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Drawing the Line: Slippery Slopes, Sex Panics, and Polyamorous Marriages

Gretchen A Myers, Stetson University College of Law

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DRAWING THE LINE:
SLIPPERY SLOPES, SEX PANICS, AND POLYAMOROUS
MARRIAGES

Gretchen A. Myers

Among the likeliest effect of gay marriage is to take us down a slippery slope to legalized polygamy and “polyamory” . . . . Marriage will be transformed into a variety of relationship contracts, linking two, three, or more individuals (however weakly and temporarily) in every conceivable combination of male and female. A scare scenario? Hardly.¹

When Nan first met John, she knew immediately that he was the man she would marry.² After twenty-four years of marriage, they have raised their two children together and are still happy with their relationship. Nan is a psychotherapist, and John is a lawyer. They appear to be just like any other married couple with a solid, honest relationship—except that they are polyamorous. After being happily monogamous for the first twenty years of their marriage, they

decided to open their relationship “very slowly and carefully.” First John brought Amy into the family, and a few years later Nan did the same with Julio. John and Amy are sexually involved with each other, as are Nan and Julio, but all four of them are united by more than simply sex—they are a family, an “extended family of intimate friends.” Nan and Amy support each other emotionally: as Nan describes, “when something good happens [Amy is] the first person I think of, when something bad happens she is the first person I call.” Similarly, John and Julio support each other “like brothers.” When they all spend time together, they cook, entertain, watch movies, talk, and do laundry—like any couple might. Though they are four people instead of two, each is committed to the others just as seriously as many monogamous couples are committed to each other.3

Akin and Dawn are another polyamorous couple, who have been married for fifteen years.4 They are both in love—as well as sexually involved—with a woman named Kay. Kay has her own apartment and enjoys the space that it provides her, but she still spends a great deal of time with Akin and Dawn at their home. Dawn is also in a long-distance relationship with Gary and has been for twenty-four years, though they only get to see each other about once every six months. Five years ago Gary met Judith, and now he is engaged to her and building a home with her while openly maintaining his relationship with Dawn. Gary’s fifteen-year-old daughter, Kerry, was raised in this polyamorous environment. “It was good to be raised in a polyamorous home,” she says, “because I found people everywhere who had these amazing relationships with other people and it felt like this gigantic web of . . . people who were all connected to one

3 Williams, Multiple Love, supra note 2.

4 Id.
another and all connected to me, so everywhere I turned I found someone who I could . . . talk to or count on, and it was a beautiful feeling—I loved it.”

According to the people who live it, polyamory is much like traditional monogamy in terms of love, sex, commitment, and family—except that it incorporates more people. They also agree that polyamory is not for everyone. As Nan puts it,

I [am not] trying to promote [polyamory]. What I’m trying to do is let people know that this exists and also increase the tolerance that we have for different kinds of choices about how our relationships . . . and . . . families look and how, by having open conversations with their partners, people can create the relationships consciously that can work for them.

Making this point is difficult because of the strong feelings and even fears that the thought of openly sharing love and sex with more than one person can evoke. But, as Nan questions, is “sexual fidelity the best measure of commitment to a relationship?”

I. INTRODUCTION

Marriage between one man and one woman who are sexually involved only with each other is “the most privileged form of family relationship in American society.” This standard of heterosexual monogamy is currently being questioned in the debate over whether same-sex couples should have the privilege of getting married or taking on the legal rights and responsibilities that marriage entails. If same-sex couples are given the privilege to marry, these

5 Id.
6 Id.
8 Id. at 597.
couples will eventually become part of the “charmed circle” of sexual relationships that are considered proper. There will no longer be a gender requirement for marriages to be valid. However, the monogamy standard will remain intact, and nonmonogamous relationships will remain outside the “charmed circle” of sexual relationship forms.

