is easily seen. Without a clearly delineated natural kind defined by essential traits, it would be impossible to fashion a theory of dispositional development as the criterion of moral goodness. The moral theory could still be true if there were no natural kinds, that is, if every creature were radically individual and singular; it could still count as "good" for each creature to strive to realize its own idiosyncratic natural inclinations. But this state of affairs would not allow for the development of natural law (as opposed, for example, to a natural ethics), which, as Aquinas says, must be geared "to suit the majority of instances; and they are not framed according to what may possibly

<sup>28</sup> See GRAFF, *supra* note 3, at 53 ("For many centuries the Church refused to bless remarriage widows and widowers, especially if the woman was too old to bear children.").

<sup>29</sup> Other persons get around the problem of the heterosexual sterile marriage (or at least think they do) by allowing for other functions of marriage beyond the purely procreative. See, e.g., John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1065 (1994).

<sup>30</sup> ANTHONY J. LISSKA, *AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION* 137 (1996).

<sup>31</sup> *Id.* at 105.

happen in individual cases" (Q.96, a.1). If Aquinas is to be successful in his goal to articulate the philosophical foundation of law, then he must presume the existence of natural kinds defined by essential traits.

To be specific, Aquinas requires that *human* be a natural kind. The following argument, however, demonstrates that *human* is not a natural kind. If this argument is successful, then the model of natural law crafted by Aquinas (and adopted by Arkes) fails on its most elemental premise. Consequently, it could not support Arkes's argument against same-sex marriage.

What is it to be human? The primary work of this term is usually to separate humans from the nonhumans commonly called *animals*. The problem of demarcation between *animal* and *human* is philosophically vague, and hence scientifically inspecific.<sup>32</sup> Still, most educated persons begin with the assumption that humans are part of the evolutionary process and assign them membership in the Animal Kingdom.<sup>33</sup> Whatever humans may be in addition to this, they have their origin here, and are thereby animals. To contrast animals with humans (as both Aquinas and Aristotle do) is therefore perhaps disingenuous at the outset. But the distinction is marked; our task is to find out how. How does the philosophical *human* relate to the animal *Homo sapiens*?<sup>34</sup>

The first attempted clarification offered might be that *animal* means "non-*Homo sapiens*." Those organisms belonging to the species *Homo sapiens* are therefore humans; to be *Homo* is to be human.

There is a strong sense in which we take this equation to be accurate. But we have two reasons to reject the contention that "*human* = *Homo sapiens*." First, if *human* and *Homo sapiens* were synonymous we should be able to employ them identically. That is, we would expect the two to be linguistically interchangeable. But this is not the case. Consistently we find that the criteria for *human* are behavioral, while those for *Homo* are biological.<sup>35</sup>

This point can be illustrated by considering what we mean when we discuss *human nature*, the major premise in Aquinas's model of natural law.

*Human nature*, in general terms, denotes the nature of man, with more especial reference to his personality and/or character *as acquired in the course of socialization* and often with further reference to aspects of human potential and powers of development.<sup>36</sup>

This definition of *human nature* is typical in that that which is *human* emerges from the organism's socialization into a culture. "Philosophies of human nature reflect beliefs about what people are like *after* they have moved through a

<sup>32</sup> This problem or the merging and overlap of humans and animals is illustrated nicely in the title to Douglas Keith Candland's *FERAL CHILDREN & CLEVER ANIMALS* (1993).

<sup>33</sup> See, e.g., THE NEW YORK PUBLIC LIBRARY DESK REFERENCE 55-58 (1993) (classifying humans in the order of primates).

<sup>34</sup> The question has been phrased in other terms. Where here the contrast is between *human* and *Homo*, others mark the same broad distinction as arising between persons and mere human beings. See DEREK PARFIT, *REASONS AND PERSONS* 322 (1984). The first is to be preferred. Some legal systems explicitly restrict the status of personhood in ways that are discomforting. The Roman Catholic canon law, for example, accords the status of "person" only to those who are baptized. See 1983 CODE c. 96, §1.

<sup>35</sup> See LISSKA, *supra* note 30 and accompanying text.

<sup>36</sup> E.H. Volkart, *Human Nature*, in A DICTIONARY OF THE SOCIAL SCIENCES 306 (1964) (emphasis added).

lengthy socialization process. The concept does *not* attempt to reflect beliefs about inherent or innate qualities."<sup>37</sup>

This perspective holds that the organism left to develop in isolation might survive but would never be quite human, regardless of its genotype.<sup>38</sup> That is, *Homo* is not human where it lacks enculturation. Consequently, being *Homo* does not entail being human, falsifying the assumption that "*human* = *Homo sapiens*." So at best *Homo* membership is necessary but not sufficient for *human* status: Humans are socialized *Homos*.

Consider now the same issue from the opposite direction. Instead of showing that not all *Homo* are human, we might argue that some non-*Homo* are human. Regardless of its genotype, an enculturated organism may be definitionally human. If culture and humanness are strictly correlated, "then some chimpanzees may be human or human-like."<sup>39</sup> The force of this fact has become so strong that "a growing number of scientists argue that [chimpanzees, currently in the genus *Pan*] belong in our own genus *Homo*."<sup>40</sup> If "human rights" are tied to our humanness, which in turn is definitionally equated with our status as *Homo*, and further, if the higher primates are embraced by that genera either literally or proximately, then by conclusion we will have to accept that these animals are entitled to the full panoply of human rights. This outcome will please some more than others. But we see that *Homo* might be *neither* necessary *nor* sufficient for human status.

These facts jointly force the conclusion that while *Homo* and human are highly correlated, they are not equivalent. Even if in practice they are largely co-occurring, they are nevertheless distinctively different categories and cannot be defined in terms of one another.

The conclusion more specific to our analysis of Aquinas is that *human* is not a natural kind because the category possesses no natural *essential* qualities.<sup>41</sup> Whatever all humans have in common is a consequence of their enculturation, not of their natural traits. Enculturation is not limited to *Homo sapiens*.<sup>42</sup> Therefore, the category of *human* is not a natural kind in the sense required here.<sup>43</sup>

The best possibility that our analysis has revealed is that we can, by convention, *stipulate* a very narrow denotative range for the word. This

<sup>37</sup> L.S. WRIGHTSMAN, ASSUMPTIONS ABOUT HUMAN NATURE 46 (2d ed., 1992).

<sup>38</sup> An early articulation of this position is found in Aristotle's *POLITICS*:

an individual *incapable* of membership of a *polis* is not, strictly speaking, a human being, but rather a (non-human) animal, while one who is self-sufficient apart from the *polis* is superhuman, or, as Aristotle puts it, a god.... [One] cannot be a human being except in the context of a *polis*.

C.C.W. Taylor, *Politics*, in *THE CAMBRIDGE COMPANION TO ARISTOTLE* 233, 239 (Jonathan Barnes ed., 1995). This possibility raises the issue of feral children, some of whom are described by Candland, *supra* note 32.

<sup>39</sup> WILLIAM NOBLE and IAIN DAVIDSON, *HUMAN EVOLUTION, LANGUAGE AND MIND* 83 (1996).

<sup>40</sup> Joseph Hart, *Chimps are People Too: But Should Their Rights Ape Our Own?*, 99 *UTNE READER* 20 (May-June 2000).

<sup>41</sup> See LISSKA, *supra* note 30 and accompanying text.

<sup>42</sup> See generally FRANS DE WAAL, *THE APE AND THE SUSHI MASTER: CULTURAL REFLECTIONS OF A PRIMATOLOGIST* (2001) (exploring the possibility that apes have their own culture).

<sup>43</sup> See discussion *supra* notes 31-42 and accompanying text.

stipulation, however adequate for use in a linguistic community so that the term *human* does possess an identifiable meaning, fails to qualify as an essential trait necessary to demarcate a natural kind.<sup>44</sup> To qualify as a natural kind, "the name for an essential property [can not be] an arbitrary definition."<sup>45</sup> Natural kinds are rather "rigidly designate[d]"<sup>46</sup> by their properties. As we have seen, *human* falls far short of being "rigidly designated."

Because *human* fails the criteria of a natural kind with essential traits, Aquinas's model is necessarily a fiction. One might think that this analysis of *human* does not directly address Arkes's primary emphasis upon the natural teleology of human genitalia.<sup>47</sup> Even if humans per se are not a natural kind, perhaps their genitals are. But that reading would be a violent misinterpretation of the Aristotelian texts that Aquinas was at pains to follow. Only whole entities have an essence, not parts.<sup>48</sup> Genitals do not have an essential nature apart from the entity whose genitals they are. If the entity is not itself a natural kind, then, genitals have no natural teleology.<sup>49</sup> Although *Homo sapiens* might qualify as a natural kind, humans do not because they are cultural creations. *Homo* mates, but only humans marry. Natural law, then, has nothing to say about marriage, only mating (and if you read Arkes's argument about genitals and procreation

<sup>44</sup> See LISSKA, *supra* note 30, at 86.

<sup>45</sup> LISSKA, *supra* note 30, at 86.

<sup>46</sup> *Id.*

<sup>47</sup> See Hearings, *supra* note 20.

<sup>48</sup> This lesson comes from Aristotle's *Categories*, and the reasoning runs like this: Each individual entity has a primary "substance" (Greek: *ousia*). One sense of this term is that "[o]usia is what something is; the answer to the question 'What is F' tells us the *ousia* of F. In these cases it is rendered by 'essence'. . . ." ARISTOTLE: SELECTIONS 616 (Terence Irwin & Gail Fine eds., 1995). This primary and individual substance (the particular individual, "Eric") underlies everything else, including and especially the "secondary" substances to which the individual belongs, in this case "man" and "animal."

We see then that the particular entity "Eric" consists of an essential substance that makes him what he is. If Eric has a "natural teleology," it must relate to this particular essence, considered in its entirety.

Now consider what are the implications of Aristotle's philosophy for any claim that a mere part of an entity has its own "natural teleology" apart from the entity which is the whole. Eric's hand is what it is, a *hand*, because it partakes and participates in the essence that makes Eric what Eric is—that is to say, a man. Severed from his body, the thing that was a hand is a *hand* only by analogy, but no longer by definition. It has no purpose, no function, no *essence* outside of its role in making Eric what he is. A part of Eric does not possess a different substance, with its own essential properties, and its own "natural teleology."

Aquinas's model presumes that the Aristotelian secondary substance, "human," is a natural kind. If this assumption is false, as I have argued, the claim that humans have a "natural teleology" cannot be saved by retreating to an emphasis on a mere part of that purported kind, the genitalia, not least because that strategy would undermine the Aristotelian philosophical foundation that warranted the "natural teleology" claim in the first place.

<sup>49</sup> The intention of this section has been to demonstrate that Arkes's reliance upon the "natural teleology of the body" as a reason to oppose same-sex marriage is misplaced. However, even if we were to accept that as the appropriate standard to apply, it may not prove what Arkes hopes. According to John Corvino, Aquinas accepted that "the natural teleology of the body is consistent with [polygamy], since it is in the nature of the body that one man can easily impregnate more than one woman." John Corvino, *infra* note 130, at 40. So if Arkes accepts natural teleology as the determinative standard, then he must find polygamy acceptable. That he does not shows that he does not consistently apply his own criterion, and that ultimately Arkes is not marshalling a philosophical argument but only seeking some rationalism that will justify his exclusion of homosexuals from civil marriage.

closely, you see that that is all he does talk about).<sup>50</sup> Since the issue before us pertains to the former, not the latter, Arkes's introduction of natural law is irrelevant to the discussion.

### *b. Metaphysics and Law*

Even if Arkes was not simply mistaken in his application of Thomistic natural law to the issue of same-sex marriage, the question is legitimately raised as to how secular law should respond to his assertion of Catholic metaphysics. In its plainest terms, Arkes merely asserts that God (as he and the Catholic Church understand it) made the world in a particular way, and that a particular arrangement of social institutions would and thus should parallel that religious interpretation.<sup>51</sup> Deviation from that Catholic sectarian world view presumably will provoke a divine reaction or at least throw a monkey-wrench into the ordered working of the world, which believers such as himself would rather avoid.<sup>52</sup>

Arkes himself begrudgingly recognizes that "the moral precepts of Christianity and Judaism may not supply the premises of the law in a secular state."<sup>53</sup> In other words, religious believers may not co-opt secular governmental machinery to enforce upon a nonmember the dictates of their beliefs. He responds by attempting to cast the believer as the one being oppressed when wider society passes laws that do not comport with his own faith: "It is quite another to say that people who take those precepts seriously may be enduring targets of litigation and legal sanction if they have the temerity to voice those precepts as their own and make them the ground of their acts even in their private settings."<sup>54</sup>

If by this Arkes means that allowing same-sex marriage will force contrary believing religionists to tolerate and recognize such marriages, he is right. That is the price of living in a pluralistic society.<sup>55</sup> Not everyone behaves as we might wish, and we cannot ordinarily punish them merely for being different. Critical here is that the Catholic Church itself is not being required to

<sup>50</sup> See ARKES, *supra* note 24.

<sup>51</sup> See ARKES, *supra* note 24.

<sup>52</sup> An example of this kind of sectarian argument is found in G. SIDNEY BUCHANAN, *MORALITY, SEX, AND THE CONSTITUTION: A CHRISTIAN PERSPECTIVE ON THE POWER OF GOVERNMENT TO REGULATE PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS* (1985).

<sup>53</sup> Hadley Arkes, *A Culture Corrupted*, 67 FIRST THINGS 30, 33 (Nov. 1996).

<sup>54</sup> *Id.* Similar arguments that same-sex marriage should be prevented to preserve the sensibilities of religious fundamentalists are offered by George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 639-41 (1999).

Truthfully, I do worry about "people who are 'overly serious' about their religion—which is to say, people who take seriously the traditional moral teachings of Christianity and Judaism." *Id.* The "traditional moral teachings" of those religions required execution of homosexuals. If more progressive strains of these sects have moved beyond such judgments, bully for them. But the call for traditional morality does, for me, send up red flags. It always ends badly for us. See *Leviticus* 20:13.

<sup>55</sup> Of course, some conservatives have been honest enough to admit that for them pluralism is neither a value to be fostered nor even a condition to be silently endured: As Randall Terry, the founder of Operation Rescue, preached: "I want you to let a wave of intolerance wash over you. Our goal is a Christian nation. We have a biblical duty, we are called by God, to conquer this country. We don't want equal time. We don't want pluralism." URVASHI VAID, *VIRTUAL EQUALITY* 308 (1995) (quoting Randall Terry).

create same-sex marriages. Those who have read the canon law understand that Catholic marriage already significantly deviate from civil marriage.<sup>56</sup> Moreover, church members already recognize—at least in the sense that they extend marriage benefits to their employees who married outside the Catholic tradition—many marriages that do not conform to their own criteria (i.e., those performed in other religious traditions, or those which are purely civil).<sup>57</sup> So at worst the church would only be required to recognize civilly sanctioned same-sex marriages when it chooses to interact with nonmembers in the public fora. My civil rights should not be limited by Arkes's religious beliefs; in other words, *his* religious beliefs should govern *his* actions, not mine.<sup>58</sup> I should not be denied a civilly recognized marriage to a man merely to spare Arkes the psychological trauma of going to bed at night knowing that I am out there, somewhere, being *married* against his personal wishes and religious beliefs.

Recall also that Arkes denies that marriage is a result of positive law.<sup>59</sup> His opinion is not rare among conservatives.<sup>60</sup> To them, marriage is divinely established. This claim is, I feel, especially curious given the long and tortured evolution of marriage, including its late recognition by the Catholic Church.<sup>61</sup> All we need reiterate here is that civil marriage is severable from religious marriage, and no religion can be compelled to sanction a marriage of which it disapproves *within its ranks*. But this concession has no impact on civil marriage. Arkes argues *as if* the proposal were to compel all religions to bless same-sex marriage. Why else would he argue Catholic theology, which can only go to show why there can be no same-sex marriages with Catholic ceremonies? Perhaps so. But he seems to believe that winning this point also demonstrates why civil same-sex marriage (i.e., marriages outside the Catholic Church) should be prohibited. On this he is wrong. Unless this country becomes a theocratic state guided by Vatican dictates, the conclusions of Catholic theology have no

<sup>56</sup> For example, most people would be surprised to learn that "[a]ntecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative, by its very nature invalidates marriage." 1983 CODE c.1084, § 1. A greatly marked divergence from civil marriage occurs in the Catholic absolute denial of divorce: "A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death." 1983 CODE c.1141.

<sup>57</sup> See generally GRAFF, *supra* note 3.

<sup>58</sup> I have elsewhere proposed the criterion that First Amendment protections should extend only to demands on the believer, and not to his demands on others. See James M. Donovan, *Restoring Free Exercise Protections by Limiting Them: Preventing a Repeat of Smith*, 17 N. ILL. U. L. REV. 1, 35-40 (1996).

<sup>59</sup> See Hearings, *supra* note 20.

<sup>60</sup> For example, during the DOMA debate, several federal legislators expressed their opinion that marriage came solely from God, not from the state. See James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianity*, 4 MICH. J. GENDER & L. 335, 350-351 (1997). This thesis is championed in Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245 (1998) (providing a metaphysical basis for the conclusion that marriage is recognized, not created by the state).

<sup>61</sup> See STONE, *supra* note 12, at 30 ("[T]he church wedding had not been elevated to the position of a sacrament until 1439, and it was only in 1563, after the Reformation, that the Catholic Church first required the presence of a priest for a valid and binding marriage."). See also GRAFF, *supra* note 3, at 195 ("Christianity, as we know, wanted nothing to do with marriage for centuries . . . No one considered marriage sacred, as celibacy was: marriage was one of those secular and earthbound forms rendered unto Caesar.").

special pertinence to the formulation of secular social policy, much less a determinative impact. But this outcome is unlikely even by Vatican terms. As part of the restructuring of the council of "Vatican II," limits upon an individual's religious freedom have been recognized: permissible are those "restrictions which are 'required for the effective *protection of the rights* of all citizens and of their peaceful coexistence'."<sup>62</sup> When (not if) gays and lesbians are recognized as citizens fully entitled to the panoply of state protections offered to heterosexuals, then Catholics, by their own terms, will be bound to respect those rights.

In short, Arkes has misplaced his hopes if he expects the secular government to use its police powers to impose Catholic (or any religious) metaphysical views as to the appropriate social order. We thankfully have the First Amendment to protect against just such sectarian establishment.

## 2. Stanley Kurtz: *Marriage for Subordination*

Arkes and other same-sex marriage opponents structure their arguments along the lines that marriage is not based upon emotions, least of all love, but instead on something else. That "something else" can be, as it was for Arkes, reproductive functionality or "natural teleology." If marriage *were* a function of love, they fear, then *any* claim of love could lay claim to the status of marriage. Thus, their images are of persons "loving" and wishing to marry their infants, their dogs, or entire roomfuls.

Although Stanley Kurtz aims toward the same goal—the denial of same-sex marriage—his rhetorical strategy is not only different from that of Arkes, but antithetical to it.<sup>63</sup> While Arkes worries that the claim of "love" will open the door to same-sex marriage, compelling his recourse to a reproductive natural teleology, Kurtz faces off against the claim that marriage is a "right."<sup>64</sup> If access to civil marriage is based upon claims of human and civil rights, then the denial of marriage to gays and lesbians is likewise a denial of this human right. Kurtz hopes to demonstrate that this denial is rational, and not an unjustified transgression of such rights.<sup>65</sup>

His strategy asserts what Arkes (and conservatives like the Family Research Council) expressly denies: that "the fundamental glue of Western marriage" is not Arkes's natural teleology, but "emotionally intimate ties," otherwise known as "committed romantic love."<sup>66</sup> Gays are nevertheless excluded from marriage because they are incapable of that emotion, which depends upon "the complementarity of the sexes."<sup>67</sup>

Marriage, Kurtz claims, is possible only because of the peculiar qualities that males and females each bring to the relationship. Men are domesticated by women, and not, as others have claimed, by marriage.<sup>68</sup> Men are willing to be

<sup>62</sup> Finnis, *supra* note 29, at 1073.

<sup>63</sup> Stanley N. Kurtz, *What is Wrong with Gay Marriage*, 2000 COMMENTARY 35, 36. One such claim comes from the Lambda Legal Defense and Education Fund, *Talking about the Freedom to Marry*, (visited June 20, 2001) <<http://www.lamdalegal.org>> ("Marriage is a civil right that belongs to everyone.").

<sup>64</sup> See Kurtz, *supra* note 63, at 36.

<sup>65</sup> *Id.*

<sup>66</sup> Kurtz, *supra* note 63, at 37-38.

<sup>67</sup> *Id.* at 38.

<sup>68</sup> *Id.*; see also Dent, *supra* note 54, at 605.

domesticated by women because only in marriage can they gain hierarchical power over another: "to put it plainly, what the Promise Keepers have the audacity to say out loud about a man's authority within the marriage bond remains, in subtler form, the formula of heterosexual marital success."<sup>69</sup>

If a man's proprietary interest in wife and family—his sense of possession and responsibility—is what both induces and permits him to give up the restless search for sexual conquest, the maintenance of this interest depends on, at a minimum, the tokens of entitlement suggested (again, however visibly to feminists and others) by the image of a home as a castle and the father and husband as its king.<sup>70</sup>

If men cannot subordinate women, the essence of monogamous heterosexual marriage is erased. A wedding merely "embodies and reinforces already existing public sentiments about a man's responsibilities to a woman."<sup>71</sup> The "complimentarity of the sexes" predisposes each sex to play its role in this arrangement: men subordinate, women are subordinated, and each would have it no other way. In a same-sex marriage, men have no one to subordinate, and women have no one to whom they can be subordinate. The "glue" of marriage is thus missing, meaning that the relationship cannot be monogamous because the men have not been domesticated. Same-sex marriage thus "represents . . . a critical first step toward the legitimization of multipartner marriages"<sup>72</sup> because it provides a contrary model of married life.

But the harm goes even further: "same-sex marriage will imply that the sexes are deeply and fundamentally equal."<sup>73</sup> If this truth became widely known, heterosexual men would not be motivated to exchange promiscuous sex for settled domesticity with a subordinated woman, since they would now realize that they have no guarantee that the woman *would* be subordinate. Given Kurtz's premise about what holds traditional marriages together, he is right to conclude that same-sex marriage is a major threat to heterosexual marriage.<sup>74</sup>

#### a. *Marriage as Subordination*

Kurtz realizes the controversial claim he asserts. Marriage as subordination is not how most persons, other than Southern Baptists,<sup>75</sup> explicitly intend or understand marriage to be structured. He hopes to mitigate the offensiveness of this premise by clarifying that the "kingship" without which

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Stanley Kurtz, *Point of No Return: Marriage Needs a Man and a Woman. And, an Amendment*, NATIONAL REVIEW ONLINE, (visited Aug. 3, 2001) <<http://www.nationalreview.com/contributors/kurtz080301.html>>.

<sup>72</sup> Kurtz, *supra* note 63, at 39.

<sup>73</sup> GRAFF, *supra* note 3, at 159.

<sup>74</sup> Kurtz's argument showing why same-sex marriage is a threat to existing heterosexual marriages, although flawed, is considerably superior to that from Wendy Herdlein, staff attorney of the Marriage Law Project. She argues that allowing gays to marry is like allowing illegal aliens to vote. The illegitimate votes "dilut[e] the impact of citizens' votes and render[ ] results potentially contrary to the will of voting citizens . . ." Wendy Herdlein, *Letter: The Damage of Same-Sex Marriage*, WASHINGTON POST, Aug. 1, 2001.