The question of whether nonmonogamous marriage should be legalized is not generally taken very seriously; both sides of the current marriage debate seem to agree that marriage should be monogamous. Same-sex marriage opponents worry not only about loss of status for

9 Id.; see Gayle S. Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, reprinted in THE LESBIAN AND GAY STUDIES READER 3, 3 (Henry Abelove, Michele Aina Barale, & David M. Halperin eds., Routledge 1993) (using the term “charmed circle”). As same-sex marriage becomes a reality, same-sex relationships will at least be considered proper enough to receive legal recognition, but it is unrealistic to expect that they will automatically receive social acceptance as well. See Val D. Ricks, Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response, 7 FLA. COASTAL L. REV. 271, 336, 338 (2005) (explaining that many oppose same-sex marriage precisely because it would be an official approval of same-sex relationships and noting that people will not respect same-sex couples simply because they are allowed to legally marry).

10 Elizabeth F. Emens, Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 282 (2004). Additionally, those who oppose marriage entirely do not take a stance on whether marriage should include polygamous relationships. Suffredini & Findley, supra note 7, at 597 (stepping back “from the current political and legal storm over same-sex marriages to question the supremacy of marriage as the ideal family unit”); Matilda Bernstein Sycamore, Down With Legitimacy: Want to Define Love, Commitment,
heterosexuality but also fear that if same-sex marriage is legalized monogamy will soon lose its privileged status as well, and polygamous marriage will be legalized.\textsuperscript{11} Advocates of same-sex marriage seek to distinguish between same-sex marriage and polygamy in order to bolster their pro-same-sex-marriage stance—“[s]coffing at the polygamy prospect as ludicrous has been the strategy of choice for gay marriage advocates.”\textsuperscript{12}

Both sides of the same-sex marriage debate tend to agree that nonmonogamous marriage should be illegal because nonmonogamous marriage is often equated with a horrific specter of patriarchal polygyny, where one husband has several wives who are subordinate to him and


“physical abuse, rape, incest and underage marriage” run rampant. This particular vision of

13 Emens, supra note 10, at 282. The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) is a polygamist sect that has been repeatedly and recently investigated for child abuse and underage marriage. See e.g. Andrew Gumbel, Zion Raid: The Ranch Has Not Yet Revealed All Its Secrets . . ., THE INDEPENDENT, April 13, 2008, http://www.independent.co.uk/ news/world/americas/zion-raid-the-ranch-has-not-yet-revealed-all-its-secrets-808370.html (describing the recently raided polygamist Yearning For Zion (YFZ) polygamist ranch as “one of America’s weirdest and most secretive religious compounds,” where girls as young as 14 are forced to marry men in their 80s and reporting that 139 adult women as well as 416 children were removed from the ranch by authorities); Rampant Sexual Abuse Alleged at Texas Sect, CBS NEWS, April 8, 2008, http://www.cbsnews.com/stories/2008/04/08/national/main4000780.shtml (discussing allegations that YFZ polygamist sect married girls to older men as soon as the girls hit puberty, that the girls were then forced to have sex with and bear children for the men, and that the boys of the sect were groomed to continue the same cycle); Amanda Townsend & Agnes Pawlowski, Girl, 14, Fled Abuse, ‘Mind Control’ of Polygamy, CNN.COM/US, September 14, 2007, http://www.cnn.com/2007/US/law/09/11/fleeing-polygamy.hamon/index.html (reporting on one woman’s escape from a polygamist family where “[t]here was a tremendous amount of abuse [of] . . . all kinds: sexual, physical, emotional, mental,” not only by the husband but also by some of the 19 wives and some of the 75 children); but see All Texas Polygamist Sect Children Reunited with Parents, FOXNEWS.COM, June 4, 2008, http://www.foxnews.com/story/0,2933,362816,00.html (reporting that all 440 children taken from the YFZ ranch were returned to their parents, that the call to an abuse hotline that triggered the raid on the ranch is being
nonmonogamous marriage is understandably opposed by most who have entered the debate about same-sex marriage, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) activists as well as feminists, because no one wants to support the abuse of women and children. However, this vision of nonmonogamy may be more of a rhetorical tool used to police the boundaries of marriage and sexuality than an accurate description of nonmonogamous relationship forms in general. Polyamory is one nonmonogamous relationship form that may have the potential to counter polygamy’s tarnished reputation in the United States by showing that nonmonogamy itself is not necessary destructive. Polyamory is described as “a [nonmonogamous] form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone.” This relationship form is a “new polygamy [that] reflects postmodern critiques of patriarchy, gender, heterosexuality and genetic parenthood.”

This article will use the practice of polyamory to suggest that marriage law regulates intimate relationships for the wrong reasons: it currently regulates relationships based on form—which is used as a proxy for sexual morality—instead of function. Part II describes the current marriage debate over same-sex marriage and the related fear some have of sliding down the investigated as a hoax, and that the Texas Supreme Court found that the state’s evidence suggested only 5 of the 440 children had been abused).


15 Strassberg, Considering Polyamory, supra note 11, at 439.

16 Id.
slippery slope to legalized nonmonogamy. It also outlines the main reasons why polygamy is
criminalized in the United States and introduces polyamory as another example of
nonmonogamous partnering. Part III suggests that marriage law historically has been and
continues to be used as a tool for policing the boundaries of proper sexuality in times of cultural
“panic” over sex and morality. It notes that relationships outside of the “proper” boundaries—
interracial relationships, same-sex relationships, nonmonogamous relationships—have been
unfairly sexualized and labeled as deviant while actually providing caretaking and stability.\(^\text{17}\)
Finally, Part IV uses the unique example of polyamorous relationship forms to argue that the
state should reject the number, sexual, and gender requirements in marriage and instead should

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\(^{17}\) Analogies between interracial marriage bans, same-sex marriage bans, and polygamy bans
have been sharply criticized from many different perspectives in the current debate about
571. These attacks often assume that drawing a comparison between these bans also requires
comparing the disadvantaged groups involved (interracial couples, same-sex couples,
nonmonogamous groups) or equating the prejudices in question (racism, homophobia, prejudice
against nonmonogamists). *See* Lenhardt, *supra* note 17, at 840. This article is not meant to do
either of these things. Instead, it argues that legal regulation of sexuality based on disgust
instead of rational argument is a common factor in all of these cases, regardless of any other
similarities or differences between these groups/prejudices.
regulate intimate relationships only to support caretaking families, in whatever forms those families happen to take.18

II. THE SPECTER OF NONMONOGAMY: THE SAME-SEX MARRIAGE DEBATE AND THE CURRENT SLIPPERY SLOPE

One of the most potent arguments against same-sex marriage is that it will lead us down the “slippery slope” to legalized polygamy.19 Responses to this type of slippery slope argument

18 This article will analyze nonmonogamous relationships in terms of the “ideal” nonmonogamous/polyamorous relationship because current marriage law is based on the “ideal” of heterosexual monogamous marriage. See Josephine Ross, Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage, 55 SMU L. REV. 1657, 1673–75 (2002) [hereinafter Sex, Marriage and History]. Problematic realities (abuse, violence, and high divorce rates, for example) exist within any category of relationship form, including heterosexual monogamous marriage. See id. at 1674. Only if the problematic realities of nonmonogamous/polyamorous relationships/family structures are significantly worse than the current marriage standard is it justifiable to use these potential problems as a reason for not allowing state recognition of multipartner relationships. Indeed, the state has not stopped recognizing heterosexual monogamous relationships because of the high divorce rate or because these relationships are sometimes abusive. See id. Determining the level of harm associated with different relationship forms is beyond the scope of this article; however, this article uses the “ideal” nonmonogamous/polyamorous relationship/family as a reference point just as marriage law uses the “ideal” monogamous heterosexual relationship/family as justification.