<sup>75</sup> See Kristen Moulton, *Marriage Stand Isolates Baptists*, THE TIMES-PICAYUNE (NEW ORLEANS), June 11, 1998, at A22.

marriage cannot exist "is more often symbolic than real: a rough sort of equality has always lain hidden under the idea of heterosexual hierarchy."<sup>76</sup>

Kurtz here places himself in an odd position. Marriage, he first claims, is based upon the hierarchical subordination of women by men. But, he assures us, such subordination is mere theatre: the true circumstance is that the sexes are, and have *always been*, roughly equal. He admits no difference in the relationship between the sexes as it exists today and as it has historically and cross-culturally existed.

Nor could he admit such difference. If marriage had been originally based upon *real* subordination, but had now been stretched to include *faux* subordination, then subordination cannot be the "fundamental glue" of marriage. It would only, at best, be the most common vocabulary for talking about marriage. Kurtz must claim, if his argument is to have any consistency at all, that marriage has *always* been pretend subordination, or that true marriages today are only those incorporating *genuine* subordination. He opts for the former, for reasons that should be obvious. The goal, remember, is to deny same-sex marriage with arguments that do not simultaneously invalidate most existing heterosexual marriages. If actual subordination of one member of the couple is required to constitute a true marriage, how many heterosexual marriages would pass that criterion?<sup>77</sup>

Kurtz's choice is puzzling. Unlike Arkes, who writes as a philosopher and thus is perhaps entitled to assume a certain idealistic stance, Kurtz's intellectual credentials are those of an anthropologist. When he therefore claims that, despite all appearances to the contrary, marriage has always been a relationship of equals, he must be taken as asserting a factual conclusion. Yet this claim is astoundingly contrary to everything anthropology knows to be the case about the relationship between the two sexes. The one generalization that can be safely made is that whatever best characterizes how the relationship has been structured cross-culturally and transtemporally, the one thing it has *not* been is that of equals.<sup>78</sup> The only question is how much inequality exists between them, with males *always* being on top.

Equality has not, therefore, "always lain hidden" within the heterosexual hierarchy of marriage. If Kurtz's argument is to remain cohesive, he must

<sup>76</sup> Kurtz, *supra* note 63, at 38.

<sup>77</sup> Outside Louisiana, that is. There, the Civil Code still expressly requires wives to yield to their husbands. See LA. CIV. CODE ANN. art. 216 (West 1993) ("In case of difference between the parents [in matters of the child], the authority of the father prevails."). The common law had a similar rule. Blackstone observed that "the father had a natural right to his children, while a mother 'was entitled to no power but only to reverence and respect.'" GRAFF, *supra* note 3, at 107. So pronounced was this principle that "an orphan in colonial America was defined as a child whose father had died, even if the child had a surviving mother." *Id.* (quoting historian Mary Ann Mason).

<sup>78</sup> One hardly knows where to begin to document this point. If Kurtz's claim that "marriage has always been a relationship of equals" were true, one wonders what the women's movement was all about. A contrary account is offered by JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (MIT Press 1970) (1869) (comparing the lot of a wife to that of a slave, "and the slave under not the mildest form of slavery: for in some slave codes the slave could, under certain circumstances of ill usage, legally compel the master to sell him. But no amount of ill usage, without adultery superadded, will in England free a wife from her tormentor."). See also GRAFF, *supra* note 3, at 215-226.

therefore argue that marriage today, as it originally was, requires active and real subordination of women by men. That argument can in fact be made, but it would remain to be seen how many would accept marriage as an enduring institution in today's society if that were indeed the necessary (as opposed to accidental) price.

*b. Sexes as Complimentary*

Even were Kurtz's characterization of heterosexual relationships valid, his argument contains another undefended assumption. Just because complementarity is required within the relationship, such that one member must subordinate the other, it does not thereby follow that the assignment of the respective roles must match the biological sexes.

Kurtz avoids identifying the source of the complementarity of the sexes he requires for his argument. It seemingly matters not to him "whether [the complementarity of the sexes] is a biologically based fact or a cultural artifact, or both."<sup>79</sup> But the source of the alleged complementarity is in fact vitally important. If it is "biologically based," then we have a kind of natural law argument like that Arkes asserted. All natural law arguments, whether Aquinian or otherwise, have in common the exercise of deriving moral values from empirical facts. Here, Kurtz would have to argue that because the sexes are biologically determined in the way he describes, it necessarily follows that relationships based upon that fact is a moral good that must be preserved to the exclusion of all other variations. Our consideration of Arkes's natural law arguments has shown the difficulty in making sustainable natural law arguments of any kind, much less in the area under immediate consideration. Still, Kurtz is free to make such an argument. But he has failed to assert it, and it is not our job to scry the argument he might be willing to defend. Weighing against the likelihood that Kurtz is making a hidden natural law argument, however, is that he writes as an anthropologist, not as a philosopher. If he changes hats it at least behooves him to make the costume change explicit.

Further weighing against a natural law construction of the complementarity of the sexes upon which Kurtz depends is that, to do the job he would require of it, biological sex must *determine* this alleged complementarity. That is, *all* men must be willing, able and eager to subordinate, and *all* women must dream and desire to be subordinated. If the scope of his claims is framed in anything less than such universal scope, then sex is not the determining variable for the complementarity he defines for marriage. That fact would allow for the possibility that what matters in his argument is a kind of *psychological* complementarity (which might correlate with biological sex very highly, but not be determined by it). Once psychological complementarity becomes the true criterion for a genuine marriage, then same-sex marriage is no longer ruled out by definition.<sup>80</sup>

<sup>79</sup> Kurtz, *supra* note 63, at 38.

<sup>80</sup> See also Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1504-07 (1997). ("Because there is no guarantee that an individual of a particular sex will have the desired complimentary capacities, . . . a marriage . . . cannot be arranged merely by assuring that one partner of each sex is present.")

If, however, the complimentary is not "biologically based," but is instead a "cultural artifact," articulating a conclusive bar to same-sex marriage becomes even less likely. "Cultural" is not a synonym for "arbitrary," and *within* a particular tradition a cultural origin can be almost as powerful as a biological one. But when viewed cross-culturally, traits with a cultural origin can display an amazing range of variation. If the complementarity of the sexes is indeed a cultural artifact, then it is ultimately learned, and could, conceivably, be learned otherwise than it has been, if not in existing persons then in the next generation. If marriage is based upon such an in-theory malleable feature, then it surely is part of the superstructure of society, and not, as conservatives like Kurtz and Arkes argue, the infrastructure. As such, it is more open to deliberate manipulation than it might otherwise be.

In short, an overall understanding of Kurtz's argument demands that he specify whether the key concept of his argument, the complementarity of the sexes, is biological or cultural. But in terms of the bottom line, neither source of such alleged complementarity supports his conclusion that in its nature such complementarity necessarily precludes same-sex marriage, much less that recognizing such unions will necessarily lead to multipartner constellations such as polygamy.

## II. PRIOR RESPONSES REFUTING THE LINK

The response to the slippery slope argument has been as varied as the original accusations themselves. Sometimes the response has been to evade the issue, as demonstrated in the following television exchange:

PUGNO<sup>81</sup>: Well, you can't be opposed to polygamous marriage if all you want marriage to be is a loving committed relationship between consenting adults. There is no logical rational reason to limit it to two individuals if you also are removing the requirement that you're binding together the opposite sexes.

ROBINSON<sup>82</sup>: Now, that strikes you as crazy, but it strikes me as plausible, that if you remove the notion of a man and a woman, they you not only—you extend it to gay couples, but who knows that else you're going to be extending it to. Felicia, no?

ROGERS<sup>83</sup>: Polygamous marriage is a false issue. We're not talking about that. We're talking about two individuals—

ROBINSON: No, no, but I'm talking about, just to flesh out the values—

<sup>81</sup> Andy Pugno is the Chief of Staff for California State Senator Pete Knight. See Uncommon Knowledge, *The Wedding Zinger: The Definition of Marriage*, (film date Mar. 28), 2000 <<http://www.uncommonknowledge.org/winter00/425.html>>.

<sup>82</sup> Peter Robinson is the television show's moderator. See internet source cited *supra* note 81.

<sup>83</sup> Felicia Park Rogers is the Executive Director of Children of Lesbians and Gays Everywhere (COLAGE). See internet source cited *supra* note 81.

ROGERS: No, but it's a slippery slope.

ROBINSON: But how do you keep from sliding down that slope?

ROGERS: By only talking about including same-sex couples to be able to be married.<sup>84</sup>

Refusing to directly confront the issue, as Rogers suggests, is not an appropriate reaction. Just as the demagogues on the right deploy the shudder of revulsion as if it were an argument, the defenders on the left seemingly suggest that simply ignoring the challenge can be an effective response.

One step up from this refusal to engage in the discussion are comments that, without actually endorsing polygamy, seem open to the possibility. David Chambers admits that "if there were a move to legalize plural marriages, I would encourage the state to permit them unless they genuinely posed significant harms."<sup>85</sup>

Still more controversial is the reply that sees no problem in the worst case scenario painted by opponents of same-sex marriage. What the conservatives hold out as a *reductio ad absurdum*, others on the opposite side of the table adopt as desirable outcomes. Jennifer Vanasco, for example, accepts completely the arguments made by Arkes and Kurtz:

Gays and polygamists are making the exact same argument for the exact same ends—to live with people they love without interference by the state . . . . It may be politically expedient to ignore or declaim polygamy so that approving of our relationships isn't taken to approving theirs. But if we narrow our civil rights cause to encompass just us, we are behaving just like those heterosexual bigots who oppose same-sex marriage.<sup>86</sup>

Again paralleling the discussion of marriage opponents, only a few marriage advocates confront the problem of the slide into polygamy. Interestingly, a disproportionate number of those who confront the slippery slope challenge full-on are themselves conservatives. This may be because persons on the left are too prone to dismiss the value of marriage in all its forms to worry about preserving a distinction between polygamy and same-sex marriage.<sup>87</sup>

<sup>84</sup> See internet source cited *supra* note 81.

<sup>85</sup> David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 82 (1997); see also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 491 (1996).

<sup>86</sup> Jennifer Vanasco, *Gay Marriage Fans Owe Their Support to Polygamists*, THE WASHINGTON BLADE, June 22, 2001 <<http://www.washblade.com/forum/columns/viewpt010622a.htm>>. See also Steve Chapman, *Our Unwarranted Ban on Polygamy*, CHICAGO TRIBUNE, Aug. 30, 2001, at 27 ("[I]f people want to engage in polygamy, it's really not our business to stop them.").

<sup>87</sup> See, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation*, in LESBIAN AND GAY MARRIAGE 20 (Suzanne Sherman ed., 1992); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* vii (1999) ("marriage is unethical"); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994); Laurie Essig, *Same-Sex Marriage: I Don't Care If It is Legal, I Still Think It's Wrong—And I'm a Lesbian*, SALON, July 10, 2000; Katha Pollitt, *Polyamorally Perverse*, THE NATION, Oct. 4, 1999, at 10 ("Shouldn't the real libertarian position be that marriage itself has to go?"). Nietzsche, the German philosopher, also concluded that marriage should be abolished. See FRIEDRICH NIETZSCHE, *THE PORTABLE NIETZSCHE* 544 (Walter Kaufmann ed., 1982).

### A. The Extra-Legal Response

#### 1. Andrew Sullivan

Without question the single most influential voice on the issue of same-sex marriage has been Andrew Sullivan. Although others have been more involved in the actual work of the courts and legislatures in pursuit of this goal,<sup>88</sup> Sullivan was one of the first to underscore and articulate the singular importance of marriage to the social treatment of gays and lesbians. At a time when our official spokespersons, such as the Human Rights Campaign's Elizabeth Birch, were publicly lamenting that this issue had been thrust upon them by rogue actors in Hawaii,<sup>89</sup> Sullivan, writing from his chair as then-editor of *The New Republic*, identified same-sex marriage as *the* most important aspiration of our movement:

Gay marriage is not a radical step; it is a profoundly humanizing, traditionalizing step. It is the first step in any resolution of the homosexual question—more important than any other institution, since it is the most central institution to the nature of the problem, which is to say, the emotional and sexual bond between one human being and another. If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. It is ultimately the only reform that truly matters.<sup>90</sup>

In 1996, Sullivan was called to Congress—along with others, including Hadley Arkes—to testify on the pending Defense of Marriage Act.<sup>91</sup> He later reminisced about the eye-opening experience. The testimony bogged down, he tells us, on speculations about possible polygamy, and although the language of the bill was ostensibly focused on same-sex marriage, “[b]efore long we were busy debating on what terms Utah should have been allowed into the Union and whether bisexuals could have legal harems.”<sup>92</sup>

Bill Bennett, a noted cultural warrior dedicated to preserving the status quo, had at the time of these hearings invoked the slippery slope from same-sex marriage into the usual litany of social horrors including polygamy and

<sup>88</sup> Most notably, Lambda Legal Defense's Evan Wolfson. See Evan Wolfson, *The Freedom to Marry: Our Struggle for the Map of the Country*, 16 QUINNIPIAC L. REV. 209 (1996). Wolfson was central to the legal success of Hawaii's *Baehr* case. *Id.*

<sup>89</sup> See Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 18 (1996) (“I beg to differ with the Human Rights Campaign. No, the country doesn't have better things to do than this.”). Similarly, the right to interracial marriage was not on the agenda of the 1960's civil rights organizations. “Even today, *Loving v. Virginia*—the court case that brought down antimiscegenation laws—does not even rate an index entry in books about the civil rights movement.” GRAFF, *supra* note 3, at 154.

<sup>90</sup> ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 185 (1995).

<sup>91</sup> See Hearings, *supra* note 20, at 118-25 (testimony and prepared statement of Andrew Sullivan). About DOMA, see James M. Donovan, *supra* note 60.

<sup>92</sup> Andrew Sullivan, *Three's a Crowd*, in *SAME-SEX MARRIAGE: PRO AND CON* 278 (Andrew Sullivan ed., 1997).

incest.<sup>93</sup> Bennett challenged Sullivan by name to identify a "principled ground" that would allow same-sex marriage but exclude these other innovations.<sup>94</sup>

In his reply article Sullivan took up Bennett's thrown glove.<sup>95</sup> Sullivan identified the core assumption that supports Bennett's recourse to an alleged link between polygamy and same-sex marriage.<sup>96</sup> Critics like Bennett equate the impulse toward homosexuality with the desire for polygamous (or incestuous) unions.<sup>97</sup> Merged thus in the conservative mind, truly it would be impossible to treat them differently. The slippery slope would be real. But Sullivan points out that even as conservative an institution as the Roman Catholic Church does not agree with this assumption.

Almost everyone seems to accept, even if they find homosexuality morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse. Even the Catholic Church, which believes that homosexuality is an "objective disorder," concedes that it is a profound element of human identity. It speaks of "homosexual persons," for example, in a way it would never speak of "polygamous persons." And almost all of us tacitly assume this, even in the very use of the term "homosexuals." We accept also that multiple partners can be desired by gays and straights alike: that polygamy is an activity, whereas both homosexuality and heterosexuality are states.<sup>98</sup>

To repeat Sullivan's point, to be homosexual is just that: to *be* something.<sup>99</sup> But to be polygamous is merely to *do* something.<sup>100</sup> Homosexuality is state of being, while polygamy is an activity.<sup>101</sup> This ontological difference requires that the two be treated differently *legally*. At the very least, a principled ground thereby exists for such differential treatment.

Even if this demonstration fails to persuade every cultural conservative, it must be particularly effective against Bennett. Bennett, a conservative Catholic,<sup>102</sup> finds himself in an awkward position when confronted with the finding from the Vatican that Sullivan (also a Catholic) introduces.<sup>103</sup> If Bennett does not refute it, he must accept Sullivan's argument and concede that Sullivan has met his challenge; if he does refute it, he ceases to be a conservative.

Therein, of course, also lies the major shortcoming of Sullivan's reply. It is tailored too specifically to Bennett personally. His argument incorporates premises that Bennett is likely to accept, but not other, or even most conservatives, who are Protestants: That homosexuality is an innate orientation is far from unquestioned by the right.<sup>104</sup> Non-Catholic conservatives are not

<sup>93</sup> See William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996 at 27.

<sup>94</sup> *Id.*

<sup>95</sup> See Sullivan, *supra* note 92.

<sup>96</sup> See Sullivan, *supra* note 92 and accompanying text.

<sup>97</sup> See Bennett, *supra* note 93, at 27.

<sup>98</sup> Sullivan, *supra* note 92, at 279.

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See WHO'S WHO IN AMERICA 369 (2002).

<sup>103</sup> See SULLIVAN, *supra* note 90.

<sup>104</sup> The premise that homosexuality is not innate lies behind the movement to "cure" gays. See JOSEPH NICOLISI, *HEALING HOMOSEXUALITY: CASE STORIES OF REPARATIVE THERAPY* (1993); John

ethically bound to defer to pronouncements by the Pope, and Sullivan offers no other authority for this conclusion. And although other such authorities exist,<sup>105</sup> none would garner universal acceptance.

## 2. Jonathan Rauch

In that same, busy year of 1996, Charles Krauthammer, writing in *Time*, reiterated the conservative line that same-sex marriage necessarily segues into polygamy.<sup>106</sup> One cannot dismantle a dam and yet expect to regulate what water would then flow through: it *all* escapes. Likewise, if the barrier that limits marriage to two sexes is dismantled, the *all* that the barrier excluded becomes acceptable, including polygamy. Krauthammer—much like Bennett challenged Sullivan—dares advocates of same-sex marriage to articulate “good enough reasons” that would permit same-sex marriage yet successfully maintain the bar to polygamy, incest, and bestiality.<sup>107</sup>

This time Jonathan Rauch accepted the challenge, and in his reply he formulated an original standard to maintain the distinction:

The hidden assumption of the argument which brackets gay marriage with polygamous or incestuous marriage is that homosexuals want the right to marry anybody they fall for. But, of course, heterosexuals are currently denied that right. They can not marry their immediate family or all their sex partners. What homosexuals are asking for is the right to marry, not anybody they love, but *somebody* they love, which is not at all the same thing.<sup>108</sup>

In other words, “[h]omosexuals want the same freedom [allowed heterosexuals], subject to the same restriction.”<sup>109</sup> To desire polygamy (or incest, or bestiality) is to desire “an additional (and weird) marital option.”<sup>110</sup>

Rauch makes, I believe, an important point. Opponents of same-sex marriage will sometimes trivialize the debate by declaring that gays already have the same marital option as heterosexuals: to marry someone of the opposite sex.<sup>111</sup> From this perspective, gays are also (like polygamists et al.) seeking “an additional (and weird) marital option.”<sup>112</sup>

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Leland and Mark Miller, *Can Gays Convert?*, NEWSWEEK, Aug. 17, 1998, at 46-52. One response to the “ex-gay” movement can be found in SURINA KHAN, *CALCULATED COMPASSION: HOW THE EX-GAY MOVEMENT SERVES THE RIGHT’S ATTACK ON DEMOCRACY* (National Gay and Lesbian Task Force Policy Institute, 1998).

<sup>105</sup> See generally CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1996); DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* (1994); SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* (1996).

<sup>106</sup> See Charles Krauthammer, *When John and Jim Say, “I Do,”* TIME, July 22, 1996, at 120 (“[I]f marriage is redefined to include two men in love, on what possible principled grounds can it be denied to three men in love?”).

<sup>107</sup> *Id.*

<sup>108</sup> Jonathan Rauch, *Marrying Somebody*, in *SAME-SEX MARRIAGE: PRO AND CON* 285, 286 (Andrew Sullivan ed., 1997). For a revised version of this article, see Johnathon Rauch, *Marrying Somebody*, (visited Feb. 26, 2002) <<http://www.indegayforum.org/articlesrauch5.html>>.

<sup>109</sup> See Rauch, *supra* note 108, at 286.

<sup>110</sup> *Id.*

<sup>111</sup> See Kurtz, *supra* note 63, at 37; see also Dent, *supra* note 54, at 608. This same perverse logic was used to defend the notorious outcome of *Plessy v. Ferguson*, 163 U.S. 537 (1896), the case that

This argument borders on the offensive, and depends on a linguistic subterfuge. As phrased, gays and straights are similarly situated, and gays are asking for something extra. But a straight man can expect to actually *want* to wed some of the persons from among these designated candidates. The gay man will want to marry none of them, *by definition*, given that marriage is "for," at least in part, its companionate and unitive function as expressed sexually.<sup>113</sup> Given his most fundamental sexual desires, that kind of unity cannot be achieved with a woman (and vice-versa for a lesbian). Because this result is definitional, gays and straights are *not* similarly situated. Gays are therefore not asking for something "extra," but rather for the *same* thing, appropriate to their actual situation: a pool of potential marital partners defined so as to include at least some individuals they would actually *want* to marry.

That, of course, is Rauch's point. Up to here he is on solid ground, and has adequately met Krauthammer's challenge. To this fine argument he appends Sullivan's distinction between homosexuality as a "constitutive need," and polygamy as an optional behavior.<sup>114</sup> Whereas Sullivan found that merely noting this distinction settled the question as to how to make a principled distinction between homosexual marriage and polygamy, Rauch further analyzes the opposition.<sup>115</sup>

According to Rauch, the social purpose of marriage is not to "sanctify love" (if it were, then indeed polygamy and incest would be permissible).<sup>116</sup> Instead, the social purpose is "to bond as many people as possible into committed, stable, relationships."<sup>117</sup> Society has a vested interest in such relationships because they serve three essential functions: (1) to raise children; (2) to domesticate men; and (3) to create ties of mutual aid and support.<sup>118</sup>

Polygamy, according to Rauch's account, undermines these goals (especially the second) because it leaves some men with no wives at all, creating a class of rogue, undomesticated males that can only be controlled through harsh repression. The "one-partner-each rule stands at the very core of a liberal society, by making marriage a goal that everyone can aspire to."<sup>119</sup>

The actual details of polygamy as it has been known in this country are described in a later section.<sup>120</sup> The only point that needs to be made here is that

sustained the practice of racial segregation. "It was said in argument that the statute of Louisiana [which forbade the mixing of races on railway passenger cars] does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens." *Id.* at 556-57 (Harlan, J., dissenting).

<sup>112</sup> See Rauch, *supra* note 108.

<sup>113</sup> See, e.g., Arkes, *supra* note 53 and accompanying text.

<sup>114</sup> The phrase "constitutive need" appears in the internet version of Rauch's article. See internet source cited *supra* note 108.

<sup>115</sup> See Sullivan, *supra* note 89.

<sup>116</sup> Rauch, *supra* note 108, at 287.

<sup>117</sup> *Id.* This sentence is poorly phrased, since polygamy would appear to be a superior marital form if the goal is to cement "as many people as possible." We can take Rauch here to mean "as many people as possible into committed, stable relationship" *pairs*.

<sup>118</sup> See *id.* Rauch's argument will be but one of many we shall see that views polygamy as being politically undemocratic. See Section IV(B) *infra*.

<sup>119</sup> *Id.*

<sup>120</sup> See *infra* section IV.

this effect of polygamy more aptly describes baboons than humans.<sup>121</sup> First, even within polygamy-tolerant societies, the percentage of men taking more than one wife is actually quite low.<sup>122</sup> One explanation for this discrepancy is that this cultural option requires the acquisition of considerable material resources, which only few achieve. Second, the problem Rauch highlights is likely to arise only within closed, small communities that have a small pool of potential spouses by any criterion.<sup>123</sup> That condition does not describe most of the United States.<sup>124</sup> The comparative openness of urban society permits a free flow of persons from one marriage "market" to another. Third, although the sex ratio of a cohort starts out favoring males, that soon changes in its mid-twenties so that there are thereafter more females than males.<sup>125</sup> Younger males will therefore lack partners among their female peers based on sheer demographics. That polygamy might exacerbate the shortfall is what worries Rauch, but the problem exists even without it. This natural gap is made even worse due to the serial polygamy our society practices, putting older males in competition with younger males for younger females, with the result that some of those women will choose older partners. If polygamy is bad for males—and thus, Rauch argues, bad for society—then monogamy, even in its serially polygamous form, can be bad for females (at least only when considering the availability of potential quality spouses).<sup>126</sup> If, as Rauch claims, the social interest in marriage is to create as

<sup>121</sup> See ALISON JOLLY, *THE EVOLUTION OF PRIMATE BEHAVIOR* 337-38 (2d ed., 1985). Baboons force their subadult males into bachelor bands that linger on the periphery of the troop, where they are the first to be exposed to predators. Humans do the same with their unmarried males when they preferentially select them to serve on the front lines of the military. To that extent, at least, humans already exert coercive control over their rogue bachelors, adding to the evidence that humans are, by nature, polygamous. See DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY* 179 (2001) ("The human species is preferentially and biologically polygynous...").

<sup>122</sup> According to one study, only about five to ten percent of men actually avail themselves of this option where it is offered. See HELEN FISHER, *ANATOMY OF LOVE* 69 (1992).

<sup>123</sup> See GRAFF, *supra* note 3.

<sup>124</sup> See generally GRAFF, *supra* note 3.

<sup>125</sup> See MARTIN DALY & MARGO WILSON, *SEX, EVOLUTION, AND BEHAVIOR* 298, Table 11-4 (2d ed., 1983) ("At all ages, males are likelier than females to die as a result of both "external" causes (mainly accidents, as well as suicides, homicides, and poisonings) and "internal" causes (disease and senescence"). Thus, when adjusted for age, the death rate for males is almost double that for females in every age category. See STATISTICAL ABSTRACT OF THE UNITED STATES, Table 130 (1999).

As a result, although males begin by outnumbering females at about 25 years of age the balance shifts. See *id.* at Table 14. By age 45, there are about 93 males per 100 females; by age 65, only 70 males per 100 females. See *id.* at Table 15. In 1998 only 67% of women between 35 and 44 were legally married. See Rodger Doyle, *The Decline of Marriage*, 281(6) *SCIENTIFIC AMERICAN* 36 (Dec. 1999).

<sup>126</sup> See Rauch, *supra* note 108, at 286. The argument is this: Polygamy is advantageous to women in that it allows each woman access to the most desirable mates; a male's prior pairing with another female does not necessarily preclude her own access to him as a preferred genetic donor to her offspring. Our physiology and psychology bears the marks of our species being naturally at least inclined to practice polygamy. See BARASH & LIPTON, *supra* note 121, at 179 ("The human species is preferentially and biologically polygynous"). Monogamy arose as a compromise between males "whereby access to women is divided up and harmful fighting is avoided." *Id.* at 155. This arrangement does nothing to improve female overall reproductive success (they were likely to bear children regardless), but does lower the individual quality of offspring because each woman does not have access to the most desirable males. In contrast, males profit enormously from monogamy. Under polygamy many males might be shut out completely because the women were monopolized by a few males. So male reproductive success gains tremendously under the scheme of monogamy.

many pair-bonds as possible, then a mixture of marriage forms seems the best solution, so that the detrimental effects of exclusive permission for only one form is counterbalanced by the other.

Rauch intends to show that because polygamy fails to further an important social interest, and in fact exacerbates the problem, it can be prohibited.<sup>127</sup> Same-sex marriage does further these societal interests, and thus should be permitted.<sup>128</sup> But the support for this particular argument against polygamy is spotty at best. If it fails, Rauch ultimately has failed to sustain the distinction between same-sex marriage and polygamy as Krauthammer challenged.<sup>129</sup>

Again, had Rauch stopped midway through his essay, the piece would have avoided this difficulty, and been much stronger. By daring too much, he possibly distracts from his more enduring contribution.

### 3. John Corvino

John Corvino, a professional philosopher, finds the arguments of Sullivan and Rauch to be incomplete.<sup>130</sup> Sullivan's "We really exist" argument will convince only those who believe homosexuality to be an immutable condition.<sup>131</sup> We have already seen that many if not most social conservatives have yet to accept this fact.<sup>132</sup> Moreover, Sullivan's position is not logically conclusive: Alcoholics "really exist" too, but "we don't encourage them."<sup>133</sup> At best, Sullivan's points will contribute to a complete rebuttal to the polygamy challenge, but they fail to fell the opponent on their own.

Corvino characterizes Rauch's argument as the "equal options" argument: homosexuals are only asking to "engage in [the same] monogamous, non-incestuous relationships with people they love—just as heterosexuals do."<sup>134</sup> But again, this rationale is overinclusive. Pedophiles, for example, could assert exactly the same argument. So long as we are asking society to relax *some* traditional standards, Rauch has not completely shown how to distinguish our own request from all the imaginable termini of the slippery slope.

In formulating a third alternative Corvino invokes a different version of natural law than did Arkes. Whereas Arkes relies upon Aquinas, Corvino looks to John Finnis.<sup>135</sup> Briefly, the two differ in the following way. John Finnis's

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Still, many feminists persist in viewing matters in exactly the opposite way. Polygamy in their eyes is patriarchal, treating women like property, whereas monogamy is feminist, regarding women and men as equals. See Miller, *supra* note 341. At the very least, the undesirability of polygamy is not as clear-cut as some feminists might think.

<sup>127</sup> See Rauch, *supra* note 108.

<sup>128</sup> See *id.*

<sup>129</sup> See Krauthammer, *supra* note 106.

<sup>130</sup> See John Corvino, *No Slippery Slope*, 7(3) THE GAY & LESBIAN REVIEW 37, 38 (Summer 2000).

A revised version of this article is available online: See John Corvino, *First Gays, Then Polygamists?*, INDEPENDENT GAY FORUM (visited Feb. 26, 2002)

<<http://www.indegayforum.org/articles/corvino59.html>>.

<sup>131</sup> See *id.*

<sup>132</sup> See Corvino, *supra* note 130, at 38.

<sup>133</sup> Corvino, *supra* note 130, at 38.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 39.

*Natural Law and Natural Rights*<sup>136</sup> is credited with singularly "revitaliz[ing] the natural law tradition in the English-speaking world."<sup>137</sup> His model, however, is the inversion of Aquinas's. Whereas Aquinas *posited* an essential human nature which one then examined in order to ascertain the good, for Finnis "human nature or essence is the conclusion of a natural law ethical inquiry . . . not the starting point."<sup>138</sup> Finnis will always be at pains to minimize the significant differences between his argument and those of his predecessors in whose tradition he seems himself working, Aristotle and Aquinas. Therefore, his own description of Aquinas's work de-emphasizes the role of the natural in Aquinas, producing a sketch which sounds very much like the product Finnis fashions:

[F]or Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable. And this quest will eventually bring one back to the *underived* first principles of practical reasonableness, principles which make no reference at all to human nature, but only to human good.<sup>139</sup>

This statement is true only as far as it goes. What Finnis obscures is that Aquinas's application of reason is, as we have seen, *against the background* of what is natural. It is the kind of reasoning that a person would do given the possession of an essential human nature of Aquinas's description.<sup>140</sup> Excise this background criterion of the ontological primacy of the natural, and the result makes Aquinas sound very similar to Finnis, despite the fact that his method is quite the opposite.

The key concept that Corvino takes up from Finnis is his idea of human "flourishing."<sup>141</sup> Finnis himself believes that homosexuality is contrary to human flourishing, and thus against natural law, and therefore immoral.<sup>142</sup> But when

<sup>136</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

<sup>137</sup> GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 193 (2d ed., 1995).

<sup>138</sup> LISSKA, *supra* note 30, at 147.

<sup>139</sup> FINNIS, *supra* note 136, at 36.

<sup>140</sup> See discussion of Aquinas *supra* section I(B)(1)(A).

<sup>141</sup> *Id.* at 23.

<sup>142</sup> See Finnis, *supra* note 29. While there may be some strategic value to Corvino's selection of Finnis to construct a pro-same-sex marriage argument, there is considerable irony in the choice. Of all the conservatives considered in this Article, Finnis's problem with homosexuals is barely hidden. For example, although conceding that we should not be persecuted for what we *feel*, he believes that the full force of law should prohibit any and all expression of those feelings. See Finnis, *supra* note 29.

The philosophical implications of this distinction alone are puzzling. We saw earlier that the actualization of a truly natural inclination is the natural law's very definition of the good, at least as articulated by Aristotle and Aquinas. Since Finnis concedes (or at least does not present a contrary argument) that we have these natural inclinations ("a psychological or psychosomatic disposition inwardly orienting one *towards* homosexual activity," *Id.* at 1053-54), that is, we are not necessarily perverted heterosexuals but rather by our nature true homosexuals, then he should conclude, were he being consistent, that the moral good lies in our appropriate actualization of that inclination (e.g., same-sex marriage, perhaps). But he here carves out, without explanation, a special exception to this general rule.

Finnis's attitude toward homosexuals is further revealed when he goes beyond the standard conservative concerns regarding same-sex marriage and child adoption by homosexuals,

reaching this result Finnis is arguing philosophically. Corvino's point is that this determination must be empirical, and therefore dependent upon relevant data and not merely upon the concatenation of ideas and thought.<sup>143</sup>

This general point allows Corvino to assert his major conclusion: If the conditions of human flourishing are empirical, then whether homosexuality or polygamy is compatible with that flourishing will each require its own set of relevant data. "[T]o observe that many people flourish in homosexual relationships is not to prove that others might flourish in incestuous, bestial, or polygamous ones. Whether they would or not is a separate question—one that requires a whole new set of data."<sup>144</sup>

Corvino thus winds up in another place than do Sullivan and Rauch. They seem to believe that a proper response to the alleged slippery slope requires them not merely to differentiate same-sex marriage from polygamy, but also to demonstrate how the former is good while the latter is bad.<sup>145</sup> Their responses thereby concede at least one point made by the framers of the slippery slope argument, that same-sex marriage and polygamy can be linked by the same standard of evaluation. This concession is the precondition for constructing the slippery slope in the first place. In the end, Sullivan and Rauch do not deny the slope, but merely argue that it is not slippery. In other words, they do not claim

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to include a call for the cessation of toleration of the existence of "places of resort for homosexuality" and our use of "public media of communication," *Id.* at 1076. In other words, our bars and clubs should be closed and shuttered, our associations and organizations disbanded, and our newspapers and magazines censored, all by exercise of the police powers of the state.

Finnis defends these conclusions largely by demonstrating that the classic Greek philosophical triumvirate of Socrates, Plato, and Aristotle also condemned homosexual conduct in any context. Even if true, it is not clear how this fact is relevant. These same philosophers also disliked democracy. If Finnis sincerely wishes to assert that their opinions are the standard by which we should order our public policy, then he must also cavil against our entire political system, and not just its homosexual citizens.

<sup>143</sup> The further irony in Finnis's article against homosexuals is that when discussing the appropriate methodology for natural law analysis *generally*, Finnis's innovation was to insist that it begin with an empirical overview of the relevant facts as offered by anthropology and the other social sciences. See FINNIS, *supra* note 136, at 17 ("the disciplined acquisition of accurate knowledge about human affairs . . . is an important help to the reflective and critical theorist in his effort to convert his own (and his culture's) practical 'prejudices' into truly reasonable judgments about what is good and practically reasonable."). He would, in other words, have been the first to agree with Corvino. Finnis does not explain why, in the context of discussing homosexuals, empirical data-gathering now becomes superfluous.

<sup>144</sup> Corvino, *supra* note 130, at 39. This same point is phrased more clearly in the internet version of the article:

But whether PIB [polygamous, incestuous, bestial] relationships do in fact have such benefits and lack such drawbacks is an empirical matter, one that will not be settled by looking to homosexual relationships.

To put my point more concretely: to observe that Tom and Dick (and many others like them) flourish in homosexual relationships is not to prove that Greg and Marcia would flourish in an incestuous relationship, or that Mike, Carol, and Alice would flourish in a polygamous relationship, or that Bobby and Tiger would flourish in a bestial relationship.

John Corvino, *First Gays, Then Polygamists?*, INDEPENDENT GAY FORUM (visited Feb. 26, 2002) <<http://indegayforum.org/articles/corvino59/html>>. Kind of puts a whole new slant on watching the *Brady Bunch*, doesn't it?

<sup>145</sup> See Sullivan, *supra* note 92; see Rauch *supra* note 108.

that the link is nonsensical, but only that movement from one to the other is not inevitable.

Corvino, in contrast, argues that to pair same-sex marriage and polygamy in the way the slippery slope argument requires is simply a non sequitur. His strategy is to deny that the slope exists at all, much less that it is a slippery slope.<sup>146</sup> The data relevant to the issue of same-sex marriage are completely different from the data that would be relevant to argue the acceptability of polygamy.<sup>147</sup> Proving that oranges are good for your health does not help on the question of whether lawn grass is also good for your health. The two problems at best share some similarity in the methodological procedures one would use to resolve the issue, but knowing the answer to the one provides no insight as to the other.<sup>148</sup> So too the relationship (or lack thereof) between same-sex marriage and polygamy.

The weakness of Corvino's argument lies in what he leaves unsaid. The model he constructs—to decide what kinds of marital forms to endorse because they further human flourishing—works best when the problem is treated as analogous to deciding which students to put in an advanced section. The category or class is essentially open, and the only real problem is a sorting task: which forms go into the "acceptable" pile and which not, based upon relevant data.

But conservatives could object to this suggestion that the category of "marriage" is essentially open. Instead they would deem it essentially closed.<sup>149</sup> Corvino assigns no social costs to holding the category open. Conservatives, because the category is by tradition closed, would assess high costs merely for reopening the issue, whatever the outcome. Even if the empirical data suggest a positive benefit to same-sex marriage, any such benefit may be more than offset by the negative costs of disturbing settled issues. In that case, perhaps same-sex marriage should *not* be allowed. But if it is accepted, this successful changing of the marriage concept has set a precedent to which polygamists can appeal to further their own cause. In this sense, at least, the debate over same-sex marriage is not a "separate question" from that of polygamy. What was once a wall has become a door, which every time it is opened incurs a social cost in uncertainty on that specific issue, and a general cynicism about the soundness of social institutions in general.

Corvino does not address the issue of why his implied openness is more valid than the assumption by opponents of closed-ness. On this issue, in fact, the weight of law and anthropology may well be against him. Law favors, as a rule, closure and certainty of outcome, as evidenced in such rules as *res judicata* and

<sup>146</sup> See Corvino, *supra* note 130.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Hence their repeated characterizations of marriage as immutable from time immemorial. If this point needs documenting, one need only peruse the contents of two collections on the gay marriage debate, SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997), and SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997). See also PHILIPPE ARIÈS, THE HOUR OF OUR DEATH xiv (Helen Weaver trans., 1981) (recognizing "a general tendency, in the nineteenth and early twentieth centuries, to attribute remote origins to collective and mental phenomena that were really quite new," including the modern sense of the family).

*stare decisis*. Anthropology has often found that cultural uncertainty can be destructive to the mental health of its participants.<sup>150</sup>

Corvino's reliance upon a minority understanding of the structure of social institutions should at least merit recognition and explanation. As Corvino has not offered that explanation, his model, itself an improvement over those by Sullivan and Rauch, is still incomplete.

## B. The Legal Response

### 1. William Eskridge

One of the many persons who responded to Kurtz's article in *Commentary*<sup>151</sup> was Yale law professor William Eskridge.<sup>152</sup> In his letter Eskridge made several of the points discussed above, specifically that Kurtz's depiction of heterosexual marriage seemed to require that women desire their servitude to men. He also criticized Kurtz's invocation of the slippery slope from same-sex marriage to polygamy.

By this time Eskridge had already made his own contribution to the debate over same-sex marriage.<sup>153</sup> In his book Eskridge devotes but only two pages to the argument of a slippery slope toward polygamy. He observes that to the extent that marriage is characterized as "an engine of procreation"<sup>154</sup> then the criminalization of polygamy is difficult to justify. Instead, such criminalization must "relate to the unitive goals of marriage."<sup>155</sup> He identifies several practical problems associated with a man having multiple wives: who, for example, would make executive decisions should the man become incapacitated? To whom falls the decision of whether to "pull the plug" if he is in a vegetative coma? But such issues, while real, do not seem sufficient to justify an outright ban on the marriage form.

Eskridge believes the more intrinsic flaw with polygamy lies in that it "might create or exacerbate hierarchical structures within marriage."<sup>156</sup> This fact, if true, "not only defeats the companionate goal of marriage but contributes to

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<sup>150</sup> As one example, Lommel offers a riveting depiction of reproduction impacted by anxiety resulting from culture loss:

Procreation of the Australian aborigines ... diminishes or ceases altogether if their unconscious mental life is disturbed. Far more than among ourselves, their biological productivity seems also to be dependent upon their mental balance. Disturbances of the subconscious have the effect of reducing the number of children. The aborigines express the inadequate mental disposition to procreation by saying: "We cannot dream any more children."

ANDREAS LOMMEL, *SHAMANISM: THE BEGINNINGS OF ART* 74 (Michael Bullock trans., 1967).

<sup>151</sup> Discussed *supra* note 63 and associated text.

<sup>152</sup> See William Eskridge, *Same-sex Marriage* [Letter to the Editor], *COMMENTARY*, Dec. 2000, p. 5.

<sup>153</sup> See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996).

<sup>154</sup> *Id.* at 148.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 149.

gender equality."<sup>157</sup> The state's interest in the latter is compelling, he says, and would alone justify the criminalization of polygamy.

The difficulty with Eskridge's argument is that we do not in fact know whether either of these asserted consequences of polygamous unions in fact applies. As a later section of this paper details, we have empirical data suggesting that, at least as applied to the Mormon practice, polygamy does not inherently undermine female equality. For example, Mormon women were the first to get the right to vote, and only had it withdrawn by Congress when they refused to use this right to outlaw their marriages.<sup>158</sup>

Eskridge is probably wrong on what he imagines the consequences of polygamy to necessarily be. Yet he has no "fall back" argument for the criminalization of polygamy absent those alleged consequences. Without something more, same-sex marriage *could* lead to polygamy.

## 2. Maura Strassberg

Maura Strassberg offers the most philosophically sophisticated response we shall consider.<sup>159</sup> She examines the reasons offered by the U.S. Supreme Court in the decision that is most responsible for the legal (as opposed to the moral, ethical, or social) conclusion that polygamy is a danger case, *Reynolds v. United States*.<sup>160</sup> In *Reynolds* the Court expressed its view that because polygamy is not simply incompatible with a political democracy but is in fact aggressively antagonistic to it, that practice can be excised from the population.<sup>161</sup> But this conclusory language is not fully explained in the decision.<sup>162</sup> Strassberg argues that this explanatory lacuna can be found in the writings of George W. F. Hegel.<sup>163</sup>

For Hegel "the essence of marriage . . . is not contract, which has as its premise independent individuals reciprocally using each other to achieve individual ends, but rather a transcendence of contract and individual self-interest in which two individuals become one person."<sup>164</sup> This unity in turn "simultaneously sustains and promotes individuality"<sup>165</sup> through the medium of love.

The key to this achievement is monogamy: "Only 'mutual, whole-hearted, surrender' of individual personality results in each having the identical relationship with the other which allows both to become conscious of their personhood in the other."<sup>166</sup> In other words, the desired effect is possible only when the individuals are dialectical opposites, so that the impact of the loving merger equivalently transforms them both. The involvement of any more

<sup>157</sup> *Id.*

<sup>158</sup> See generally GRAFF, *supra* note 3

<sup>159</sup> See generally Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

<sup>160</sup> 98 U.S. 145 (1878). See Strassberg, *supra* note 159 at 1524-1527.

<sup>161</sup> See *Reynolds v. United States*, 98 U.S. at 155-56. See also Strassberg, *supra* note 159, at 1522-23.

<sup>162</sup> See Strassberg, *supra* note 159, at 1523.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1527.

<sup>165</sup> *Id.* at 1537.

<sup>166</sup> *Id.* at 1529.

persons could not be balanced in the required manner. The "paradox of love"<sup>167</sup>—referring to the simultaneous loss of individuality via union with the beloved, and the discovery of a new individuality through the mutual experience<sup>168</sup>—therefore forges "*individuals* who can emerge from the family and take their place in civil society as holders of rights."<sup>169</sup>

This brief description does much violence to the nuanced argument Strassberg presents on behalf of Hegel. But it suffices to sustain the main points she next offers, that the Hegelian account of marriage both *precludes* polygamy but *includes* same-sex marriage.

The first result—the exclusion of polygamy—follows from her description of polygamy as loveless.<sup>170</sup> "In the polygamous family . . . neither love nor justice is likely to flourish,"<sup>171</sup> but is instead the breeding ground of jealousy and disharmony.<sup>172</sup> Family integrity can be preserved only through "walls, armed guards, or the threat of torture, mutilation, or death . . .".<sup>173</sup> Although the harshest elements of this Hegelian account are based on his image of Eastern polygamous practices,<sup>174</sup> Strassberg extends the conclusions to encompass the more temperate Mormon polygamy as well.<sup>175</sup>

Important in Strassberg's model is the claim that polygamous families do not "dissolve" and disperse its members throughout the wider society, thereby dissipating the power and loyalty owed the family subunit.<sup>176</sup> They remain comparatively intact, stunting the development of personal individuality and creating groups competing with the civil government for the loyalty of its members.<sup>177</sup> In short, "while the basis of monogamy is the equality and mutual recognition necessary for the development of individuality, the basis of polygamy is lordship and bondage."<sup>178</sup>

Strassberg next undertakes the challenge to show that, while the Hegelian analysis of marriage (which she has shown to be consistent with American case law on marriage<sup>179</sup>) precludes polygamy, it includes same-sex marriage.

[T]he monogamous nature of same-sex marriage, together with the fundamental personal, religious, political, ideological, and geographic diversity of homosexuals, prevents same-sex marriage from being a

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<sup>167</sup> *Id.* at 1527.

<sup>168</sup> That is to say, the wonderful impact of the thought that "He loves me" emerges from the tension between the individual selfhood in "me" with the unifying merge of "loves."

<sup>169</sup> Strassberg, *supra* note 159, at 1537.

<sup>170</sup> *Id.* at 1534 ("The lack of love in the polygamous family inhibits the full development of independent personality.").

<sup>171</sup> *Id.* at 1533.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See Strassberg, *supra* note 159, at 1577.

<sup>175</sup> See *id.* at 1576-94.

<sup>176</sup> *Id.* at 1535.