range from merely dismissing it as ridiculous to trying to distinguish same-sex marriage from the other taboos on the slippery slope. Both sides seem to agree that polygamy should not be legalized, but it is unclear whether this consensus is based on the nonmonogamous relationship/family form per se or on a particular vision of a particular type of nonmonogamy—patriarchal polygyny. This section will define patriarchal polygyny and outline the reasons why polygamy has historically been and still is criminalized in this country. Then, this section will

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on Contemporary Family Discourse and the Incest Taboo, 99 NW. U. L. REV. 1543, 1544–45, n.5 (2005) (quoting Senator Rick Sanatorum’s remark that “[i]f the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything”).

20 Compare Ruth K. Khalsa, Polygamy as a Red Herring in the Same-Sex Marriage Debate, 54 DUKE L.J. 1665, 1668 (2005) (arguing that polygamy is not relevant to the same-sex marriage debate because “polygamy is fundamentally antithetical to the principles informing the institutional purpose of marriage in American society and therefore unlikely to be legalized”), and Hema Chatlani, In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy, 6 APPALACHIAN J.L. 101, 104 (2006) (arguing that same-sex marriage and polygamy are distinguishable), with Elizabeth Larcano, The Pink Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage, 38 CONN. L. REV. 1065, 1068 (2006) (arguing that the legalization of polygamy is a possibility), and Gher, supra note 14, at 562–63, 572 (noting that there are certain linkages between same-sex marriage and polygamy and stating that some within the GLBTQ community support legal protection for polygamy).
use polyamory, another nonmonogamous relationship/family form, to suggest that nonmonogamous family forms are not necessarily destructive.

A. Polygamy

Polygamy has been criminalized in the United States since its founding for three main reasons.\(^{21}\) First and foremost, the people of the United States have historically considered and still consider polygamy immoral, even barbaric.\(^{22}\) Second, it is thought to harm society as a


whole because it is anti-democratic.\textsuperscript{23} Third, people believe it harms individual women and children in polygamous families.\textsuperscript{24}

However, these reasons may not sufficiently justify the criminalization of polygamy. Law Professor Shayna M. Sigman suggests that polygamy has been criminalized based on mere assumptions of harm, not actual harm, and that “[r]eliance on the visceral abhorrence to polygamy has preempted the development of a full legal debate on the merits of polygamy criminalization and prevented a discussion of how polygamy fits within the framework of governmental regulation of the family.”\textsuperscript{25} Indeed, Sigman demonstrates that it is not the relationship/family form of polygamy that causes the harms to the democratic state and to the treatment of women but instead the particular practices of certain communities that may also be

\textsuperscript{23} Sigman, \textit{supra} note 21, at 168; \textit{e.g.} Strassberg, \textit{Considering Polyamory}, \textit{supra} note 11, at 487 (arguing that 19th century Mormon polygamy supports a despotic rather than a democratic state because it socializes family members to reject “abstract equality and state citizenship” in favor of “personal, hierarchical rule” by suppressing family members’ individuality and stressing the importance of family ties); Martha Strassberg, \textit{Distinctions of Form and Substance: Monogamy, Polygamy, and Same-Sex Marriage}, 75 N.C. L. REV. 1501, 1509–10 (1997) (same).

\textsuperscript{24} Sigman, \textit{supra} note 21, at 168; \textit{e.g.} Berkowitz, \textit{supra} note 22, at 640 (stating that “[t]o protect the innocent victims from exploitation, sexual slavery, and psychological manipulation, our society must . . . uniformly condemn the destructive practice of polygamy”).

\textsuperscript{25} Sigman, \textit{supra} note 21, at 106.
polygamous.\textsuperscript{26} Others, like Law Professor Michele Alexandre, argue that regardless of the harms associated with polygamy, people should be able to choose polygamy over monogamy if they so desire.\textsuperscript{27}

Whether the traditional justifications for criminalizing polygamy are valid or not, they are closely associated with polygyny, where one man is married to multiple women.\textsuperscript{28} But other nonmonogamous relationship forms exist.\textsuperscript{29} One such relationship form is polyamory.