<sup>177</sup> See *id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Strassberg, *supra* note 159, at 1557-1576.

threat to our political ideals in the same way Mormon polygamous marriage was.<sup>180</sup>

Central to this demonstration is that Hegel de-emphasized procreation as a purpose of marriage.<sup>181</sup> If homosexual sex can achieve the same unifying effect Hegel demands of heterosexual sex, then same-sex marriage is compatible with traditional marriage.<sup>182</sup>

She believes this argument can be made. The kinds of oppositions necessary for the dialectical transcendence—oppositions Kurtz might have grounded in the complementarity of the biological sexes—Strassberg locates elsewhere, on the “focus of romantic love on the interplay of differentiated individuality, rather than the mere opposition of sex.”<sup>183</sup>

To the extent such unity depends, under the Hegelian view, upon the presence within the relationship of at least one partner who can create emotive unity and one partner who can develop rational independence, no more reason exists to assume that both such capacities cannot be found within a same-sex relationship than to assume that both such capacities will be found within every heterosexual relationship.<sup>184</sup>

Ergo, “the doctrinal underpinnings of same-sex marriage . . . can be seen as indistinguishable from the doctrinal underpinnings of modern heterosexual marriage founded on romantic love and sexual desire and reshaped by gender equality,” a claim that cannot be made for polygamy.<sup>185</sup>

Strassberg’s argument improves everytime I read it. She identifies all of the central issues, and deals with each of them in a serious if not conclusive way. Most of my disagreements are merely differences of emphasis that have little to do with the main thrust of her thesis. The only potentially critical problem refers to one technical point touching on the relationship of love to marriage. Today we expect love to be a *precondition* to marriage.<sup>186</sup> At times, however, she speaks as though love is a *consequence* of marriage.<sup>187</sup> Her argument is strongest under the latter reading which depicts marriage as a developmental process of deepening emotional resonance.<sup>188</sup> That would leave undetermined, however, the original basis for the marriage. Love and transcendence are desirable consequences of marriage, but as sequelae they cannot so easily serve, as she seems to wish, to determine what kinds of marriage can be entered into. A model that reflected our own expectation that love is a precondition, and not a consequence of marriage, would be more effective and appropriate.

A philosophical reaction is provoked by her choice of Hegel upon which to build her response. My understanding has been that Hegel was more relevant to the history of philosophy than to philosophy itself. At issue is not that Hegel is unfashionable (although that may be true), but that the heart of his philosophy

<sup>180</sup> *Id.* at 1594.

<sup>181</sup> *Id.* at 1531.

<sup>182</sup> *See id.* at 1608; *see also* Strassberg, *infra* note 159, at 1608 and accompanying text.

<sup>183</sup> *Id.* at 1607.

<sup>184</sup> Strassberg, *supra* note 159, at 1608.

<sup>185</sup> *See id.* at 1611.

<sup>186</sup> *See id.* at 1607 (noting “the modern grounding of heterosexual marriage in romantic love”).

<sup>187</sup> *See id.* at 1533 (“marriage . . . creates . . . love.”).

<sup>188</sup> *See id.*

had been skewered by Kierkegaard.<sup>189</sup> That the fragments of a shattered philosophical system can have life independent of their original, now discredited context, is not immediately obvious.

The existentialism of Kierkegaard (for me, at least; philosophy is on many points a matter of taste<sup>190</sup>) is the more vital perspective than the systematics of Hegel. Kierkegaard argued that Hegel had rendered impossible the very thing that Strassberg singles out for emphasis in her analysis: personal freedom.<sup>191</sup> Hegel had argued that the rules of logic identified by Aristotle were wrong, not least because they presumed a static reality of discrete oppositions.<sup>192</sup> Instead, everything moves back and forth.<sup>193</sup> But without discrete oppositions, there can be no choices to make, everything being fundamentally the same.<sup>194</sup> Without choice, there is no freedom.<sup>195</sup> The result, then, is that on the one hand Hegelian philosophy *precludes* personal freedom, but on the other Strassberg is using that same philosophy to show demonstrate how individuals are properly formed to participate in a democratic society. There is clearly a contradiction here, and I admit my inclination to side with Kierkegaard.

Finally, pragmatic criticisms can be directed toward Strassberg's thesis. Even if Hegel is not as problematic as I believe, a practical consideration arises from the sheer complexity of her account. Complex arguments do not fare well in a public debate built around soundbites and three-minute television segments. One would like to see, if possible, the essential retort to the slippery slope argument distilled into a few simple points.

### III. THE SLIPPERY SLOPE ARGUMENT PARSED

Despite the verbiage both pro and con addressing the relationship of same-sex marriage to polygamy, rarely have the details of the alleged association been scrutinized. Sometimes the argument is cast in simple terms of moral decline: if same-sex marriage is accepted, that fact, tossed into a social mix already allowing abortion, divorce, and other forms of moral deviance, will be just one more step on the path to complete moral collapse embodied in the boogey of polygamy.<sup>196</sup> This argument links same-sex marriage to polygamy not

<sup>189</sup> Kierkegaard, for example, argues the impossibility of constructing a purely logical system, because such a system would lack an absolute beginning. One can select a beginning, but that would be an existential act of will, not a logical result. So either the system is not logical, having a nonlogical beginning, or the system is not systematic, having no beginning. See SØREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 99-103 (David F. Swenson trans., 1944).

<sup>190</sup> In some ways this parenthetical contains the germ of Kierkegaard's whole philosophy. His most famous statement is that "Truth is subjectivity." *Id.* at 169.

<sup>191</sup> See DONALD L. PALMER, KIERKEGAARD FOR BEGINNERS 69 (1996).

<sup>192</sup> See *id.*

<sup>193</sup> Kierkegaard termed Hegel's "introduction of movement into logic" his "unparalleled discovery" that was also a failure. See KIERKEGAARD, *supra* note 189, at 99.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* 91-92 (1996).

<sup>196</sup> Columnist Jeff Jacoby employs this strategy. Marriage, he observes, has already suffered a number of blows, most notably the sexual revolution, the Pill, legalized abortion, unmarried cohabitation, the welfare state, and no-fault divorce. Same-sex marriage would "be taking this bad

by any special connection, but merely as contributing to an aggregate of immorality.<sup>197</sup>

The slippery slope argument, however, suggests a more direct link between the two than their mere opposition on the scales of morality. The slippery slope argument suggests that same-sex marriage entails, as an inevitable outcome, the eventual acceptance of polygamy.<sup>198</sup> In other words, if we allow same-sex marriage, we will have polygamy even if in every other way our culture were perfectly moral, contrary to the aggregation argument.<sup>199</sup>

The technical terrain of the slippery slope argument has been infrequently scouted. Frederick Schauer's analysis will serve as our map.<sup>200</sup> Schauer identifies four components to every true slippery slope argument. First, the "slope" is bounded on one end by the "instant case," which is the "problem before us now."<sup>201</sup> On the other end is the "danger case," characterized as an "intolerable result with respect to some currently hypothetical but potentially real future state of affairs."<sup>202</sup> In our discussion the role of the instant case is played by same-sex marriage, and that of the danger case by polygamy.

Schauer next specifies that at least for purposes of asserting the slippery slope argument, the acceptability of the instance cases is conceded.<sup>203</sup> In other words, the slippery slope argument is distinguishable from other kinds of arguments against the instant case that conclude, based on the instant case's *intrinsic* qualities, that it is bad in *itself*. The slippery slope argument as an *extrinsic* argument holds that the instant case will *lead* to some *other* thing that is bad, the danger case. But for this unintended consequence, the instant case would be acceptable.

Opponents of same-sex marriage simultaneously assert both kinds of arguments, intrinsic and extrinsic. The resort to the extrinsic argument of the slippery slope, however, suggests that the intrinsic arguments are unlikely to "clinch" the deal. With the general increased tolerance of homosexuality itself,<sup>204</sup> and the recurring creation of domestic partnership plans in businesses and cities,<sup>205</sup> our society seems poised to accept the conclusion that same-sex marriage is not itself intrinsically evil or immoral. By invoking the slippery slope argument, opponents of same-sex marriage have themselves signaled their own assessment that the intrinsic strategy will ultimately fail.

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situation and making it even worse." Jeff Jacoby, *The Threat from Same-Sex Marriage*, BOSTON GLOBE, Aug. 6, 2001.

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., Jeff Jacoby, *Just Another Nontraditional Family?*, BOSTON GLOBE, May 17, 2001.

<sup>199</sup> *Id.*

<sup>200</sup> See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

<sup>201</sup> *Id.* at 364.

<sup>202</sup> *Id.* at 365.

<sup>203</sup> *Id.* at 368-69.

<sup>204</sup> See ALAN YANG, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY, 1973-1999 23 (National Gay and Lesbian Task Force Policy Institute, 1999). ("The striking trend in public opinion during the 1990's is that all groups became more accepting of homosexuality.")

<sup>205</sup> For example, as of August 2001, 4,285 employers had established domestic partner health insurance benefits. See Human Rights Campaign, *State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2001* (visited Mar. 20, 2002) <[http://www.hrc.org/worknet/publications/state\\_workplace/2001/exec\\_summary.asp](http://www.hrc.org/worknet/publications/state_workplace/2001/exec_summary.asp)>.

Behind this conclusion lies the premise that a successful intrinsic argument is always preferable to any extrinsic argument. If a proposed action is intrinsically objectionable, the necessary outcome is that that action must be avoided even if it would lead to an extrinsic good. This result in turn depends upon the general value position that ends do not justify the means. If the means are themselves immoral, they cannot be justified by their role in effectuating a moral or desirable outcome: we are not allowed to kill Andy, even if doing so would save the lives of ten others. Against that background, an intrinsically bad mean must be rejected regardless of its relationship to a good extrinsic end.

So if a person is confident that a proposal is intrinsically bad—as conservatives repeatedly assert to be true about same-sex marriage<sup>206</sup>—there is no need to resort to an extrinsic argument. On the other hand, an extrinsically bad action can still be acceptable if it is itself intrinsically good. The more determinative variable, then, is therefore the act's intrinsic value. Extrinsic considerations come into play only if the action is intrinsically good: In that circumstance, it can still be denied if it will lead to consequences that are bad.<sup>207</sup>

<sup>206</sup> See, e.g., Finnis, *supra* note 29.

<sup>207</sup> This finding—that resort to the slippery slope argument is incompatible with a serious claim that same-sex marriage is intrinsically bad—is important. Rephrased in more formal terms, the argument can be analyzed via the possible combinations of intrinsic (I) and extrinsic (E) considerations when determining whether some action X should be permitted:

Value of I		Value of E		Value of X	
IF	I	AND	E	THEN	X
	Not-I		Not-E		Not-X
	Not-I		E		Not-X
	I		Not-E		Indeterminate

The first two conclusions are obvious: if X is acceptable both intrinsically and extrinsically, then X should be permitted. If, however, X is unacceptable from both intrinsic and extrinsic perspectives, then X should not be permitted. The problematic analyses are the mixed combinations.

The third line (1) presumes that the ends never justify the means, (2) interprets intrinsic analysis as a means analysis, and extrinsic analysis as ends analysis, and then (3) concludes that a negative intrinsic determination precludes X, even when E is positive. (1) is a stipulation, and, given that stipulation, (3) follows logically given (2). Therefore, if this analysis is flawed, the error occurs in the second step. The outcome as regards X, however, does not alter if, instead of equating intrinsic analysis with a means analysis, it is viewed as an end analysis. If Not-I is the end, then analysis ends there: One does not advance an ignoble end, whether by good or bad means. Therefore, Not-I results in Not-X, even though there are multiple possible explanations accounting for this outcome.

Without more facts, it is not possible to reach a principled conclusion as to the permissibility of X in the context of the fourth combination. If X is intrinsically good, then it might be permissible if the amount of extrinsic bad it leads to is not so very much. There can be, after all, inherent value in the doing the right thing, in and of itself—that, at least, is the Kantian opinion. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton, trans., 1964). But taken to extremes, this position can result in grotesque behaviors that most of us would consider to be unacceptable. See Julia Annas, *Personal Love and Kantian Ethics*, in *FRIENDSHIP: A PHILOSOPHICAL READER* 155, 173 (Neera Kapur Badhwar, ed., 1993) (“to live successfully by the Kantian ethic is to risk destroying one’s sources of love and concern for others”).

From the table we see that, in isolation, knowing the value of E tells us nothing conclusive about the acceptability of X. A conclusion of Not-I, however, *always* results in the outcome of Not-X, regardless of any other information. A negative determination on the intrinsic merits of X, in other words, trumps all other concerns and conclusively terminates the debate.

If opponents of same-sex marriage had such a winning argument that allowing gays to

That opponents of same-sex marriage have resorted to an extrinsic slippery slope argument, therefore, suggests their uncertainty that they can win the case on the intrinsic merits. Their resort to an extrinsic slippery slope argument must be read not as overkill, adding new blows to a fight already won on intrinsic merits, but instead as the abandonment of intrinsic arguments for an inferior but perhaps serviceable alternative.

So while the slippery slope argument technically requires, according to Schauer, only an imaginary concession of the acceptability of the instant case, the argumentative move to the slippery slope—a move not only incompatible with the intrinsic case but actually undermining it—presages an actual concession at a later time.<sup>208</sup> If true, the implications are significant for this policy debate. Almost all advocates of same-sex marriage feel bound to demonstrate that same-sex marriage is a good thing.<sup>209</sup> That argument is relevant only if a serious accusation is on the table that same-sex marriage is (intrinsically) bad. But we have now have reason to believe that opponents have abandoned that argument in favor of other, extrinsic ones.<sup>210</sup> That chosen extrinsic argument concedes this very point that same-sex marriage is not intrinsically offensive. We need no longer expend our intellectual energies defending against this abandoned accusation.

The fourth component that Schauer isolates in a true slippery slope argument is a boundary separating the instant from the danger case.<sup>211</sup> If no such boundary exists, the problem reduces to a description of the instant case that is overly broad.<sup>212</sup> In that situation the argument is not really a slippery slope, but simply a demand that like cases be treated alike: "If one argues that the given justification of A'ing also applies to Z'ing, and that Z'ing is unacceptable, then one's argument is a direct argument against A'ing..., not a [slippery slope argument] at all."<sup>213</sup> The heart of the slippery slope argument is that permitting the instant case will "lead to or increase the likelihood of the danger case."<sup>214</sup>

The way this comes about is that, when the critical moment arrives, we will fail to maintain the distinction between A and Z.<sup>215</sup> Schauer lists some

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marry is intrinsically bad, then they have no need to range into discussion about the policy's extrinsic merits. That debate adds nothing to the reasonableness of a Not-X determination. By making this argument, that is, by asserting the slippery slope argument we are considering here, the marriage opponents reveal themselves to be either irrational in confusing the issue, snatching, as it were, defeat from the jaws of victory, or uncertain that they actually have such a winning argument on the grounds of intrinsic harms. I will leave it to them to announce which of these two alternatives better describes their position. For my part, I prefer to give them the benefit of the doubt, and thus assume that by retreating to the slippery slope argument they are not behaving irrationally, but are only switching strategies.

<sup>208</sup> See Schauer, *supra* note 200, at 382-383.

<sup>209</sup> For example, that demonstration is the primary purpose behind Graff's book, *supra* note 3, and Strassberg's article, *supra* note 159.

<sup>210</sup> This opposition stance was succinctly stated by Ron Unz, then United States Senate candidate: "Legalizing gay marriages today means legalizing polygamy or group marriages tomorrow." Unz, *supra* note 15.

<sup>211</sup> Schauer, *supra* note 200, at 369.

<sup>212</sup> *Id.* at 366.

<sup>213</sup> David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope*, 21 OXFORD J. OF LEGAL STUD. 629, 645 (2001).

<sup>214</sup> Schauer, *supra* note 200, at 369.

<sup>215</sup> See Schauer, *supra* note 200, at 370 (discussing the linguistic boundary between the "instant"

factors that can contribute to the collapse of the boundary: linguistic imprecision characterizing the boundary, so that "a soft linguistic boundary around the definition of the instant case will make that definition more likely to embrace the danger case than would language that specifically excluded the danger case"<sup>216</sup>; and the fact that those who will be called upon to maintain the boundary will not comprehend the distinction made by those who erected it, and consequently fail to preserve it.<sup>217</sup> Whatever the precise reason, the threat of the slippery slope exists because we are, by nature, simply "bad at abiding by [the] distinctions" necessary to keep from sliding down the slope.<sup>218</sup>

The inevitability of the slip down the slope<sup>219</sup> arises not from any logical necessity (again, if the connection between A and Z were one of logical entailment, then we do not have a slippery slope), but from the empirical fact of the kind of psychology we have. In other words, the conservatives' prophecy is not a conclusion that, given A, we must Z lest we be inconsistent and unprincipled. Instead, the fear is a recognition that given A, we will find ourselves Z'ing after all, despite our best intentions to the contrary.

Therefore, after Schauer, we can characterize a slippery slope argument as the assertion that by virtue of the acceptance of the instant case of same-sex marriage (which is itself tolerable, at least for the limited purposes of the slippery slope argument) we will inevitably (but not logically necessarily) come to accept also the danger case of polygamy. The following section analyzes the asserted claim that the link between same-sex marriage and polygamy is validly described as a slippery slope of this kind.

#### IV. THE SLIPPERY SLOPE ARGUMENT APPLIED TO SAME-SEX MARRIAGE

Our first task is to erect the boundary between same-sex marriage and polygamy. The essential difference—one that is fundamental to the marriage forms, and not merely correlative—is that marriage, same-sex or otherwise, is today predicated on romantic love. In contrast, polygamy is expressly admitted to exclude the expectation of romantic love: it is grounded on other experiences, and intended to fulfill other personal, social, and religious needs (duty, for one).

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case and the "danger" case and what pressures may come to bear on those boundaries, causing the distinction/boundary to disappear).

<sup>216</sup> *Id.* at 370.

<sup>217</sup> *Id.* at 373-76. As we shall see below, this will be the critical shortcoming in this particular debate.

<sup>218</sup> Enoch, *supra* note 213, at 631.

<sup>219</sup> The punch of the slippery slope argument comes not from the structure outlined here, but from the temporal inevitability of the slide. The threat of the danger case must not be merely possible or even likely. If the claim were only these, then opponents of same-sex marriage are merely urging caution (never a bad thing), not catastrophe.

A. *Firming the Boundary between Polygamy and Same-Sex Marriage*

1. *Romantic Love Distinguishes Marriage from Polygamy*

E.J. Graff set herself the task of finding out "what is marriage for."<sup>220</sup> The historical progression she documents has the purpose of marriage being at various times for economics, for sexual outlet, for procreation, for political alliances, to order society along lines of affinal alliances, and finally to create a bond of companionship and love.<sup>221</sup> Marriage continues to serve all of these functions to some degree. But by late in the eighteenth century romantic love had emerged as a "respectable motive for marriage."<sup>222</sup> Indeed, today "almost all will consider "love" to be *the* acceptable justification for getting or staying married."<sup>223</sup> Few would contest the assertion that the modern marriage is first and foremost an expression of the love and commitment between the spouses. All the other reasons may follow as a consequence of that love—including procreation—but we would look askance at anyone who claimed to be marrying without love solely for money or to have children.<sup>224</sup> The traditional marriage vows, for example, speak only of love, not of reproduction; one promises to love, not to bear children.<sup>225</sup> Arkes's choice of reproduction as the primary value of marriage is not so much wrong as it is anachronistic.<sup>226</sup>

Arkes claims that love is insufficient to constitute or justify marriage: "There are abiding relations of love between brothers and sisters, parents and children."<sup>227</sup> If same-sex marriage is permitted because two men "love" one another (as, at times, Rauch seems to be saying<sup>228</sup>), then so too would we have to allow marriage between siblings and groups. To avoid this result Rauch denies, contrary to Graff's historical analysis, that the social purpose of marriage is to "sanctify love."<sup>229</sup> On this point, at least, he concurs with those of his opponents who similarly assert that "love is neither a necessary nor a sufficient condition for a socially or legally acceptable marriage."<sup>230</sup> Kurtz on the other hand did

<sup>220</sup> See generally GRAFF, *supra* note 3, at 168-177.

<sup>221</sup> See generally GRAFF, *supra* note 3,

<sup>222</sup> STONE, *supra* note 12, at 190.

<sup>223</sup> GRAFF, *supra* note 3, at 228.

<sup>224</sup> See Daniel Maguire, *The Morality of Homosexual Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 57, 63 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) ("[T]he indispensable goods of marriage are those that do not relate intrinsically to heterosexuality. The dispensable good—offspring—is the only good that does relate to heterosexuality.").

<sup>225</sup> See, e.g., THE BOOK OF COMMON PRAYER 1559: THE ELIZABETHAN PRAYER BOOK 290-99 (John F. Booty ed., 1976) ("Wilt thou love her, comfort her, honor and keep her, in sickness, and in health? An forsaking all other, keep thee only to her, so long as you both shall live?"). It should not escape our notice that even according to the Bible, Eve was created for Adam's companionship, not for the purpose of procreation. See *Genesis* 2:18.

<sup>226</sup> Even were Arkes correct in holding out procreation and child-rearing as the primary purpose of marriage today, it is not immediately obvious that this would gain him the argumentative points he expects. Homosexuals are "only 25% less likely to be raising children than heterosexual adults." Hearing, *supra* note 20, at 44 (prepared statement of the National Gay and Lesbian Task Force).

<sup>227</sup> *Id.* at 87 (testimony of Hadley Arkes).

<sup>228</sup> See Rauch, *supra* note 108, at 286 ("What homosexuals are asking for is the right to marry . . . somebody they love. . .").

<sup>229</sup> *Id.* at 287.

<sup>230</sup> Dent, *supra* note 54, at 591.

recognize that "emotionally intimate ties" are the basis of Western marriage.<sup>231</sup> His solution to the slippery slope was to argue that gays and lesbians are constitutionally incapable of such emotionally intimate ties.

All of our discussions skirt around the tension between what we know to be modern reality—that marriage is primarily a vehicle in which the partners express their mutual love—and what we fear would be the logical consequences of highlighting that reality to attain same-sex marriage (e.g., a slide into polygamy).<sup>232</sup> They are forced either to deny love its central role in marriage, producing a counterintuitive account of marriage, or to deny that gays and lesbians could experience this love because, in accounts such as that given by Finnis,<sup>233</sup> true love seems to be magically generated via the friction of a penis in the vagina.<sup>234</sup>

This murky scenario clears considerably once we explicitly identify what we mean by "love." Marriage is not grounded upon simply *any* love at all, but only upon *romantic* love.<sup>235</sup> The other kinds of love would fall into the category of *companionate* love.<sup>236</sup> Once this limitation is made, the claims of marriage conservatives become starkly vivid and much more controversial, given what has been claimed for romantic love.

Romantic love has been defined as "any intense attraction that involves the idealization of the other, within an erotic context, with the expectation of enduring for some time into the future."<sup>237</sup> An element of exclusivity is implicit in this definition within the term "idealization."<sup>238</sup> Why romantic love should necessarily be exclusive is not immediately apparent, and the conclusion depends upon several other of our cultural presumptions. First is the importance of the individual, a perspective associated in our country with the political philosophy of John Locke.<sup>239</sup> Once a person has a personal self and identity, one also has one's own "life" to be lived by personal choices instead of community demands. That would include the freedom to select one's own spouse. Second, we view relationships as limited by factors such as time, energy, compatibility, and association. Heavy investment in some comes at the cost of lesser investment in others.<sup>240</sup> Third, we (unlike the Greeks, for example<sup>241</sup>) expect our relationship

<sup>231</sup> Kurtz, *supra* note 63, at 37.

<sup>232</sup> See discussion, *supra* section II.

<sup>233</sup> See Finnis, *supra* note 29, at 1066 (stating that homosexuals' "activation of one or even each of their reproductive organs cannot be an actualizing and experiencing of the marital good—as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who happen to be sterile. . .").

<sup>234</sup> Dent provides a similar rationale supporting his conclusion that only heterosexuals can experience love. See Dent, *supra* note 54, at 606 (concluding that "the scientific basis of enduring love is exclusively heterosexual").

<sup>235</sup> See RICHARD S. LAZARUS & BERNICE N. LAZARUS, *PASSION & REASON: MAKING SENSE OF OUR EMOTIONS* 109-12 (1994). "Romantic love fits in with our modern Western conception of marriage. . . ." *Id.* at 109.

<sup>236</sup> *Id.* at 109-12.

<sup>237</sup> William R. Jankowiak & Edward F. Fischer, *A Cross-Cultural Perspective on Romantic Love*, 31 *ETHNOLOGY* 159 (1992).

<sup>238</sup> See also Strassberg, *supra* note 159, at 1572.

<sup>239</sup> See J.W. Gough, *Introduction*, in JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* vii, xxxvii (Basil Blackwell, 1946).

<sup>240</sup> For example, Aristotle concluded that "it is impossible to be the friend of a number of people as being virtuous and deserving of friendship for their own sake. We must be content if we can find

with our marriage partner to be the most intimate we experience in this life. In combination, a marriage based on the romantic love made possible by personal freedom will absorb so much of our emotional interest and energy that, if we have truly achieved it with anyone, we cannot experience it with a second simultaneously. Romantic love is therefore necessarily exclusive.

While romantic love "fits in with our modern Western conception of marriage,"<sup>242</sup> it is by design *incompatible* with polygamy: "at its deepest level, [polygamy] was a fundamental protest against the careless individualism of romantic love. . . ."<sup>243</sup> If this point can be sustained, romantic love can mark the boundary between same-sex marriage and polygamy. The first could slide into the second only if we fail to remember the distinction.

Even Mormon polygamists conceded that plural marriage "inherently assaulted the ideology of romantic love."<sup>244</sup> Instead, polygamy emphasized the relationships the Mormon wife may herself have most valued, that between mother and child, and that between women.<sup>245</sup> The "ties of sisterhood among plural wives" may have evolved as a "compensatory emotion function of this loss of romantic love."<sup>246</sup> In other words, the distinction we are making is one that the participants would have themselves recognized, and not one we are projecting onto them. In their eyes the romantic basis of marriage was undesirable because it depended upon an accentuated individualism instead of a more appropriate emphasis on community values.<sup>247</sup> Mormons were not incapable of romantic love, they merely devalued it as a suitable basis upon which to build a godly society.<sup>248</sup> The need for that last sentence is important, because it deflects any accusation that Mormons were somehow unable to experience romantic love. Some have in fact gone so far as to restrict the capacity for this emotion to only a privileged few.<sup>249</sup>

William Jankowiak and Edward Fischer investigated the question whether romantic love is a cultural universal.<sup>250</sup> They found romantic love documented in 147 out of 166 world cultures.<sup>251</sup> Of the nineteen remaining cultures, only one ethnographer addressed the question and then explicitly denied the existence of romantic love;<sup>252</sup> Jankowiak later attests to documenting

only a few people who deserve such friendship." ARISTOTLE, *supra* note 38, at 318.

<sup>241</sup> See RICHARD A. POSNER, *SEX AND REASON* 40 (1992) ("Greek women were not considered fit companions for men; they did not even take their meals with their husbands.").

<sup>242</sup> LAZARUS & LAZARUS, *supra* note 235, at 109.

<sup>243</sup> GRAFF, *supra* note 3, at 174.

<sup>244</sup> Joan Iversen, *Feminist Implications of Mormon Polygyny*, 10(3) *FEMINIST STUDIES* 505, 515 (1984); see also IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 344-346 (1996).

<sup>245</sup> *Id.*

<sup>246</sup> Iversen, *supra* note 244, at 516.

<sup>247</sup> See GRAFF, *supra* note 3, at 168-177.

<sup>248</sup> Some wives in polygamous unions might, as individuals, expect to develop romantic intimacy with their husbands. See William Jankowiak & Monique Diderich, *Sibling Solidarity in a Polygamous Community in the USA: Unpacking Inclusive Fitness*, 21 *EVOLUTION AND HUMAN BEHAVIOR* 125, 129 (2000). Whether they are successful in achieving these personal goals that are admittedly contrary to official church teachings, is another question.

<sup>249</sup> See Jankowiak, *supra* note 253, at 1.

<sup>250</sup> Jankowiak & Fischer, *supra* note 237, at 149.

<sup>251</sup> See Jankowiak & Fischer, *supra* note 237, at 159.

<sup>252</sup> See *id.*

romantic love in two of these nineteen problematic cultures.<sup>253</sup> They conclude that romantic love is a cultural universal, or at least a "near-universal."<sup>254</sup>

It is one thing to say—as one could legitimately argue—that romantic love may play a lesser or greater role in social arrangements such as marriages,<sup>255</sup> or that the emotional experience we recognize as "romantic love" has been differently parsed and lexicalized cross-culturally. It is quite another to claim, as does Lawrence Stone, that "the actual experience of romantic love is [not] at all common to all societies."<sup>256</sup> Psychologist George Mandler agrees: Romantic love "has no counterpart in some non-Western societies,"<sup>257</sup> Herbert Lantz goes so far as to imply that "literacy is a necessary precondition of [feeling] romantic love."<sup>258</sup> Some argue the contrary, that "literacy depends on the virtue of Christian love."<sup>259</sup> Either relationship restricts romantic love to a small subset of the human population.

This restriction is neither minor nor benign. While crediting the experience of romantic love to select people in some few cultures, our culture simultaneously elevates this love to the pinnacle of both its philosophy and theology. Novelist and philosopher Iris Murdoch, for example, concludes that "the central concept of morality is 'the individual' thought of as knowable by love."<sup>260</sup> Christianity enlists love as the master metaphor for the relationship between God and his church as depicted in Paul's *Letter to the Ephesians*.<sup>261</sup> If true philosophy and true theology are both grounded in love, and love is a limited good, then those persons and societies innately lacking the capacity for this experience are somehow "less" than ourselves, either less developed or even less human. Kurtz's claim that gays and lesbians are incapable of romantic love is therefore a serious and alarming charge.<sup>262</sup>

Lest this fear seem overstated, consider the following chain: Romantic love has been identified as a "trigger" of mystical experience;<sup>263</sup> love has been "a means to attain spiritual perfection, as was made clear by the consistent association of the romantic discourse with the values and metaphors of religion."<sup>264</sup> Those incapable of romantic love are deprived of this access to the transcendent. Consequently those who experience romantic love possess

<sup>253</sup> William R. Jankowiak, *Introduction*, in *ROMANTIC PASSION: A UNIVERSAL EXPERIENCE?* 1 (William Jankowiak ed., 1995).

<sup>254</sup> Jankowiak & Fischer, *supra* note 237, at 154.

<sup>255</sup> See, e.g., EVA ILLOUZ, *CONSUMING THE ROMANTIC UTOPIA* 189 (1997) ("American marriage has always emphasized romantic love more than its European counterpart").

<sup>256</sup> Lawrence Stone, *Passionate Attachments in the West in Historical Perspective*, in *PASSIONATE ATTACHMENTS* 15, 16 (W. Gaylin & E. Person eds., 1988).

<sup>257</sup> GEORGE MANDLER, *HUMAN NATURE EXPLORED* 78 (1997).

<sup>258</sup> ILLOUZ, *supra* note 255, at 248 (quoting Lantz: "[P]eople have to be able to read and discuss feelings before feelings can become a part of their experience.").

<sup>259</sup> Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 *CARDOZO L. REV.* 2169, 2179 (1995).

<sup>260</sup> IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 30 (1970).

<sup>261</sup> See also Pontifical Council for the Family, *Family, Marriage and "De Facto" Unions* (visited Nov. 29, 2000) <<http://www.ewtn.com/library/CURIA/PCFFMMRD.HTM>> ("[T]he constitution of Christian marriage is a real sign of Christ's union with the Church.").

<sup>262</sup> See Kurtz, *supra* note 63.

<sup>263</sup> RALPH W. HOOD, JR., ET AL., *THE PSYCHOLOGY OF RELIGION: AN EMPIRICAL APPROACH* 254 (2d ed., 1996).

<sup>264</sup> ILLOUZ, *supra* note 258, at 29.

emotional and spiritual potential superior to others because only they have direct access to God. If indeed God is love, then he must be markedly detached from those who are ignorant of love's fullest expression: Theologian C.S. Lewis identifies the function of free will as to permit love, the key to "infinite happiness;"<sup>265</sup> the religious writings of Kierkegaard require that "If we want to understand what it means to be a [Christian] believer, we will have to think carefully about what it means to be a lover."<sup>266</sup> All manner of responses to these lesser endowed (i.e., loveless therefore godless) peoples become culturally justified, from the paternalistic to the exploitative.

The fruit of this logic flourishes in our society. Conservative columnist Cal Thomas ridicules as "foolishness" the idea that cultures are "morally equivalent."<sup>267</sup> This opinion is supported by Christian fundamentalist evangelicals who believe that "apart from cultures guided and directed by the Bible, human society has *never* maintained what most of us might regard as 'traditional family values.'"<sup>268</sup> On the contrary, unchristian "primitive peoples *invariably* had perverse sexual customs."<sup>269</sup> Until they were taught about love by missionaries, their "children [were] left to die, women sacrificed to dumb idols, families destroyed by fleshly perversion, and the sick given over to their own devices."<sup>270</sup> Love, we are told, is a special Christian revelation that had to be forcibly imposed upon a pagan world.

In even less subtle terms Paul Cameron, whose Family Research Institute is the research arm of Christian fundamentalism, assures his patrons that they need not look to other cultures as "models worthy of analysis" because those creatures are "vicious and mean-spirited trolls."<sup>271</sup>

Moral chauvinism and ethnocentrism are the inevitable results when love is the limited good that Kurtz insists.<sup>272</sup> As most persons would reject this outcome, only two alternatives exist that avoid a conclusion that we, who experience romantic love, are qualitatively superior to other cultures that (purportedly) do not. Either we reject the assertion that other cultures are incapable of romantic love (i.e., love is not "limited"),<sup>273</sup> or deny that love has the central place it currently holds in our morality, psychology, philosophy, and religion (love is not uniquely "good").<sup>274</sup> The first is a statement of empirical fact we currently have no reason to doubt; the second would require a radical upheaval of our cultural premises. The first alternative, therefore, would be the more prudent option. Romantic love is not a good limited to only a few privileged societies.

<sup>265</sup> C.S. LEWIS, *MERE CHRISTIANITY* 143 (1952).

<sup>266</sup> MEROLD WESTPHAL, *BECOMING A SELF: A READING OF KIERKEGAARD'S CONCLUDING UNSCIENTIFIC POSTSCRIPT* 56 (1996).

<sup>267</sup> Cal Thomas, *Citizens Get Bull While China Shops*, THE TIMES-PICAYUNE [NEW ORLEANS], March 18, 1999, at B7.

<sup>268</sup> GEORGE GRANT & MARK A. HORNE, *LEGISLATING IMMORALITY* 25 (1993) (emphasis added).

<sup>269</sup> *Id.* at 29 (emphasis added).

<sup>270</sup> *Id.* at 46 (quoting CHARLES MORRIS, *THE MARVELOUS RECORD OF THE CLOSING CENTURY* 610 (1899)).

<sup>271</sup> PAUL CAMERON, *THE GAY NINETIES: WHAT THE EMPIRICAL EVIDENCE REVEALS ABOUT HOMOSEXUALITY* 11 (1993).

<sup>272</sup> See Kurtz, *supra* note 63.

<sup>273</sup> See Jankowiak & Fischer, *supra* note 237.

<sup>274</sup> See MURDOCH, *supra* note 260.

If factions within our society are willing to withhold the ability to love from entire cultures, we should not be surprised that they would likewise seek to deny that ability to gays and lesbians. The argument presented here does not directly address this issue. But it has outlined what would be the consequences of maintaining the position that love is a good limited, if not, as we have shown, to societies, then to special groups within societies. Conjoined with other premises we hold, we would be justified in severely regulating any group known to be incapable of love. Whether that is the kind of people we wish to become, I leave to another venue.

But the arguments employed toward that inauspicious end substantiate the specific points needed here. Romantic love is central to our western experience of self, and is the fundamental justification today for choosing to marry.<sup>275</sup> Moreover, the fallout of seeking to deny gays and lesbians the ability to experience romantic love with a same-sex partner would be significant. If society grants that ability, however, the primary precondition to confect a marriage has been conceded.

Romantic love and that same emphasis upon the individual is also the very thing that polygamy (at least as experienced in this country) was reacting against. Ergo, the traditional marriage grounded in romantic love, in which gays and lesbians seek to share, is antithetical to the practice of polygamy. Although both are termed "marriage," their internal structures and rationales are so disparate as to be different institutional species. The boundary separating same-sex marriage from polygamy is therefore neither vague nor arbitrary. The barrier to avoid a slide down the slippery slope has thus been erected.

## 2. *Maintaining the Boundary of Romantic Love*

We have identified the boundary separating same-sex marriage from polygamy as the romantic love intrinsic to the former but incompatible with the latter. The next step in the slippery slope analysis inquires into the likelihood that this boundary is one that will be ignored at some critical, policy-determinative moment.

The language we examined in Section I demonstrates that, yes, the boundary is likely to be ignored. Some writers (Arkes, Sullivan, Corvino) did not recognize love of any kind as playing the needed role;<sup>276</sup> others (Rauch, Arkes) explicitly deny that love can or should play this role, and did so speaking of love in generic terms, without clarifying that only romantic love is relevant.<sup>277</sup> Only Strassberg and Kurtz correctly isolated romantic love as the important variable for analysis.<sup>278</sup>

Because the boundary separating same-sex marriage and polygamy is therefore likely to be ignored or misunderstood, the condition to find a slippery slope has been satisfied. The conservative fear that permitting same-sex marriage will slide into the acceptance of polygamy is not unjustified.

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<sup>275</sup> See, e.g., GRAFF, *supra* note 3,

<sup>276</sup> See discussion *supra* sections I(B)(1), II(A)(1), II(A)(3).

<sup>277</sup> See discussion *supra* sections II(A)(2), I(B)(1).

<sup>278</sup> See discussion *supra* sections II(B)(2), I(B)(2).

The question then becomes what to do with this result. Certainly conservatives would like to use it to prevent the recognition of same-sex marriage.<sup>279</sup> But this hope may be premature for two reasons. First, for the reasons one is likely to want to invoke a particular slippery slope argument, those same reasons are at least as good, and perhaps better, to avoid all slippery slope arguments. Second, even if the resort to slippery slope arguments are not eliminable, a reverse slippery slope argument can be offered to show why we should permit same-sex marriage lest a different kind of danger case result.

*a. The Slippery Slope of Slippery Slopes*<sup>280</sup>

The worse we are at respecting the relevant boundary distinctions, the more legitimate is the claim that a slippery slope exists. Some distinctions we will be very good at recognizing and maintaining; others less so. The conclusion is that distinctions range on a continuum according to how well we can recognize which distinctions we will be good at respecting, and which not.

This conclusion raises the problem of "the second-order distinction between distinctions we're good and those we're bad at abiding by."<sup>281</sup> Can we trust our ability to know which distinctions are which? Probably not; and if not, "we are likely to... fail to make the distinction between good and bad" slippery slope arguments.<sup>282</sup> This reasonable claim produces a surprising result:

Using good [slippery slope arguments] is thus likely to lead to using bad ones . . . . It follows that although using good [slippery slope arguments] is in itself unobjectionable, we should not use them because—liable as we are to fail to distinguish between good and bad [slippery slope arguments]—using good ones would lead to our using bad ones. We ought not to use [slippery slope arguments], the argument concludes, even when they are good ones.<sup>283</sup>

"The stronger the reason you think [slippery slope arguments] generally give to avoid the contested action, the stronger the reason you must—on pain of inconsistency—think [Enoch's slippery slope argument] gives not to use [slippery slope arguments]."<sup>284</sup> The challenges raised by this argument are not insurmountable.

The implications for the present discussion are clear. Even if conservatives have a good slippery slope argument, something more is required before they are entitled to deploy it in the field of policy debate. Enoch notes two ways that the challenge of his argument against using these arguments can be met:

First, [the proponent] may argue that the bad consequences of her [argument] warns against [*i.e.*, the danger case] . . . are much worse than

<sup>279</sup> See discussion *supra* section I.

<sup>280</sup> This section addresses issues raised in the provocative article by David Enoch. See Enoch, *supra* note 213.

<sup>281</sup> *Id.* at 635.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* This result, Enoch concludes, is more applicable to politicians than to philosophers. The latter are especially trained to note and consider distinctions, a skill usually lacking in politicians. See *id.* at 643.

<sup>284</sup> *Id.* at 638.

the bad consequences [Enoch's argument] warns against. . . . Or, second, she may argue that the instance of the Essential Premise<sup>285</sup> her argument trades on is empirically more plausible than the one [Enoch's argument] trades on.<sup>286</sup>

Since no opponent of same-sex marriage has ventured this far into the proper framing of the slippery slope argument, we need not consider here whether or how they might meet these new obstacles. Suffice it to say that conservatives therefore have much work ahead of them if they wish to press this slippery slope argument, even in light of the seemingly favor conclusion of the previous part.

#### *b. The Reverse Slippery Slope*

Schauer, in his analysis of the slippery slope form of argument, concludes by observing that "in virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim."<sup>287</sup> A final section of Strassberg's article is devoted to just that, a reverse slippery slope argument: "The failure to recognize same-sex marriage . . . will have negative social consequences as profound as its possible positive consequences."<sup>288</sup> Another writer, based upon his analysis of the Louisiana Civil Code, asks "whether *resistance* to same-sex marriage will lead to polygamy."<sup>289</sup> Eskridge, finally, constructs his own reverse slippery slope argument: "if it is constitutional for the state to prohibit same-sex marriages because they offend many citizens, what is there to protect other unpopular groups from being denied basic liberties?"<sup>290</sup>

If a reverse slippery slope argument can be marshaled such that the failure to recognize same-sex marriage can result in its own danger case, the value of the original accusation diminishes. From the perspective of marriage opponents the best possible outcome would be for the net conflicting claims to functionally cancel out one another, meaning that the ultimate decision would be made on some other basis than rational argument. At least as likely, however, is that opponents would lose any head-on confrontation with a reverse slippery slope. Conservatives would have to address an addition question: If they are so convinced that the slide down the slope toward polygamy is inevitable, why not did the practice of polygamy—which is permitted in most of the world's cultures—ever lead to same-sex marriage? That this has never been the result demonstrates empirically that the boundary between the two can be maintained in practice. The slide, instead of being either inevitable or even probable, is at best merely possible, a purely theoretical eventuality despite many natural experiments.

<sup>285</sup> The Essential Premise of every slippery slope argument is the "assumption that we are bad at abiding by the relevant distinction. . . ." *Id.* at 631. See Enoch, *supra* note 213.

<sup>286</sup> *Id.* at 639.

<sup>287</sup> Schauer, *supra* note 200, at 381.

<sup>288</sup> Strassberg, *supra* note 159, at 1618.

<sup>289</sup> Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 131 (1996).

<sup>290</sup> See ESKRIDGE, *supra* note 153, at 144-145.

### B. Polygamy as the "Danger Case"

The previous section examined the conditions under which the slide from same-sex marriage into polygamy can be avoided, that is, through maintaining the boundary condition of romantic love as implicit in the first but precluded by the second. This section approaches the challenge of the slippery slope from a different perspective. As a problem, the slippery slope presumes a slide from an instant case to the danger case. Our analysis thus far has accepted the usual approach in seeking to clarify the boundary that prevents the slide.

This section inverts the analysis. The problem here is not whether the slope has slid, but whether the terminus of the slide is really a danger case. The argument establishing a condition as a danger case can be made in at least two ways, either by law or by fact. That is, the status as a danger case to be avoided can be a conclusion from legal reasoning, or a demonstration from empirical observation. In the case of polygamy, the prongs of this distinction converge because the U.S. Supreme Court, when it pronounced polygamy to be a danger case, chose to justify this legal decision by empirical facts.<sup>291</sup>

Keith Sealing has recently argued that the Court's decisions criminalizing polygamy are probably unconstitutional by today's standards.<sup>292</sup> This section argues the same point by different means. If these arguments are successful, then there would remain no rational foundation (either legal or empirical) in place to warrant the characterization of polygamy as a danger case. This would not mean that such argument, either legal or (less likely) empirical, could not be made in the future. Maura Strassberg presents one possible alternative argument that might allow the continued prohibition of polygamy.<sup>293</sup> But the Court has yet to adopt her alternative reasoning. If the rationale of the standing cases falls, then there would be no *objective* ground to depict polygamy as a danger case. If it is not a danger case, then by definition the threat of the slippery slope does not exist.

#### 1. Mormon Polygamy

The early Mormons<sup>294</sup> were unquestionably the victims of unrelenting oppression from the federal government. Much (but not all) of the popular distaste for this religion today is a lingering reaction to its early advocacy of polygamy. It is not immediately obvious why polygamy provoked this vigorous opposition. Certainly the charge against polygamy cannot be that it is "unnatural." At least 83% of human societies permit polygamy.<sup>295</sup> "Strict monogamy, defined in terms of sexual encounters, is probably more a human

<sup>291</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>292</sup> See Keith E. Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions against Polygamy Are Unconstitutional under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001).

<sup>293</sup> See Strassberg, *supra* note 159 and accompanying text.

<sup>294</sup> The Church of Jesus Christ of Latter-Day Saints has recently announced that "it no longer wants to be referred to as 'the Mormon Church.'" Jeffery L. Sheler, *Don't Call it 'Mormon'*, 130(11) U.S. NEWS & WORLD REPORT 51 (March 19, 2001). It is still acceptable to use Mormon in proper names, and church members may continue to be called Mormons "although many prefer the title 'Latter-day Saints.'" *Id.* I have attempted to adhere to this preferred usage.

<sup>295</sup> DAVID M. BUSS, *THE EVOLUTION OF DESIRE* 178 (1994).

ideal than it is a common biological reality."<sup>296</sup> Even in our civilization we came to the idea of monogamy relatively late. "Up to the eleventh century casual polygamy appears to have been general, with easy divorce and much concubinage."<sup>297</sup> Bigamy in England was "both easy and common" as late as 1570.<sup>298</sup> The fact that the majority of societies are polygamous is obscured by the fact that most unions within even those societies are, for reasons both biological and economic, monogamous. The Mormon average in the pioneer era may have been only as high as 20%.<sup>299</sup> Many features of human life are rare without being thereby disparagingly termed "unnatural." By no measure is polygamy "unnatural;" quite the contrary.<sup>300</sup>

Few anti-polygamists would disagree with the characterization of monogamy as "the moral nexus" of our society.<sup>301</sup> If polygamy stands as the antithesis of monogamy, then presumptively polygamy also opposes every good thing associated with monogamy, especially "the family." Without delving too deeply into the subconscious motivations of an entire cultural movement, we may expect that some such associational thinking underlies the strident opposition to Mormon polygamy. Such was the abhorrence that "even such a liberally minded American revolutionary as Thomas Jefferson wrote the Virginia law of 1779 that decreed castration for all men convicted of rape, sodomy, bestiality (sex with animals), or polygamy."<sup>302</sup>

## 2. The Congressional Reaction against Polygamy

Fully in step with its constituents, Congress enacted several laws which outlawed this marriage practice,<sup>303</sup> including the Morrill Act of 1862,<sup>304</sup> the Edmunds Act of 1882,<sup>305</sup> and the Edmunds-Tucker Act of 1887.<sup>306</sup> Such was the

<sup>296</sup> TIMOTHY H. GOLDSMITH, *THE BIOLOGICAL ROOTS OF HUMAN NATURE* 56 (1991). Peggy Vaughan describes monogamy as an achievement, not an assumption. PEGGY VAUGHAN, *THE MONOGAMY MYTH* 171 (1989).