\textsuperscript{26}Id. at 163–64. Sigman argues that “[r]ather than the gender biased monolith some have made it out to be, polygyny is a multi-faceted choice of family structure, rooted in the economic, sociological, cultural, and biological particulars of a given society.” Id.

\textsuperscript{27}Michele Alexandre, Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility? 18 HASTINGS WOMEN’S L.J. 3, 5 (2007) (noting that polygamy is often associated with the oppression of women but advocating for the acceptance of women’s agency in choosing polygamy as well as the protection of women, particularly Muslim women, who are in polygamous relationships).

\textsuperscript{28}Emens, supra note 10, at 282.

\textsuperscript{29}Id. at 301–02. The term “polygamy” technically includes both polyandry and polygyny but is most commonly equated with polygyny. Cleveland v. United States, 329 U.S. 14, 25–26 (1946). Polyandry is another type of multipartner relationship where one woman has multiple husbands. Id. Other multipartner relationships, such as polyamory, are not defined by the gender of the partners—a relationship may include multiple men and multiple women. See supra text accompanying notes 2–6; Gher, supra note 14, at 561 & n.2. The practice of these relationships varies across cultures and has been given different names at different times. See e.g. Melita J. Noël, Progressive Polyamory: Considering Issues of Diversity, Special Issue on Polyamory, 9(5)
B. Polyamory

Polyamory is “a form of relationship where it is possible, valid, and worthwhile to maintain (usually long-term) intimate and sexual relationships with multiple partners simultaneously.”

This “ethical non-monogamy” is a practice but also a theory of relationships, guided by certain ideals and values, such as self-knowledge, radical honesty, consent, self-possession, and the privileging of love and sex. There are various polyamorous relationship


30 Jin Haritaworn, Chin-ju Lin & Christian Klesse, Polylogue: A Critical Introduction to Polyamory, Special Issue on Polyamory, 9(5) SEXUALITIES 515, 515 (SAGE 2006). Polyamory has come out of various social movements, such as the feminist, sexual liberation, LGBT and queer movements as well as the commune movements of the 1960s and 1970s. Id. at 517–18.

31 Emens, supra note 10, at 283, 320. Self-knowledge, in terms of “core” identity as well as daily emotions, needs, and desires, is necessary to a healthy relationship. Id. at 321. Radical honesty as a relationship philosophy is in part “a reaction to the gap between the fantasy and the reality of compulsory monogamy” and requires absolute honesty and open communication between or among partners. Id. at 322. With this radical honesty, partners should be able to truly consent to their intimate and sexual relationships through explicit negotiation and agreement; “Because no one relationship model provides a blueprint for the number, shape, or type of bonds among individuals within and without poly relationships, polys must develop their
models and types. Within each group, members may be committed to each other on varying levels or members may all be committed to each other at the same level (sometimes called own models through the agreement of the partners.” Id. at 325. Through self-possession—a philosophical response to the dependence, possessiveness, and control in marriage that has historically disadvantaged women—partners ideally “resist the pressure . . . to merge into one being” and remain autonomous and independent individuals. Id. at 327 (citing Marny Hall, Turning Down the Jezebel Decibels, in THE LESBIAN POLYAMORY READER: OPEN RELATIONSHIPS, NON-MONOOGAMY, AND CASUAL SEX 47, 55–59 (1999)). As independent individuals, polyamorists strive to let go of jealous and possessive feelings that they see as “not symptoms of love, but as a pathology of insecurity”—correspondingly, they believe that love and sex are positive aspects of life that should not be limited or suppressed. Id. at 328–30. These ideals are descriptive as well as aspirational: together, they create an “ethical vision” for all relationships, not just polyamorous ones. Id. at 320.