<sup>297</sup> STONE, *supra* note 12, at 29.

<sup>298</sup> *Id.* at 35.

<sup>299</sup> ALTMAN & GINAT, *supra* note 244, at 39.

<sup>300</sup> See generally BARASH & LIPTON, *supra* note 121. According to Plato, "the common possession of women" would be the greatest good, if indeed it is possible." But for many reasons he doubted that this would be possible. PLATO, *REPUBLIC* 132 (G.M.A. Grube trans., 1992).

One interesting observation relates our extended lifespans with our new lifestyles. "A lifelong monogamous marriage when the life expectancy was forty or fifty is very different from a lifelong monogamous marriage when the life expectancy has increased so dramatically [to seventy or eighty]." VAUGHAN, *supra* note 296 at 193; cf. FISHER, *supra* note 122, at 304. If valid, this would account for the perception that what was "natural" is now crumbling. But instead of accounting for this change in terms of moral degeneration, the alternative reading would be that marriages are lasting as long as ever they did; it is we who are outliving the marriages. For this reason Stone suggests that "modern divorce is little more than a functional substitute for death." STONE, *supra* note 12, at 46.

<sup>301</sup> A laundry list of values associated with monogamy is given at ADAM PHILLIPS, *MONOGAMY* i-ii (1996).

<sup>302</sup> D. MICHAEL QUINN, *SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS: A MORMON EXAMPLE* 35 (1996).

<sup>303</sup> An able review of the Congressional debates surrounding the passage of the antipolygamy laws can be found in Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, 5(1-3) *UTAH BAR JOURNAL* 35 (1977).

<sup>304</sup> Morrill Act, ch. 126, 12 Stat. 501 (July 1, 1862).

<sup>305</sup> Edmunds Act, ch. 47, 22 Stat. 30 (Mar. 22, 1882) (amended 1887, repealed 1909).

vigor with which this crime was prosecuted that "from 1882 to 1890 [there were] federal indictments, arrests, prosecutions, and imprisonments of more than 1,300 polygamist Mormons."<sup>307</sup>

The prosecution of George Reynolds under the Morrill Act afforded the opportunity for the United States Supreme Court to author one of the most influential decisions in our nation's history. As then codified, the relevant statute stated that

Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years.<sup>308</sup>

*Reynolds v. United States*<sup>309</sup> ultimately found itself in the Supreme Court, which upheld Reynolds' conviction in 1878.<sup>310</sup>

Our purposes target the reasons given for the decision's outcome. How does the Court justify the criminalization of polygamy? Clearly the opinion penalizes the religious observances of the Mormons, so one might have expected them to be entitled to a free exercise exemption from an otherwise valid law.<sup>311</sup> On the other hand, the law itself puts state machinery behind Christian marriage practices. Why is this not an unconstitutional establishment of religion?

For a law to pass constitutional muster it is necessary but not sufficient that there be independent secular justifications beyond the sectarian preference it may advocate.<sup>312</sup> The Court must find that the law criminalizing polygamy has a legitimate and primarily secular reason behind it, leaving its support of Christian

<sup>306</sup> Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (March 3, 1887).

<sup>307</sup> QUINN, *supra* note 302, at 282-283.

<sup>308</sup> Sect. 5352, Revised Statutes.

<sup>309</sup> 98 U.S. 145 (1878).

<sup>310</sup> Later, in 1885, despite this conviction, George Reynolds took a third wife. This fact prompted Ray Davis to relay the following limerick:

There was a young fellow of Lyme  
Who lived with three wives at a time.  
When asked, 'Why the *third*?'  
He said, 'One's absurd,  
And bigamy, sir, is a crime.'

Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZONA L. REV. 287, 291, note 25 (1973).

<sup>311</sup> Jesse Choper suggests that the criterion for Free Exercise exemptions should be the presence of extratemporal consequences for failure to perform the demanded act (or, alternatively, compulsion to perform the forbidden act). JESSE CHOPER, SECURING RELIGIOUS LIBERTY 74-80 (1995). Polygamy within Mormonism meets this standard: "[T]he failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." *Reynolds*, 98 U.S. at 161. Ira C. Lupu agrees that, contrary to *Reynolds*, "[t]he prohibition on polygamous marriage at issue in *Reynolds* . . . would present a clear case of free exercise burden." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 973 (1989).

<sup>312</sup> See JOHN E. NOWAK & DONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.3, at 1311-1318 (6th ed., 2000).

tradition as only a happy coincidence.<sup>313</sup> The discovery of this secular reason avoids the transgression of the Establishment Clause.<sup>314</sup> Similarly, the protections promised by the Free Exercise Clause are not absolute, and may be withheld if a strong, secular reason exists (we will not allow, for example, human sacrifice in the name of religious observance).<sup>315</sup>

The problem of polygamy can be resolved on both constitutional counts, then, if overarching secular reasons can be identified. To find such reasons *Reynolds* was satisfied to point to the fact that Europe had long outlawed polygamy,<sup>316</sup> and that the various states have followed this tradition.<sup>317</sup> Had the Court stopped here, the legal rule forbidding polygamy would have rested on tradition. But the Court continued on, seeking to demonstrate the pragmatic wisdom of this tradition:

[A]ccording as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.<sup>318</sup>

By this reasoning, the State finds a strong secular justification for the criminalization of polygamy in the sociological depiction of polygamy as a corrupter of the democratic spirit. In other words, the Court selected a presumptively empirical ground to rationalize this outcome. The only authority cited to substantiate this claim is Francis Lieber (more on whom below). These, then, are "the evil consequences that [are] supposed to flow from plural marriages."<sup>319</sup>

A later Supreme Court case, *Davis v. Beason*, elaborated in more colorful language the then-common perception of this Mormon practice and gave further specificity to the empirical ground found by *Reynolds*:

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Reynolds*, 98 U.S. at 164 ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society.").

We may assume a strong correlation between the criminality of polygamy in Western Europe and its disallowal by the Catholic Church. According to Philip L. Kilbride polygamy was not definitively forbidden until the Council of Trent in 1563. PHILIP L. KILBRIDE, *PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION?* 63 (1994). Apparently part of the rationale for this action was as a rebuke to Martin Luther, who would "prefer bigamy rather than divorce." *Id.*

<sup>317</sup> *Reynolds*, 98 U.S. at 165. "[T]here has never been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity." *Id.*

Citations to the various state code sections which outlaw plural marriages are succinctly listed by Ralph Slovenko, *The De Facto Decriminalization of Bigamy*, 17 JOURNAL OF FAMILY LAW 307-308 (1978-79).

<sup>318</sup> *Reynolds*, 98 U.S. at 165-166.

<sup>319</sup> *Id.* at 168.

Bigamy and polygamy . . . tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment . . . . To call their advocacy a tenet of religion is to offend the common sense of mankind."<sup>320</sup>

We will wish to consider the merit of these empirical claims. Specifically, does polygamy entail "despotism," and does it necessarily "degrade" women? If the answer is, Yes, then a reasonable secular justification to criminalize polygamy presumptively exists, and the laws touching on this issue are not unconstitutional. If the answer is, No, then the asserted secular reasons are revealed to be at best an error obscuring the essentially religious motivations behind the marriage laws.

### 3. *The Influence of Francis Lieber*

Although it can be asked whether the Supreme Court had any good reasons to assert its negative assessment of polygamy, it cannot be denied that there were few data at that time to conclude differently. This case is not one where the Court ignored a body of information that contradicted its policy decision. We would do well, therefore, to at least review the purported empirical basis upon which that decision was originally made.<sup>321</sup> Thus we turn to consider Francis Lieber.

Born in Berlin in 1800, Francis Lieber had a long history of illustrious intellectual accomplishments, including editorship of the *Encyclopedia Americana*.<sup>322</sup> In 1835 he obtained a professorship in history and political economy at what is now the University of South Carolina. "There he remained for more than twenty years, most of them spent trying to leave."<sup>323</sup> He ended his career at the Columbia Law School where he served from 1865 until his death in 1872.<sup>324</sup>

In his more sober works, particularly his influential *Manual of Political Ethics*,<sup>325</sup> Lieber begins with first principles and, working out the implications of

<sup>320</sup> Davis v. Beason, 133 U.S. 333, 341-42 (1890). This case is cited with approval by Justice Scalia in his dissent to *Romer v. Evans*, 517 U.S. 620, 649-50 (1996). His point is that if polygamy can be outlawed, indeed, if *advocating* polygamy can be outlawed, then surely actions against gays and lesbians such as Colorado's Amendment 2 must be constitutional.

<sup>321</sup> See *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

<sup>322</sup> Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16(6) CARDOZO L. REV. 2107, 2110 (1995).

<sup>323</sup> *Id.* at 2111.

<sup>324</sup> *Id.* at 2113.

<sup>325</sup> See FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW*, 2D ED., VOL. 1 (1876). Our analysis focuses on the *Manual* as the primary source for Lieber's analysis of polygamy and its nefarious influence on democratic sentiment. Because *Reynolds* provides no citations, it is uncertain what the Court had in front of it. Another author has suggested Lieber's *On Civil Liberty and Self-Government* as an alternative source. See James L. Clayton, *The Supreme Court, Polygamy and the Enforcement of Morals in Nineteenth Century America: An Analysis of Reynolds v. United States*, 12 DIALOGUE: A JOURNAL OF MORMON THOUGHT 46, 51 (1979), reprinted in CONSCIENCE AND BELIEF: THE SUPREME COURT AND RELIGION 58, 63 (Kermit L. Hall ed., 2000). The *Manual* came first (1838-39), as compared to the 1853 publication of *On Civil Liberty*. Although the ideas may be more clearly articulated in the latter, they are fully present in the first.

these principles, reaches other results he expects to be logically unassailable. Few thinkers today work such a large intellectual canvas. For Lieber "the family is the focus of patriotism. Public spirit, patriotism, devotion to our country, are nurtured by family ties."<sup>326</sup> However, the State is not merely the family writ large.

That which renders the family so admirable, so holy, is love, and a continued forgetfulness of a separate individual interest. The fundamental idea of the state, on the other hand, is justice, the right which exists between man and man. That which renders the state so great and important is, that it maintains right, protects and is a continual guard over the individual right of every one; that it demands of no member an obligation on his side alone, but knows of mutual obligations only. There shall be no duty in the state for the performance of which the citizen does not receive an equivalent. *Family and state, then, do not only differ as to size, but they differ in their characteristics and essentials, whatever confusion to the contrary may in many parts of the world exist.*<sup>327</sup>

Although the patriotic sensibility is birthed within the family confines, it must be transmuted into something different if a civilized state is to arise. Lieber is explicit about the social deformities which come from the application of the family model directly to the task of state-building:

If the principle of the family is applied to a state of any extent . . . it cannot otherwise than lead to absolutism and tyranny. For we have seen that one of the characteristics of the family is the discarding of strict right and the adhering to mutual attachment, while the just authority of the parent is restricted only by this personal attachment and the natural relations of consanguinity. But this personal attachment cannot exist in an extensive state, but in a very limited degree in the smallest one, so that nothing remains but unlimited authority without the moral control existing in the parental relation.<sup>328</sup>

If the right kind of state is to develop, it is therefore important that it be built upon the right kind of family.

The family cannot exist without marriage, nor can it develop its highest importance, it would seem, without monogamy. Civilization, in its highest state, requires it, as well as the natural organization and wants of man.<sup>329</sup>

We may well ask why polygamous families are more prone to effect this outcome than are monogamous ones. The first guess might be that polygamous families more closely resemble proto-states—and therefore are more likely to incline its members to attempt to apply familial dynamics to the organization of nations—because they tend to be larger than monogamous families. But then Lieber should also be found to caution against large families of any kind, and

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<sup>326</sup> LIEBER, *supra* note 325, at 142.

<sup>327</sup> *Id.* at 145-46 (emphasis added).

<sup>328</sup> *Id.* at 146, note 1.

<sup>329</sup> *Id.* at 139.

such warnings are not to be found. Presumably polygamy acquires its fatal flaw from the submission of multiple adults to a single head. If two or ten, why not two thousand or ten million? Alternatively, the product of a monogamous family will always associate family dynamics to the parental dyad, and will have no model for its application to larger groups.

We now see the theoretical basis for the conclusion by the *Reynolds* Court: "Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."<sup>330</sup>

We have characterized the above as Lieber's "sober" analysis.<sup>331</sup> We are fortunate in having his specific views on Mormon polygamy. Writing in a popular magazine, Lieber lambastes these "blasphemers" and their "revolting assertions and deeds."<sup>332</sup> Mormonism, he says, "from its very beginning, has been encrusted with vulgarity, jugglery, license and muddy materialism."<sup>333</sup> The monogamy rejected by the Mormons is

A psychological condition of our jural consciousness, of our liberty, of our literature, of our aspirations, of our religious convictions, and of our domestic being and family relation, the foundation of all that is called polity. It is one of the pre-existing conditions of our existence as civilized white men . . .<sup>334</sup>

Consequently the Mormon example, if allowed to spread unchecked, threatened the moral and cultural superiority patently enjoyed by "civilized white men."<sup>335</sup>

Lieber's unrestrained attack on the Mormons gives a taste of what was being said everywhere at that time, including both chambers of Congress.<sup>336</sup> In that respect he is typical. His formative influence upon the Court, which should not be underestimated, lies in his argument for a firm and unyielding response to this viper in the national bosom. In this same article we read the very principle that *Reynolds* would elevate to a constitutional standard:

<sup>330</sup> *Reynolds*, 98 U.S. at 165-66.

<sup>331</sup> Francis Lieber, *The Mormons: Shall Utah be Admitted into the Union?*, 5(27) PUTNAM'S MONTHLY 225, 226 (1855). His answer to the title question: No.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 233.

<sup>334</sup> *Id.* at 234.

<sup>335</sup> *See id.*

<sup>336</sup> For example, this from the House of Representatives:

Amid the jealousies of a plurality of wives the respect of parental authority is lost, the gentleness of fireside instruction and hearthstone memories is destroyed. Crime of the most revolting character ensues; infanticide follows as a matter of course as soon as the husband finds he is getting more children than he can support.... Point me to a nation where polygamy is practiced, and I will point you to heathens and barbarians. It seriously affects the prosperity of States, it retards civilization, it uproots Christianity.... [E]ffeminacy and weakness, lack of intellectual strength, bodily energy, national decay, is its sad, unflinching result....

We enjoy religious liberty, and mean to perpetuate it for our children; but this liberty has never been understood to mean a license of doing anything, provided it be called religious. Religious liberty means that no one shall be troubled about his faith—his inner man; but acts remain for ever subject to the law.<sup>337</sup>

Although from our contemporary perspective Lieber may come off as small-minded and even racist, in his own day his was a voice of reason and intellectual seriousness. His work allowed the Court to base its decision on conclusions that had been acknowledged by the academy. In other words, the Court most likely believed what it was saying. At the time it was rendered, the rational basis for the decision was unassailable, and by the standard of inductive methodology prevalent at the time, it probably even qualified as empirical. The next section considers whether our knowledge about polygamy has improved. Do our wider knowledge and more sophisticated analyses support or refute *Reynolds's* holding that polygamy necessarily leads to despotism and the degradation of women?

#### 4. *Correlatives of Polygamy*

##### a. *Does polygamy promote despotism?*

No small irony exists in the finding of the Supreme Court that polygamy should be criminalized because of its relationship to political despotism. Some years before the *Reynolds* decision, in 1869, John Stuart Mill had lambasted the traditional (i.e., monogamous) marriage practice for exactly the same reason: In its present form

The family is a school of despotism, in which the virtues of despotism, but also its vices, are largely nourished. Citizenship, in free countries, is partly a school of society in equality . . . . The moral training of mankind will never be adapted to the conditions of the life for which all other human progress is a preparation, until they practice in the family the same moral rule which is adapted to the normal constitution of human society. Any sentiment of freedom which can exist in a man whose nearest and dearest intimacies are with those of whom he is absolute master, is not the genuine or Christian love of freedom, but, what the love of freedom generally was in the ancients and in the middle ages—an intense feeling of the dignity and importance of his own personality; making him disdain a yoke for himself, of which has no abhorrence whatever in the abstract, but which he is abundantly ready to impose on others for his own interest or glorification.<sup>338</sup>

In theory despotism seems the inevitable result whichever marriage form society adopts.

<sup>337</sup> Lieber, *supra* note 331, at 232.

<sup>338</sup> MILL, *supra* note 78, at 44-45.

The first step in the attack of any problem is to clarify the terms of the question. First, "despotism," defined as the rule of a "king with unlimited powers,"<sup>339</sup> is more technically restricted to the case displaying "the exercised right of heads of societies to murder their subjects arbitrarily and with impunity."<sup>340</sup> Both definitions share the requirement that despots are heads of societies, meaning that heads of families can be despots only by analogy. That forces upon us the conclusion that even if polygamy does lead to despotism, this relationship is true and undesirable at the national level. That is to say, former President William Clinton's victories in presidential elections should not entitle him to take any and all women he desires to wife. His political power as head of state should not translate into sexual access (even if his own behavior suggests he believes otherwise). But this finding would not immediately require that we conclude that polygamy is also undesirable at the familial level, that is, to men who are not heads of state, and cannot therefore be literal despots.

For clarification one might briefly consider socialism. Suppose we were all to agree that socialism is unqualifiedly undesirable at the level of national policy. This was the unabashed epithet hurled at Clinton's proposed health insurance plan early in his administration, and by all appearances it was a highly effective one. This concession still would not change the fact that we expect socialistic policies to operate within the family unit. Whenever one spouse is the sole wage earner, it is assumed that the other spouse shares in the benefits of that wage. Should divorce occur, each spouse may lay legitimate claim to material goods that were technically earned only through the labor of the other. As a general principle what is good within the family may not be good for the nation, and contrarily, what is bad for the nation may not necessarily be bad for the family. Recall that this was precisely the point Lieber made when he argued that the emotional and authoritarian dynamics ideal for the family are dysfunctional when applied to governing nations.

The fear of despotism is technically a concern of national policy. Even if the point about polygamy were granted, all that that would mean is that our national leaders should not be permitted unrestricted access to mates (e.g., harem building) by virtue of their political power. This does *not* entail that all other, ordinary men should be restricted to only one wife. Even if the claim asserted by *Reynolds* is true, therefore, additional steps are required before this would justify criminalizing polygamy in private contexts.

Second, we must notice that only polygamy is criminalized, but not polygyny in all its manifestations. Although often treated as synonyms,<sup>341</sup> there is an important distinction which is obvious from the Greek roots. "Gamos" (γάμος) means *only* "a wedding, marriage,"<sup>342</sup> on the other hand, "gyne" (γυνή)

<sup>339</sup> WEBSTER'S NEW WORLD DICTIONARY (3rd College edition) 374 (1988).

<sup>340</sup> LAURA L. BETZIG, DESPOTISM AND DIFFERENTIAL REPRODUCTION: A DARWINIAN VIEW OF HISTORY 2 (1986) (emphasis added).

<sup>341</sup> Whereas most writers will select one or the other, Jeremy M. Miller, *A Critique of the Reynolds Decision*, 11 W. ST. U. L. REV. 165 (1984), is unusual in that he uses both interchangeably; G. Keith Nedrow also stipulates the terms to be synonyms. See G. Keith Nedrow, *Polygamy and the Right to Marry: New Life for an Old Lifestyle*, 11 MEMPHIS ST. U. L. REV. 303, nt. 1 (1981).

<sup>342</sup> GREEK-ENGLISH LEXICON (abridged from Liddell and Scott's *Greek-English Lexicon*) 138 (1974). Diacritical markings from the Greek are omitted.

can mean "wife," but its more common meaning is simply "woman."<sup>343</sup> For example, other words which share this root ("gynecology," "misogynist") refer to women generally and not to wives specifically. In this derivation polygamy refers only to the number of one's legally cognized wives; polygyny indicates multitudinous female sexual partners, wives or not.<sup>344</sup> "Hence monogamy does not imply fidelity."<sup>345</sup>

Even if Western civilization has been almost uniformly officially monogamist, it was also been unremittingly polygynist. The often well-structured roles of concubine, mistress, and prostitute, for instance, demonstrate society's tolerance and even expectation that males will seek sexual diversity apart from the marital relationship. The major difference is that the polygamist wants to marry these other women and accept responsibility for any offspring, rather than merely use them for sexual pleasure and ignore the reproductive consequences. The Mormons "asserted that the Gentile objection was not to a man's having more than one women, but to his calling more than one woman his wife."<sup>346</sup> It is not immediately clear that the polygamist is thereby more morally reprehensible than the more prevalent monogamous polygynist.<sup>347</sup>

In any event, two observations follow from this distinction. First, arguments against polygyny should not be conflated with those against polygamy. Were the motivation to engage in polygamy merely an impulse of sexual promiscuity, as is often and loudly alleged, the polygamist has opted for the less effective strategy.

While a polygamist is necessarily also a polygynist, a polygynist is not necessarily, indeed is only rarely a polygamist. The many ethnographic descriptions of harems within despotic societies illustrate that they are more

<sup>343</sup> *Id.* at 147. "Gyne" would mean "wife" in the same colloquial way that pointing to a female and saying "She's my woman" can be taken to mean that she is your wife. In this case, it is the attached possessive pronoun which connotes spousal ties, and not the word alone.

<sup>344</sup> A different etymology is given by Bretschneider. He construes both words according to multiple marriages. However, he takes "polygamy" to the a superordinate category comprised of two subordinates, "polygyny" and "polyandry." See PETER BRETSCHNEIDER, *POLYGyny: A CROSS-CULTURAL STUDY* 50 (1995).

<sup>345</sup> FISHER, *supra* note 122, at 63.

<sup>346</sup> Orma Linford, *The Mormons and the Law: The Polygamy Cases, Part I*, 9 UTAH L. REV. 308, 311 (1964).

<sup>347</sup> A Mormon cleaning lady is on record as replying to men sent to Utah to enforce the antipolygamy laws that they also 'lived in polygamy but they won't own up to it and marry the women.'" Joan Smyth Iversen, *A Debate on the American Home: The Antipolygamy Controversy, 1880-90*, 1(4) JOURNAL OF THE HISTORY OF SEXUALITY 585, 596 (1991).

The Mormons unsuccessfully contended that monogamy could not be proved to be morally superior to polygamy, noting that infidelity, divorce, prostitution, and the like were common in monogamous populations, while such behavior was almost non-existent among the Mormons.

Slovenko, *supra* note 317, at 298. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEORGETOWN L.J. 261, 288 nt. 105 (1995) would seem to agree.

It has been suggested that the proliferation of pornography—and the detrimental side-effects therefrom—is the result of suppressing innate polygynous tendencies into ill-fitting monogamous relationships. See Joseph Shepher & Judith Reisman, *Pornography: A Sociobiological Attempt at Understanding*, 6 ETHOLOGY AND SOCIOBIOLOGY 103 (1985).

polygynist than polygamist.<sup>348</sup> While the ruler did exert exclusive proprietary rights over his women, only a very few of them attained the status of legal wife who could produce a legitimate heir.<sup>349</sup> So while polygamy was practiced, as a proportion of the women procured for sexual purposes full marriage was a rare occurrence. The thrust of the despotism/polygamy argument is therefore actually an indictment against polygyny, of which polygamy was only a minor feature.<sup>350</sup> To the extent laws should be tailored as narrowly as possible to achieve their stated ends, it would be possible to avoid despotism by criminalizing irresponsible polygyny generally, while permitting that small portion which entailed full legal marriage and commitment to the woman.

This comment segues into the second observation. Does it not contravene a sense of fair play, if not the principle of due process, to criminalize *only* one particular (religiously inspired) form of polygyny? If polygyny is socially detrimental, should not all of its varieties be precluded? Why *only* the religiously polygamous manifestation? The law should be closely scrutinized to ascertain that it is not unjustly underinclusive in its reach and subsequent implementation. Even if the *Reynolds* correlation between despotism and polygamy were valid, good grounds still exist to question the legitimacy of the anti-polygamy laws.<sup>351</sup> The shortfall between the laws and their stated purpose may be so vast as to contravene our understanding of the Constitutional guarantee of equal protection.

But in fact, if the *Reynolds* claim is ill-conceived for these technical reasons, more probably it is also simply untrue. The reasoning of *Reynolds*

<sup>348</sup> See BETZIG, *supra* note 340.

<sup>349</sup> In most contexts, offspring inherit the status of their mother. Thus, without the sanction of marriage, offspring between a noble and a socially inferior woman were relegated to the mother's lot, rather than expecting to share in the father's. Laura Betzig reviews this issue, suggesting that one of the reasons the Romans freed so many of their slaves is because they were actually freeing their own illegitimate sons who had inherited their mother's slave status. See BETZIG, *supra* note 340, at 71-73.

<sup>350</sup> The relevant parallel, as highlighted by Macedo is the "frequency with which conservatives translate their opposition to promiscuity and liberationism into blanket condemnations of homosexual conduct [which] is as puzzling as it is illegitimate." Macedo, *supra* note 347, at 264.

<sup>351</sup> An additional failing not discussed is the fact that the anti-polygamy laws criminalize not simply polygamy, the also "the form or appearance of such marriages." Linford, *supra* note 346, at 355. This meant that a former polygamist could comply with the new laws not only by cohabitating and having sexual relations with only one of his wives, but also by abandoning all the others. The logic of the non-Mormon Christians was that if a man is nice to a woman, he must be sleeping with her; they apparently recognized no other reasons to associate with females. Therefore, were he seen to be attending to the material needs of his former wives and children, that created the criminal "appearance" of polygamy.

It seems ironic that outraged Christian America preferred him to abandon his polygamous families, leaving them destitute and unprotected, rather than to allow him to provide for their basic human needs. It must have been a higher order of logic which decreed that the "helpless victims of polygamy" would be better served by taking away in fines money needed for their food, clothing, and shelter and imprisoning their only provider.

Orma Linford, *The Mormons and the Law: The Polygamy Cases, Part II*, 9 UTAH L. REV. 543, 586 (1965). Indeed, "It would seem that the only way that a polygamist could dispose of a plural wife to the satisfaction of the courts was to either publicly drive her and her children into the streets with a whip or to bring about her demise." Linford, *supra* note 346, at 370.

depends upon a universal characterization of polygamy as necessarily associated with other cultural features. It demonstrates the reasonableness of its posture by pointing to the undesirable correlates of this marriage form as they appear in other parts of the world. A recent cross-cultural analysis has, however, ponderously demonstrated that polygamy is not a monolithic institution. The correlatives of polygamy in one part of the world do not readily transfer to another. Peter Bretschneider exhaustively tested every imaginable candidate correlate of polygamy, and reached this conclusion:

The current findings strongly suggest, that [polygamy] is a multidimensional phenomenon and that arguments pointing out singular explanatory categories, such as purely socio-cultural, economic, demographic, or environmental circumstances only insufficiently explain this kind of marriage. I found, for example, the existence of bridewealth payments, high dependencies on fishing, or plow agriculture, war for plunder and captives, and homogenous, high quality environments to be most strongly related to [polygamy]. Other predictors, such as diverging devolution, fraternal interest groups, gathering, internal warfare, marriage of female captives, and pathogen stress, are of somewhat minor relevance. The impacts of extensive agriculture, pastoralism, hunting, female contribution to agriculture or overall subsistence, crop type, offensive external warfare, population size, certain climate conditions, food stress, and variables indicating the impact of Western contact upon traditional subsistence systems are found to be weakly correlated.... The length of a post partem sex taboo, the societal appreciation of children, the level of societal complexity, differences in marriage age, male mortality due to warfare, and high female contributions to gathering, finally, turn out to be completely unrelated to the occurrence of [polygamy].<sup>352</sup>

Most importantly for our purposes, he goes on to say that

predictors relevant to a worldwide context do not replicate cross-regionally, and vice versa. Divergences from the worldwide pattern are most obvious in the Eastern Eurasian/Insular Pacific world area and in the Americas. This strongly suggests that general, i.e., worldwide explanations of [polygamy] are of limited value only.<sup>353</sup>

If he is correct, Mormon polygamy must be evaluated on its own terms. The undesirable implications of polygamy elsewhere are at most merely suggestive. *Reynolds's* appeal to other cultural traditions is irrelevant, even misleading.

Among Bretschneider's specific conclusions is that "the form of political organization as such, cannot contribute very much to our understanding of [polygamous] marriage practices."<sup>354</sup> This concern was the one which most preoccupied the *Reynolds* Court. We are fortunate to have another study on precisely this issue.

<sup>352</sup> BRETSCHNEIDER, *supra* note 344, at 183.

<sup>353</sup> *Id.* at 184.

<sup>354</sup> *Id.* at 119.

At first blush, Laura Betzig's *Despotism and Differential Reproduction* would seem to support the claim that polygamy and despotism are related, just as Lieber argued. After reviewing over one hundred ethnographically described societies covering the full span of geography and human recorded history, she concludes that despotism does highly correlate with polygamy/polygyny. But *Reynolds* stipulates that polygamy should *cause* or at least stimulate despotism. Otherwise, nothing would be gained in the fight against despotism by criminalizing polygamy. But Betzig assigns the causal links in exactly the opposite direction: Despotic rulers will use their power to accumulate women (polygyny) and perhaps wives (polygamy). In other words, despotism causes polygamy; polygamy does not cause despotism.

The full theory begins with the Darwinian assumption that men and women "have evolved to seek out positions of strength as a *means* to reproduction. Power, prestige, and privileged access to resources should be sought, not as ends in themselves, but as prerequisites to procreation."<sup>355</sup> Thus, whenever "conflicts of interest among individuals are not overridden by common interest, or by an overpowering force, [the individual interests] will be manifested."<sup>356</sup> Wherever possible, conflicts of individual interest are *always* resolved in favor of the more powerful contestant. Degree of bias in conflict resolution is directly proportional to the amount of polygyny practiced by the winners.<sup>357</sup> Sociopolitical power yields access to women, and supreme power (despotism) yields unlimited access (harems). Thus polygamy stands at the *end* of this chain, and not, as Lieber presumed, its beginning.

So the asserted secular reason by *Reynolds*, that because polygamy stimulates despotism it may be criminalized, is false.<sup>358</sup> Even if they did not know this in 1878, we know it now, meaning that this Court's secular justification for polygamy today lacks an adequate nonreligious foundation. Unless a new secular basis is found, the holding of *Reynolds* should be overturned. In any case, the marriage opponent now lacks this basis to characterize polygamy as a danger case at the end of slippery slope.

*b. Does polygamy degrade women?*

If the *Reynolds* rationale fails, perhaps the one expressed by *Beason* will suffice: Does polygamy (as opposed to polygyny) degrade women? It is on this basis that at least one author argues that the United States and England "would be justified in prohibiting polygamy within their jurisdiction," and thus fulfill the spirit of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.<sup>359</sup>

As in the previous section, it is prudent to begin with a clarification of terms. While everyone may share an intuitive sense of what it might mean to "degrade" someone, what is critically unspecified is who should be the judge.

<sup>355</sup> BETZIG, *supra* note 340, at 2.

<sup>356</sup> *Id.* at 9.

<sup>357</sup> *Id.* at 88.

<sup>358</sup> The expressed fear was that polygamy would lead to despotism. Avoid polygamy, and you can avoid despotism. On the other hand, Plato believed that the surest way to encourage despotism is to outlaw homosexuality. *Symposium*, in *ON HOMOSEXUALITY* 114 (1991).

<sup>359</sup> CAROLYN HAMILTON, *FAMILY, LAW AND RELIGION* 72-73 (1995).

Modern feminism has frequently adopted the stance that there are universal standards of what is "right," standards to which Westerners are specially privy. Any transgression of these standards is "wrong," regardless of the context. If the actors in that episode disagree, their ignorance is merely another token of their oppression or degradation.

This perspective has gained popular attention recently over the furor surrounding female circumcision.<sup>360</sup> Our culture has adopted the stance that this practice is "wrong" and inhuman in some fundamental sense, and that we are right to interfere in its performance, whether that be here or abroad. That the women involved may not view the matter in this negative light is not deemed relevant. "The way that outraged 'western' women championed the cause has since been accused of revealing 'latent racism,' 'intellectual neo-colonialism,' and 'anti-Arab and anti-Islamic fervor,' and efforts to 'eradicate FGM [female genital mutilation]' have been seen as an imperialistic intervention from meddling Westerners of privilege."<sup>361</sup> This opinion, incidentally, comes from the affected women, not the men. *We* know that it is wrong, and that presumably is sufficient.

So, who judges if a woman is "degraded"? Arguably the judgment of the woman herself should be determinative. If *she* feels that she is degraded, she is presumptively degraded. If she believes herself *not* to be degraded, she is not degraded. She should not require instruction by outsiders to become dissatisfied with her life, nor should she condescendingly be diagnosed as suffering from "false consciousness."<sup>362</sup> This will be the standard applied herein to ascertain whether polygamy degrades women.

There is good reason to doubt that Mormon women viewed themselves as degraded, especially as compared to their female contemporaries. Unlike most women of that era they could vote, a privilege they lost only with the same federal legislation which outlawed their marriages.<sup>363</sup> Even one observer, fully

<sup>360</sup> See, e.g., Carol M. Ostrom, *Hospital Debates Issue of Circumcising Muslim Girls*, THE TIMES-PICAYUNE [NEW ORLEANS], Sept. 29, 1996, at A14; Tina Kelley, *Doctor Fights Ban on Circumcising Girls*, SEATTLE TIMES, June 6, 1996, at B3; Neil MacFarquhar, *Egyptians Defy Ban on Ritual Genital Mutilation of Females Unabated*, DALLAS MORNING NEWS, Aug. 9, 1996, at 45A; Celia W. Dugger, *U.S. Outlaws Practice of Girls' Genital Cutting*, THE TIMES-PICAYUNE [NEW ORLEANS], Oct. 12, 1996, at A14.

<sup>361</sup> Bettina Shell-Duncan and Ylva Hernlund, *Female "Circumcision" in Africa: Dimensions of the Practice and Debates*, in FEMALE "CIRCUMCISION" IN AFRICA 1, 24-25 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000).

<sup>362</sup> "[O]ne of the principal aims [of the nineteenth century woman's organization, the National Woman Suffrage Association, was] 'to make those women discontented who are now content.'" Iversen, *supra* note 347, at 597.

<sup>363</sup> See *id.* at 591. The two issues were not unconnected. Discussion on the Senate floor expressed dismay that it was the vote of women which "sustained" polygamy in Utah. 13 CONGRESSIONAL RECORD 230 (1881). The speaker intended "to introduce a bill to repeal woman suffrage in the Territory of Utah, knowing and believing that that will be the most effectual remedy for the extirpation of polygamy in that unfortunate Territory." *Id.*

Congress took away the vote on the theory that the women in Utah cast their ballots as they were directed to do, which served to maintain the polygamist-dominated hierarchy in the Territory. 14 CONG. REC. 3057 (1883) (remarks of Senator Edmunds). This was a complete reversal of thinking on the subject; earlier, it had been suggested that if Congress gave the suffrage to the women

prepared to be appalled by the "hopeless, dissatisfied, worn expression" on the faces of Mormon women,<sup>364</sup> came away convinced that these were sound, normal women. Although she never came to agree with the practice of polygamy, she became so taken with the independence and refinement of the Mormon women that "I was willing to eat salt with them,"<sup>365</sup> an enormous public concession.

Specific instances can probably be cited on both sides of this question. But since the question pertains to the institution and not to any individual experience therein, the answer should be sought at the same level of generality. What are the overall trends? From this perspective it again seems unlikely that Mormon women, as a group, viewed their lot as inferior to that of monogamously married women. On the contrary, to the modern ear their condition sounds like a precocious foray into contemporary feminism:

Many wives in pioneer plural families were self-sufficient and resourceful; ran businesses; were teachers, physicians, and writers; and were quite "liberated" in a contemporary sense. They had to be strong and independent for several reasons: wives in plural families were often geographically dispersed, they lived in a frontier subsistence economy, the men were occupied with church responsibilities and travel, and the fear of prosecution kept many husbands on the run.<sup>366</sup>

While the female *role* was such that we would term it "inferior" to the male role within Mormon communities, it is extremely important to note that this inferior status was *not* justified by appeal to a mythology—popular in our own culture that has accepted as a given the "hysterical" and irrational nature of women—that females are themselves inferior beings.<sup>367</sup> Women were under male supervision

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of Utah, they would cast off the chains of polygamy. CONG. GLOBE, 41st Cong., 1st Sess. 72 (1869).

Linford, *supra* note 346, at 324 note 80. Again, as was always the case, the Mormon women failed to respond as expected of women presumably being debased and abused. The reasonable conclusion would be that they were not, in fact, debased and abused.

<sup>364</sup> CLAUDIA L. BUSHMAN, *MORMON DOMESTIC LIFE IN THE 1870S: PANDEMONIUM OR ARCADIA?* 6 (1999). This lecture examines the diaries of Elizabeth Kane, who passed extensive visits among the Mormons, for whom she expected to feel contempt and pity.

The failure of Mormon women to feel degraded by their entry into polygamous marriages is at least partially explained by the small details of how these conflicting obligations were managed and balanced. Kane gives one insightful observation along these lines: She was "always surprised when the Mormons said 'my wife' and not 'one of my wives.'" Snow brought in his wives individually rather than as a group, indicating that the relationship was between the husband and each wife, rather than the family." *Id.* at 21-22. These small details, in aggregate, can be powerful social modifiers.

<sup>365</sup> *Id.* at 30.

<sup>366</sup> ALTMAN & GINAT, *supra* note 244, at 311. See also Iversen, *supra* note 347, at 597. These descriptions can be compared with this testimony from a lawyer and one of nine wives: Plural marriage "enables women, who live in a society full of obstacles, to fully meet their career, mothering and marriage obligations. Polygamy provides a whole solution. I believe American women would have invented it if it didn't already exist." Elizabeth Joseph, *With Polygamy, Lawyer-Moms Can Have It All*, 104(106) LOS ANGELES DAILY JOURNAL 6 (May 28, 1991); *The Lawyer in the Family*, 5 NATIONAL LAW JOURNAL 43 (Oct. 18, 1982).

<sup>367</sup> Seymour Parker, Janet Smith, and Joseph Ginat, *Father Absence and Cross-Sex Identity: The Puberty Rites Controversy Revisited*, 1 AMERICAN ETHNOLOGIST 687, 694 (1973).

because this was deemed the natural order, not because women were thought to be incapable of independent living. Males were themselves subordinated to their hierarchical superiors, and all were inferior to God. The important point is that among Mormons the social hierarchy did not mirror a biological hierarchy.

Related to this question of women as self-sufficient entities is the locus of the decision to enter into a polygamous marriage. In rough terms, it may follow either the "female choice" model or the "male coercion" model. Much of the popular imagery of the late nineteenth century implied a male coercion model, wherein a lurid fictional literature depicted young, impressionable girls whose seductions into polygamous unions constituted "a socially-sanctioned, Victorian form of pornography."<sup>368</sup> It was incomprehensible that any woman of normal intelligence and moral development would willingly endure the degradations of polygamy.<sup>369</sup> Consequently either the women were themselves ignorant and foolish, or they were tricked and deceived into submission.

What evidence rebuts this popular conception? Could polygamy have been an arrangement chosen by women as being in their own best interests? Proponents of polygamy as "female choice" can marshal several arguments. First, the women claimed that the very moral principles invoked to condemn polygamy actually made it the virtuous choice. According to this argument the moral problem was not the degradation of women but the depravity of men.

If most men were depraved and most women pure and lacking in passion [as was the common belief in this Victorian ethos], it followed that there were not enough good men to marry all the good women and thus allow them to fulfill their proper sphere [the home, again a Victorian virtue].<sup>370</sup>

The Mormon critics had reversed the problem: It was monogamy which degraded women, since if forced women to marry beneath them morally or "to remain single and not fulfill their proper sphere as wives and mothers."<sup>371</sup>

At least one feminist historian regarded polygamy as "an implied sealing of wives to wives."<sup>372</sup>

Her conclusions derives from the well-known facts that "these women 'courted' other wives, placed their husband's hand on the new wife's, and were present at the sealing ceremonies." She concludes that this "qualifies as a same-sex covenant of eternal companionship between women who were, in effect, sealed to other women in polygamy."<sup>373</sup>

While it is probably too much to conclude that wives "courting" future co-wives was the norm, a reasonable conclusion would be that the participation by or at least consultation with wives regarding the addition of a new wife was far from

<sup>368</sup> KILBRIDE, *supra* note 316, at 70 (quoting Lawrence Foster).

<sup>369</sup> "Assuming that no conscientious females would accept polygamy, the text [of Marie Ward's fabricated story "Female Life among the Mormons"] accused Mormon males of using hypnotic techniques to force females to accept a presumably unnatural wedded life." RALPH W. HOOD ET AL., *THE PSYCHOLOGY OF RELIGION* 321 (1996).

<sup>370</sup> Julia Dunfey, "Living the Principle" of Plural Marriage: Mormon Women, Utopia, and Female Sexuality in the Nineteenth Century, 10(3) *FEMINIST STUDIES* 523, 529 (1984).

<sup>371</sup> *Id.* at 530.

<sup>372</sup> *Id.* at 260, n.89 (discussing the views of Maxine Hanks).

<sup>373</sup> *Id.*

uncommon.<sup>374</sup> Conversely "it is recorded that some plural wives chose a family through affection for a previous wife."<sup>375</sup> By this reading women willingly entered into polygamy, or at least remained in it, largely from the satisfying relationships they enjoyed with their co-wives--and not, recalling our discussion above, from the romantic bonds with the husband.

An even more telling rebuttal to claims that women are somehow forced into polygamous marriages is the fact that they could freely initiate divorce proceedings, perhaps even more freely than could men.<sup>376</sup> In one study of a modern polygamous congregation only three or four divorces had been granted in the previous year, all initiated by the wives.<sup>377</sup> Brigham Young, the successor to Joseph Smith, held that "a woman should 'stay with her husband as long as she could bear with him, but if life became too burdensome, then leave and get a divorce.'"<sup>378</sup> Divorce was neither difficult nor stigmatizing.<sup>379</sup>

Women possessed freedom, then, to both enter and exit polygamous marriages as they saw fit. This ability supports the argument that on the whole women participated in this institution from their own choice, not from male coercion. So contented were the majority of these women that an "Industrial Home" in Utah whose purpose was "to provide employment . . . for the dependent women who renounce polygamy" failed "due to the scarcity of disillusioned and cast-off polygamous wives and children."<sup>380</sup>

Finally, we can also approach the problem of female choice in the terms introduced for the analysis of the argument on despotism, that is, male versus female reproductive strategies. In the female choice model women will choose as husbands those "men with the most resources, even if this means mating with a man who is already married."<sup>381</sup> The male coercion model assumes that there is no benefit to females, that they would not choose polygamy if given a choice.<sup>382</sup> We shall assume women can only be degraded within the male coercion model; they may not there be actually degraded, but they certainly are *not* degraded if polygamy is their own choice.

In general, "human polygyny research usually, but not invariably, finds that polygynous women have lower total fertility than monogamous women."<sup>383</sup>

<sup>374</sup> ALTMAN & GINAT, *supra* note 244, at 97.

<sup>375</sup> Iversen, *supra* note 347, at 517.

<sup>376</sup> KILBRIDE, *supra* note 316, at 80.

<sup>377</sup> ALTMAN & GINAT, *supra* note 244, at 470.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> Linford, *supra* note 346, at 328 note 93.

<sup>381</sup> James S. Chisholm and Victoria K. Burbank, *Monogamy and Polygyny in Southeast Arnhem Land: Male Coercion and Female Choice*, 12 *ETHOLOGY AND SOCIOBIOLOGY* 291, 292 (1991).

<sup>382</sup> See *id.* at 293.

<sup>383</sup> *Id.* at 298 (Australian Aborigines); see also Michel Garenne and Etienne van de Walle, *Polygyny and Fertility among the Sereer of Senegal*, 43 *POPULATION STUDIES* 267 (1989); Warren M. Hern, *Polygyny and Fertility among the Shipibo of the Peruvian Amazon*, 46(1) *POPULATION STUD.* 53 (1992); and Kashem Shaikh, K.M.A. Aziz, and A.I. Chowdhury, *Differentials of Fertility between Polygynous and Monogamous Marriages in Rural Bangladesh*, 19 *JOURNAL OF BIOSOCIAL SCIENCE* 49 (1987).

Exceptions to this trend are reported by Nan E. Johnson and A.M. Elm, *Polygamy and Fertility in Somalia*, 21 *JOURNAL OF BIOSOCIAL SCIENCE* 127 (1989); Osei-Mensah Aborampah, *Plural Marriage and Fertility Differentials: A Study of the Yoruba of Western Nigeria*, 46(1) *HUMAN ORGANIZATION* 29 (1987); and Monique Borgerhoff Mulder, *Marital Status and*

This fact would tend to support the male coercion model at the expense of female choice, and thereby lend indirect credibility to a broad claim that polygamy is degrading to some women.<sup>384</sup>

But even if most of the world's polygamy were instituted under male coercion, this does not necessarily mean that *Mormon* polygamy followed this pattern. Recall the conclusion from Bretschneider's cross-cultural review: few generalizations can be made about polygamy worldwide; each manifestation should be evaluated on its own terms. The specific data for Mormon marriages are equivocal: While one report merely observes that Mormons are, as a group, unusually fertile when compared to Utah and the nation, two other studies - both using data covering the nineteenth century - seem to replicate the usually observed inverse relationship between fertility and polygamous marriage forms.

<sup>385</sup> In the first, eighty-one women had a *lifetime* reproductive outcome of 701 children, "demonstrating a fertility which ranks them very high among populations for whom such data has [sic] been studied."<sup>386</sup> Unfortunately, these data make no distinction between monogamous or polygamous marriages. For the kinship snapshot diagrams of 1874 alone, however, a slight advantage accrues to monogamy: Thirteen polygamous marriages, involving thirty-two women, had produced 76 offspring by 1874, for an average of 2.38 children per

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*Reproductive Performance in Kipsigis Women: Re-evaluating the Polygyny-Fertility Hypothesis*, 43 *POPULATION STUDIES* 285 (1989).

<sup>384</sup> For this forum, it is expedient to make the assumption that marriage form directly causes individual reproductive outcomes. Monique Mulder, *supra* note 383, at 303-04, clarifies under what circumstances this assumption is valid:

To argue that the low fertility of polygynously married women is a *consequence* of their marital status, a number of alternative explanations must be ruled out. First, there must be no evidence of a selective process whereby women of low reproductive potential, particularly those who are infertile, are more likely to find themselves in polygynous marriages. Secondly, secular changes, specifically those that co-vary with marital status, must be carefully excluded as the causes of reproductive differences between monogamously and polygynously married women.