32 Strassberg, Considering Polyamory, supra note 11, at 444. A single individual may have simultaneous but separate dyadic relationships with multiple people. Id. A couple may “open” their marriage to additional dyadic relationships, so that each partner in the couple has an additional partner(s). Id. The additional partners in an “open marriage” may be intimately connected with each other—emotionally and/or sexually—or not. Id. at 444–45. Triads might also exist independent of a “primary” couple, instead simply made up of three people in two or three dyadic relationships. Id. These relationship “basic units” (single, couple, triad) may be combined in various ways to form larger groups. Id.
“polyfidelity”). Each member of a group is not necessarily sexually involved with every other member of the group—members may be linked by specific types of commitments to each other, which may be purely emotional or supportive, not sexual. Additionally, groups may choose varying levels of sexual exclusivity.

Even though polyamory is a nonmonogamous relationship form distinct from traditional polygamy, it is often viewed with the same negative associations. Polyamory may be seen as inherently wrong, unhealthy, or taboo. However, the supposed harms that the state has used to justify criminalizing polygamy may not apply to polyamory. Concerns about supporting a despotic state instead of a democratic state may not apply to polyamory in the same way as fundamentalist polygyny. Because polyamory is not defined in terms of gender, it cannot be

33 Id. at 445–46. “Primary relating” is a marriage-like relationship, “secondary relating” is an ongoing/long-term but limited relationship, and “tertiary relating” is an intense short-term relationship. Id. at 445.

34 Id. at 445–47.

35 Id. at 446–47. “Closed group marriages” are sexually exclusive within the group, while “open group marriages” are not. Id.

36 Emens, supra note 10, at 301–02.

37 Id. at 333–38.

38 Strassberg, Considering Polyamory, supra note 11, at 562. Strassberg concludes that polyamory may be “compatible with the modern liberal state” if the group marriages are limited to triads or quads, thereby avoiding the criticisms of larger groups that “affect individual autonomy, the maintenance of distinctive public and private spheres, and individual reconciliation with social life and identification with the state.” Id. at 562–63.
said to oppress women—groups may be composed of any combination of genders (men, women, transgender, etcetera) and sexual orientations (heterosexual, homosexual, bisexual, etcetera).39 Children may benefit from having more parents to care for them.40 Even if the justifications for criminalizing traditional polygamy are legitimate, the same justifications may not support the criminalization of polyamory, which has the potential to be a socially positive relationship form.41 If polyamory is potentially positive, why do both sides in the debate over same-sex marriage tend to agree that nonmonogamous marriages should not be legalized?

39 Meg Barker, *This Is My Partner, and This Is My . . . Partner’s Partner: Constructing a Polyamorous Identity in a Monogamous World*, 18 *J. CONSTRUCTIVIST PSYCHOLOGY* 75, 77 (2005) (observing that “when combined with the notion that it is possible to love more than just one gender . . . polyamory . . . presents the potential for challenging the idea that people are attracted to members of the ‘opposite sex’ . . . This troubles the male/female and straight/gay binary constructs at the root of compulsory heterosexuality”). Polygynous marriages are not always oppressive to women, however. Emens, *supra* note 10, at 334. In fact, some women may prefer polygynous marriages because they may allow for more “solidarity among women” or give women more options when choosing a husband. *Id.*

40 Emens, *supra* note 10, at 337; *see supra* note 5 and accompanying text; Derek McCullough & David S. Hall, *Polyamory—What It Is and What It Isn’t*, 6 *ELECTRONIC J. HUMAN SEXUALITY* (Feb. 27, 2003) (stating that “Children having multiple parents are more likely to be better cared for and less likely to feel abandoned if someone leaves the family”).

41 McCullough & Hall, *supra* note 40. “Polyamorists believe that they represent true ‘family values.’ They have the courage to live an alternative lifestyle that, while condemned by society, is satisfying and rewarding.” *Id.* They do not argue that everyone should be polyamorous but
III. SEX PANICS, DISGUST, AND OUTSIDER RELATIONSHIPS

A. Sex Panics

The current slippery slope rhetoric that uses the specter of abusive polygamist groups to argue against same-sex marriage is not unique. As feminist anthropologist Gayle Rubin argues, while “sex is always political, . . . there are also historical periods in which sexuality is more sharply contested and more overtly politicized. In such periods, the domain of erotic life is, in effect, renegotiated.” \(^{42}\) This renegotiation may shift the line that society had previously drawn between proper and improper sexuality. \(^{43}\) Currently, the debate is focused on same-sex relationships—same-sex sexuality has already moved from being criminalized to being constitutionally protected, \(^{44}\) and now same-sex marriage is up for debate. \(^{45}\) Nonmonogamy may instead that everyone should be accepting of varying healthy relationship choices. \textit{See e.g. supra} text accompanying note 6.

\(^{42}\) Rubin, \textit{supra} note 9, at 4.

\(^{43}\) \textit{Id.}

\(^{44}\) \textit{See} Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986), \textit{overruled by} Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting). In \textit{Bowers}, the Court found that if it were to protect “voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.” 478 U.S. at 195–96. In \textit{Lawrence}, the dissent used the slippery slope to argue that the \textit{Bowers} decision should stand:
be the next relationship form to be renegotiated—but any renegotiation will be a struggle. Rubin
describes this struggle as a “Moral Panic”:

Moral Panics are the ‘political moment’ of sex, in which diffuse attitudes are
channeled into political action and from there into social change. . . . The
criminalization of innocuous behaviors is rationalized by portraying them as
menaces to health and safety, women and children, national security, the family,
or civilization itself. Even when activity is acknowledged to be harmless, it may
be banned because it is alleged to ‘lead’ to something ostensibly worse . . .

The fear that same-sex sexuality and same-sex marriage will lead to the destruction of society is
familiar and often includes the fear that polygamy is the next step on the slippery slope to chaos:

After the introduction of marriage between homosexuals . . . [the definition of
marriage] will be supported by nothing more substantial than the opinion of a
single judge or by a panel of black-robed justices. . . . Given that unstable legal

State laws against bigamy, same-sex marriage, adult incest, prostitution,
masturbation, adultery, fornication, bestiality, and obscenity are likewise
sustainable only in light of Bowers’ validation of laws based on moral choices.
Every single one of these laws is called into question by today’s decision.

Lawrence, 539 U.S. at 588 (Scalia, J., dissenting).

See Relationship Recognition in the U.S., HUMAN RIGHTS CAMPAIGN, Nov. 13, 2008,
http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (showing that
Massachusetts and Connecticut are the only states that recognize same-sex marriage, but that five
other states as well as Washington, D.C., offer legal benefits equivalent to marriage to same-sex
couples, and that three states offer some of the legal benefits of marriage to same-sex couples);
Statewide Marriage Prohibitions, HUMAN RIGHTS CAMPAIGN, Nov. 6, 2008,
http://www.hrc.org/documents/ marriage_prohibitions.pdf (showing that twenty-eight states have
passed constitutional amendments and an additional fifteen states have passed laws limiting
marriage to one man and one woman).

Rubin, supra note 9, at 25.
climate, it is certain that some self-possessed judge will soon rule that three men,
or three women, can marry. Or five men and two women. Or four and four. Who
will be able to deny them that right? The guarantee is implied, we will be told, by
the Constitution. Those who disagree will continue to be seen as hatemongers
and bigots. Indeed, those charges are already being leveled against Christians
who espouse biblical values. How about group marriage? Or marriage between
daddies and little girls? Or marriage between a man and his donkey? Anything
allegedly linked to civil rights will be destroyed. Now, that’s more or less a
prophecy. Not a divine prophecy, but a prediction . . . [same-sex marriage] will
destroy marriage. . . the family [will be] destroyed. That is the foundation for
Western civilizations, and I tell you it will bring the destruction of this nation and
many others if we go in that direction.47