Possible examples of such "secular changes" include age of husband and lack of spousal co-residency. These factors would lower reproduction in any context, but are typical of polygamy rather than monogamy. Garenne and van de Walle, *supra* note 383, at 282-83.

Having ruled out these alternative explanations, processes by which polygamy can lower reproduction include: (1) relative poverty, especially when wives are ranked in terms of seniority or favoritism; (2) higher incidence of venereal disease; and (3) "little advantage, in terms of economies of scale, to be derived from co-operative relations among co-wives." Mulder, *supra* note 383, at 303-04.

<sup>385</sup> See Judith C. Spicer and Susan O. Gustavus, *Mormon Fertility through Half a Century: Another Test of the Americanization Hypothesis*, 21(1) *SOCIAL BIOLOGY* 70 (1997). The authors suggest that Mormon fertility may be related to the religion's belief in the "pre-existence of spirits," to whom Mormons owe the temporal "responsibility of offering these spirits the best possible hope for progress toward perfectibility and exaltation" by birth into a "good" Mormon family." *Id.* at 71. KILBRIDE, *supra* note 316, at 69, notes that in 1988 Utah's birthrate of twenty-one per thousand is higher than that of China.

<sup>386</sup> Dean L. May, *People on the Mormon Frontier: Kanab's Families of 1874*, 1(2) *JOURNAL OF FAMILY HISTORY* 169, 182 (1976).

wife; by contrast, sixty monogamous unions generated 164 offspring, for an average of 2.73 children per wife.<sup>387</sup>

A second study supports this aggregate analysis.<sup>388</sup> However, its authors suggest that such lumped studies are inappropriate because they mask internal trends. First wives in polygamous marriages in this study of nineteenth century Mormons produced *more* children as compared not only to their later co-wives but also as compared to monogamous unions.<sup>389</sup> In other words, reproductively speaking, the best route for a woman is to be the first wife in a future polygamous marriage. If we extend our focus to include subsequent generations, however, the picture changes. Although later wives had fewer children, they had equal numbers of grandchildren as monogamous women, which means they achieved identical reproductive outcomes with less personal cost.<sup>390</sup>

The Mormon polygamous marriage, in the long run, turns out to be a more efficient reproductive strategy from the woman's view than is monogamy. The efficiency of these unions has often been highlighted:

The nuclear family is a capital-intensive and inefficient enterprise with enormous excess capacity in almost all its facilities. A sizable shift toward cooperative and expanded family arrangement could markedly increase the efficiency of resource utilization. Such a shift would also require radical economic reorientation, and it would not be at all surprising to find the producers of consumer goods, especially appliances, aligned on the side of the traditional family against social change.<sup>391</sup>

The contemporary furor over the possibility of gay marriage has led many people and state agents to voice the belief that the primary function of marriage is to birth and raise children. If these advocates are to be taken at their word, then they must also favor polygamy since it achieves this function more efficiently than monogamy.

From the perspective of reproductive strategy, the most cautious conclusion is that Mormon polygamy is not the clear example of male coercion that many other studied groups seem to be. Coupled with the expressed views of the women themselves, there seems little ground to assert a claim that polygamy, at least as practiced by the Mormons, constitutes a degradation to women.<sup>392</sup> We

<sup>387</sup> *Id.* at 190-92.

<sup>388</sup> See L.L. Bean and G.P. Mineau, *The Polygyny-Fertility Hypothesis: A Re-evaluation*, 40 *POPULATION STUDIES* 67 (1986).

<sup>389</sup> See *id.* at 72. The difference can be traced in part to the fact that first wives, as compared to only wives, (1) marry earlier; (2) are still producing children later in life; (3) have a smaller age gap between herself and her husband; and (4) birth intervals are shorter. All of these differences are small in absolute terms, but in combination work to give the first wife a significant reproductive advantage over a lifetime.

<sup>390</sup> See Steven C. Josephson, *Status, Reproductive Success, and Marrying Polygynously*, 14 *ETHOLOGY AND SOCIOBIOLOGY* 391 (1993).

<sup>391</sup> LARRY L. & JOAN M. CONSTANTINE, *GROUP MARRIAGE* 131 (1973).

<sup>392</sup> A related claim to the degradation of women is the effect on children of being raised in a polygamous home.

Another important antipolygamy contention was that there were deleterious effects on progeny of plural homes. A popular notion of genetics held that moral depravity led to inherited physical degeneracy. Angie Newman reported to Congress [in 1886] that there was "a physical deterioration" observable in the children of polygamy as well as mental inferiority. "They do not begin to measure up to the standard of American children of the same age."

should again emphasize that we are speaking of polygamy as an institution. The conclusions at that level will not apply to all marriages. Some women are unquestionably ill-served by their participation in plural marriages,<sup>393</sup> just as some are the worse off for their involvement with monogamous attachments. Still, the preponderance of the data force the conclusion that *Reynolds* and *Beason* are wrong. Polygamy is not an unreasonable choice for women, and may in fact have advantages over monogamous arrangements.<sup>394</sup> One ethnographer

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Iversen, *supra* note 347, at 593-594. Another opinion expressed in 1882 was that "children developed observably 'depraved tastes' and lost the innocence of childhood from being raised in polygamous homes." *Id.* at 594. The *Reynolds* decision contains similar language. Part of the case involved the trial judge's charge to the jury, which included this statement:

I think it is not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children, - innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land.

*Reynolds v. United States*, 98 U.S. 145, 167-68 (1878).

As with the examination of the question of female degradation, some evidence can be found for either side of the question of the effect upon children of being raised in a polygamous family. One study conducted among Nigerians found that "male adolescents from monogamous families had better adjustment scores than those from polygynous families." Adenekan O. Oyefeso and Ademola R. Adegoke, *Psychological Adjustment of Yoruba Adolescents as Influenced by Family Type: A Research Note*, 33(4) JOURNAL OF CHILD PSYCHOLOGY & PSYCHIATRY 785, 787 (1992). On the other hand, family type had no impact upon the relationship between corporal punishment and academic achievement. Varghese I. Cherian, *Corporal Punishment and Academic Achievement of Xhosa Children from Polygynous and Monogamous Families*, 134(3) JOURNAL OF SOCIAL PSYCHOLOGY 387 (1998). When considering many studies in concert, Kilbride concludes that "nonconventional family arrangements per se do not have undesirable effects on the children." KILBRIDE, *supra* note 316, at 20.

As regards Mormons specifically, one study compared negative courtship experiences of Mormon and non-Mormon college students. It found the two groups to be indistinguishable, *except* in the case of non-Mormon women, who "report [more] unpleasant, aggressive, and abusive experiences in both past and current relationships," and who also "report having inflicted [more] negative behaviors on their partners." Mary Riege Laner, *Unpleasant, Aggressive, and Abusive Activities in Courtship: A Comparison of Mormon and NonMormon College Students*, 6 DEVIANT BEHAVIOUR 145, 156 (1985). For women, at least, a Mormon upbringing seems to lead to more placid and pleasant intersexual relationships. This finding is merely suggestive about the formative influence of Mormonism generally, since it involves children who presumably were not raised in polygamous households. More on point was a study by Parker et al., *supra* note 367, which tested the hypothesis that father absence leads to hypermasculinity, delinquency, and gender role confusion. Examining a community of Mormon fundamentalists who still practice polygamy, the authors they found no such deficiencies among boys raised in polygamous households as compared to those of the same community raised in monogamous households.

As with female degradation, then, the argument about negative effects upon children may be less valid for Mormonism specifically than for polygamy generally.

<sup>393</sup> See Steve Kloehn, *Polygamists' Ex-Wives Speak Up*, THE TIMES-PICAYUNE [NEW ORLEANS], July 5, 1998, at A26.

<sup>394</sup> Engels agreed with much of Lieber's claims about the benefits of monogamy for laying the groundwork for civilization. But one area where they disagreed was the effect of monogamy upon women. For Engels, it is monogamy, not polygamy, which degraded and oppressed women. He believed that the nuclear monogamous family arose as an economic unit, and that as the economy

has concluded that women in contemporary polygamous marriages "are empowered more fully" than their mainstream (nonpolygamous) Mormon sisters.<sup>395</sup>

This generalized outcome matches the Supreme Court's own level of analysis, which is to say it speaks in the abstract about the generic woman. The standards of today's legal doctrine demand something more specific. Neither *Reynolds* nor *Beason* moves from the general to the particular evils supposed to have been committed by the respective defendants. Where was the despot, where the degraded woman? No fingers were pointed at actual victims of polygamy, *even in these cases*. No wife of George Reynolds was complaining to the federal agents about her miserable life, nor did the courts illustrate their point with stories of Reynolds's despotic or even merely unseemly behavior.

At the least, government plainly has the burden of producing non-speculative evidence that the harm it fears will actually come about . . . . Even in the prison and military contexts, where there is a judicial "tradition of giving due deference to the experience and expertise" of administrators, . . . "mere speculation, exaggerated fears, and trumped-up or post-hoc rationalizations for thoughtless policies will not suffice..."<sup>396</sup>

Although this statement was made in the specific context of the now-stricken Religious Freedom Restoration Act, the principle holds generally. If a woman had brought charges, for instance, claiming to have been victimized by polygamy, the charge would be specific and appropriate. The institution should not be attacked on its general, theoretical, or possible evils if none are *actually* in evidence.<sup>397</sup> Since any and every act or social arrangement can be or might be detrimental to some persons, legal action should be reserved for those that are actually injurious to specific individuals. There are no persuasive data that such injuries existed or are to be expected from Mormon polygamy.

### C. Summary

By today's standards *Reynolds* and *Beason* were wrongly decided, and the continued criminalization of polygamy is without empirical support. Presumably the Supreme Court thought its information about Mormon polygamy

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transformed from capitalism to socialism, monogamy would be either significantly altered or completely done away with. See FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (International Publishers, 1972).

<sup>395</sup> KILBRIDE, *supra* note 316, at 77.

<sup>396</sup> Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39(1) VILLANOVA L. REV. 1, 34 (1994).

<sup>397</sup> As observed by Wasby, *supra* note 251, at 118 "most violations of sex policy, with the important exceptions of rape and sexual abuse of children, are 'victimless' (or at least 'complaintless') crimes."

Within the arena of constitutional law, persons are not allowed to lodge a complaint unless he or she has "suffered a personal, *concrete* injury that would be remediable by judicial process." Carl Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70(3) NOTRE DAME L. REV. 581, 587 nt. 19 (1995) (emphasis added). "Courts are to refrain from 'abstract questions' which amount to 'generalized grievances' shared by many others." *Id.* at 615 nt. 130. "[A]s to the kinds of questions which [are] the staple of judicial business, it [is] not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law." *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.).

was accurate and the need urgent. The justices could point to learned treatises by Francis Lieber to provide a factual basis for their decisions. But today we know better. No student of Mormon polygamy could support a position comparable to that expressed by the *Reynolds* and *Beason* Courts.

This scholarly conclusion mirrors the pragmatic approach which modern society adopts in regard to a polygamy that it no longer sees as threatening to the very fabric of democracy.<sup>398</sup> Present "day officials have stated publicly that they will not initiate charges against [polygamists] because no significant harm to the community is being perpetrated."<sup>399</sup> Likewise, although a recent case found that an Arizona constitutional prohibition against polygamy is valid and that it can be used to revoke a peace officer's certification,<sup>400</sup> that state's Law Enforcement Officer Advisory Council ruled that such decertification "should be dismissed because 'there has never been...any determination that polygamy is a practice inconsistent with the peace and safety of the state.'"<sup>401</sup>

This discussion reveals two things: First, the Supreme Court was not acting unreasonably when it voiced its policy decision to criminalize polygamy. If there were any data at all on this point, they all pointed in the direction the Court chose. Second, the true empirical bases are such that they would today produce the opposite result.

If polygamy is to remain criminalized, new reasons will have to be articulated. For over a century we have relied upon *Reynolds*, but the justification given in that case is no longer valid. The existing legal reason to characterize polygamy as a danger case has crumbled under the weight of cold fact. The conservative opponents of same-sex marriage, who have heretofore taken for granted the obvious undesirability of polygamy as an established fact, now bear the burden to demonstrate the dangerousness of polygamy. Until they have done this, they cannot proceed with the slippery slope argument.

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<sup>398</sup> See, e.g., Florence Williams, *Polygamy Thriving Subculture; Government Looks Away*, THE TIMES-PICAYUNE [NEW ORLEANS], Dec. 21, 1997, at A-27. A lot of good cultural information can be gleaned from the obituaries. A death notice in the New Orleans paper included the information that "Survivors include two companions...." [Obituary for] *Dean Cloud*, THE TIMES-PICAYUNE [NEW ORLEANS], Jan. 4, 2000, at B3. A repeat notice the next day deleted this information, listing only one companion. The initial announcement may have been a mistake. But what is intriguing is that the paper, under the belief that the information was accurate, would publish the claim that he was a polygynist.

<sup>399</sup> ALTMAN & GINAT, *supra* note 244, at 52. Mike Leavitt, Governor of Utah, has declined to actively prosecute polygamists. Associated Press, *Utah Governor Trapped by Position on Polygamy*, HONOLULU ADVERTISER (Aug. 2, 1998). That position seemingly changed in May 2001 when Tom Green was found guilty of four counts of bigamy in a Provo, Utah, court. Julie Cart, *Verdict Rips Veil from Bigamy Practice*, THE TIMES-PICAYUNE [NEW ORLEANS], May 20, 2001, at A3. This case will probably remain unique for several reasons. First, Tom Green practically begged to be prosecuted by appearing repeatedly on national television shows discussing his polygamous marriages. Second, Utah may have felt the necessity to symbolically clean up its image before it hosts the 2002 Winter Olympics. It is unlikely, therefore, that the Green conviction heralds a renewed and systematic suppression of polygamy.

<sup>400</sup> See *Barlow v. Blackburn*, 798 P.2d 1360 (Ariz. App. 1990).

<sup>401</sup> ALTMAN & GINAT, *supra* note 244, at 52.

## V. CONCLUSION

Jonathan Rauch writes that "no one can argue that the deprivation [of marriage to gays and lesbians] is a minor one."<sup>402</sup> He is unjustifiably optimistic. Stanley Kurtz does seek to minimize the harm done to gays and lesbians by denying them the benefits of civil marriage:

There is not the slightest evidence that either the civil status of homosexuals or the increased sympathy and respect they now enjoy in America will in the least suffer from a continued refusal to redefine marriage so as to include homosexual unions.<sup>403</sup>

However sincere Kurtz may have been, the events since the terrorist attack on the World Trade Center belies his assessment. Surviving partners of the gay and lesbian victims of that fateful day have—at the active urging of political and religious conservatives<sup>404</sup>—been denied the support, both financial and emotional, that employers and governmental agencies have rushed to extend to partners of the heterosexual dead.<sup>405</sup> So uncertain has been the possibility of aid to homosexuals that a separate fund has been established for their protection.<sup>406</sup>

Most conservatives share our own sense that the focus of this policy debate is of critical, not ephemeral importance. They expend their energy and risk their social capital fulminating against same-sex marriage. The curiosity in this project is that this country already has same-sex marriage; we just do not know where. Sex can be defined as set at birth and immutable (and recorded in the birth certificate), or as changeable through sex-reassignment surgery.<sup>407</sup> Different states have settled on different definitions. Texas<sup>408</sup> and parts of California<sup>409</sup> say that sex for purposes of marriage is determined at birth; Kansas<sup>410</sup> and New Jersey<sup>411</sup> that the relevant moment determining sex for

<sup>402</sup> Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, THE NEW REPUBLIC, May 6, 1996.

<sup>403</sup> Kurtz, *supra* note 63, at 41.

<sup>404</sup> See Thomas B. Edsall, *Minister Says Gays Should Not Get Aid*, WASHINGTON POST, Oct. 5, 2001, at A22.

<sup>405</sup> See Victoria Scanlan Stefanakos, *Life Goes On*, N° 854/855 THE ADVOCATE, Jan. 22, 2002, at 48-51; Denny Lee, *Partners of Gay Victims Find the Law Calls Them Strangers*, NEW YORK TIMES, Oct. 14, 2001, § 14, at 4; Brooke A. Masters, *Virginia Law Denies Benefits to Domestic Partners of Sept. 11 Attack Victims*, WASHINGTON POST, Nov. 25, 2001, at C3. Hope remains, however, that the federal victim compensation fund will extend to same-sex partners, at least to some extent. See Lambda Legal Defense and Education Fund, *Government Keeps Door Open to Support for Lesbian and Gay Survivors of 9/11 Victims*, News Release, Dec. 20, 2001 (last visited Mar. 21, 2002) <<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=945>>.

<sup>406</sup> See Lambda Legal Defense and Education Fund, *Press Conference to Announce Establishment of "September 11 Gay & Lesbian Family Fund"*, News Release, Dec. 11, 2001 (last visited Mar. 21, 2002) <<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=934>>.

<sup>407</sup> The topic of civil marriage, transsexuality, and the different state definitions of sex is reviewed in Shana Brown, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113 (2001).

<sup>408</sup> See *Littleton v. Prange*, 9 S.W. 3d 223 (1999) (ruling that a person born male cannot be married to another male).

<sup>409</sup> See Jim Davis, *Fresno Co. Clarifies Gender-Union Issue*, FRESNO BEE, Sept. 11, 2001 (reporting that Fresno County, Cal., "will rely on birth certificates to determine the gender of the betrothed").

<sup>410</sup> See *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. 2001) (remanding case to determine whether

marriage is the time of license issuance.<sup>412</sup> Consequently, a marriage between a male and a male-to-female transsexual is invalid in Texas, but that between a female and a male-to-female transsexual can be valid,<sup>413</sup> even though to the casual onlooker the invalid marriage is heterosexual and the valid marriage homosexual. The opposite outcome might prevail in Kansas.<sup>414</sup> Both sides would deny that they allow same-sex marriage. But each in the eyes of the other has already taken that step.

Still, in this quest to deny homosexuals the ordinary right to marry, conservatives point to polygamy as the inevitable and intolerable outcome of that permission. If that were a serious possibility, why, one wonders, has not polygamy, the world's most prevalent marriage form, ever lead to same-sex marriage? Overlooked by conservatives is that this country already tolerates polygamy within its borders, and still it survives. Setting aside the example of Mormon polygamy, Andrew Koppelman found that when polygamous practices on Native American reservations have been legally challenged, "the attitude of state courts was one of 'casual tolerance.'"<sup>415</sup> Beyond even this, conservatives stridently warn of the loss of our own monogamous marriage tradition. But our marital tradition is one of serial polygamy, not monogamy. "American men and women are likely to have more spouses than men and women in [formally] polygamous societies."<sup>416</sup> Conservatives seek to preserve a mirage.

The connection between same-sex marriage and polygamy has been often claimed and as frequently rebutted. To the extent that opponents of same-sex marriage bear the burden to demonstrate that same-sex marriage will result in polygamy, they have failed. But so too have advocates of same-sex marriage, if the burden is on them to show that it will not. For all the heat and furor, not to mention serious scholarship and heartfelt sincerity, neither side has constructively analyzed the problem in its specifics.

Once the structure of a proper slippery slope argument is recognized and applied to this case, several conclusions emerge. First, the conservative recourse to this slippery slope argument against same-sex marriage signals a concession—formal to the argument itself, but actual in the choice of the argument at all—that the complaint against same-sex marriage based upon its intrinsic qualities has

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wife was male or female when marriage license issued).

<sup>411</sup> See *T. v. T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (declaring valid a marriage of male-to-female transsexual to a male).

<sup>412</sup> According to Shana Brown, ten states allow transsexuals to obtain new birth certificates reflecting their new anatomy, which in practice would mean that these states look to the time of marriage and not of birth to ascertain sex. See Brown, *supra* note 407, at 1129.

<sup>413</sup> San Antonio issued a marriage license to a lesbian couple because one member of the couple was a male-to-female transsexual. See Mubarak Dahir, *Genetics vs. Love*, N° 822 THE ADVOCATE 25, 26 (Oct. 10, 2000).

<sup>414</sup> Australia has also ruled valid the marriage of a male and a male-to-female transsexual. See Cindy Wockner, *Transsexual Marriage is Valid*, THE DAILY TELEGRAPH [SYDNEY], Oct. 15, 2001, at 13. This result is being appealed by the attorney-general. See Luke McIlveen, *Williams Moves to Annul "Valid" Same-Sex Union*, THE AUSTRALIAN, Jan. 10, 2002 at 6.

<sup>415</sup> Koppelman, *supra* note 289, at 111 (quoting 2 ALBERT A. EHRENZWEIG & ERIK JAYME, PRIVATE INTERNATIONAL LAW 166 (1973)).

<sup>416</sup> Homer, *supra* note 87, at 520-521. One newspaper found amusing a local man who approached weddings as a vocation, so that in that year alone he had already been married three times. See Bill Grady, *Eight is Not Enough for Wedding Veteran*, THE TIMES-PICAYUNE [NEW ORLEANS], Oct. 8, 2000, at B1. For a living the man owned a banquet hall specializing in wedding receptions. *Id.*

failed. Proponents of gay marriage, in other words, no longer have to prove that it is good, or even that it is not morally bad. Our opponents have, through their own actions, conceded this point. We need to move on to other problems.

Nor do we have to prove that polygamy is bad. Although conservatives argue as though that determination is unquestioned and even unquestionable, the discussion of this article, especially in Section IV(B), demonstrates that such an evaluative conclusion depends upon the analytic perspective taken. The legal conclusion that polygamy is bad, as articulated in *Reynolds*, is no longer defensible. To the extent that polygamy *is* bad, new justifications must be found and incorporated into our legal rules. That task, fortunately, does not fall to the advocates of same-sex marriage. The reason we do not have to prove that polygamy is bad is because the slippery slope argument merely requires that a sustainable boundary exist between the instant and the danger cases. Our burden in this controversy is met when we identify the boundary of separation, not when we also disparage or praise what lies on either side of it.

Were we to rely upon earlier writings to identify what separates same-sex marriage from polygamy, we would gain little insight. Scholars on both sides of the debate have failed to isolate romantic love as the relevant variable. The single-most essential quality of modern marriage inheres in the romantic involvement of the partners; polygamy is necessarily antagonistic to this same experience. The slide from the one to the other would occur only if policymakers gloss over this distinctive boundary at a critical moment. The discussions examined in Sections I and II affirms that thinkers on both sides of the discussion will be inclined to obscure this defining point, just as conservatives fear.

Even so, same-sex marriage opponents cannot use this result to justify the withholding of civil marriage from gays and lesbians. If the slippery slope argument is valid against same-sex marriage, the same form of argument is at least as valid as to show why slippery slope arguments should never be employed in policy decisions. The stronger the opponents' commitment to the slippery slope argument, via a logical boomerang effect the greater the reason not to accept it.

Further, the slippery slope argument against same-sex marriage can be negated with a reverse slippery-slope argument showing why it would be detrimental to society to deny homosexuals the right to marry. Even if the slippery slope argument is sound in isolation, it is still far from rationally compelling or logically conclusive.

If it is true that the multiple slippery slope arguments would only cancel themselves out, and if by choosing to deploy the slippery slope argument conservatives have lost the ability to argue against same-sex marriage intrinsically, it may be that they have nowhere left to go. Their arguments having been exhausted, the conservative opposition should concede that they have lost this debate. Their energies would be better spent supporting the marriages of all persons, gay and straight.