Though this worry about same-sex marriage may seem extreme, it cannot not simply be
dismissed as a fringe viewpoint—similar sentiments have been expressed by United States
Supreme Court Justice Scalia as well as members of Congress.48 This worry mirrors the
historical worry that interracial marriage would destroy marriage and lead to sexual/relationship

47 James Dobson, *Marriage Under Fire: Arguments Against Same-Sex Marriage*, FOCUS ON THE
see also Louis P. Sheldon, *The Destruction of Marriage Precedes the Death of a Culture*,
/pdf_files/deathofmarriage.pdf (arguing that “nations decline and eventually die when sexual
immorality becomes rampant and the traditional family is discarded in favor of group sex,
homosexuality, infidelity, and unrestrained sexual freedom).

48 See supra notes 19 & 44; Romer v. Evans, 517 U.S. 620, 648–49 (1996) (Scalia, J., dissenting)
(arguing that invalidating criminal sodomy laws could lead to invalidating laws against
polygamy).
chaos, where all sexual/relationship taboos—including polygamy—would be considered acceptable despite their “revolting” and “unnatural” character.\textsuperscript{49} As one court stated:

\begin{quote}
Extending the rule [of allowing interracial marriage] to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk of Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.\textsuperscript{50}
\end{quote}

These arguments—historically against interracial marriage and today against same-sex marriage—both use polygamy as a specter of particularly heinous immorality to evoke a gut reaction of disgust for not only the relationship forms themselves (same-sex, interracial, nonmonogamous) but also the sexual taboos that underlie them (sodomy, miscegenation, promiscuity).

\textbf{B. Sexualization and Disgust as Boundary Policing}

Society often defines taboo relationships/family forms by the taboo sexual practices that are thought to take place within them, regardless of whether these practices actually take place or


\textsuperscript{50} \textit{Id.} (quoting \textit{State v. Bell}, 66 Tenn. 9 (1872)).
are genuinely harmful.\textsuperscript{51} The sexualization of nonmonogamous (as well as interracial and same-sex) relationships and family forms links these relationships to the “outer limits” of “bad, abnormal, unnatural, damned” sexuality as opposed to the “charmed circle” of “good, normal, natural, blessed” sexuality.\textsuperscript{52} In doing so, it contributes to the marginalization of these relationships and family forms and the “panic” surrounding them.\textsuperscript{53} With this sexualization and panic, the gut reaction of disgust replaces the rational arguments that would be needed to legitimately police the boundaries of sexuality and marriage.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{51} See e.g. Ross, \textit{Sex, Marriage and History}, supra note 18, at 1669 (stating that “sexualization is a negative hardship imposed from the outside onto taboo . . . or non-sanctioned . . . relationships).
\item \textsuperscript{52} Rubin, \textit{supra} note 9, at 13. Rubin’s charts of charmed circle v. the outer limits and the struggle over where to draw the line are included \textit{infra} at app. I and app. II. Note that Rubin’s charts greatly simplify the categories of oppression that actually exist: “There is, in fact, a matrix of different hierarchies along the axis of gender, race, ethnicity, sexual orientation, class, national origin and culture.” Petula Sik Ying Ho, \textit{The (Charmed) Circle Game: Reflections on Sexual Hierarchy through Multiple Sexual Relationships}, Special Issue on Polyamory, 9(5) \textbf{Sexualities} 547, 548 (SAGE 2006).
\item \textsuperscript{53} Rubin, \textit{supra} note 9, at 13.
\item \textsuperscript{54} Cahill, \textit{supra} note 19, at 1545–46 (discussing the slippery slope and the incest taboo). Incest is another sexual taboo on the slippery slope used to argue against same-sex marriage, but same-sex marriage advocates quickly dismiss the comparison of same-sex sexuality to incest. \textit{Id.} As Law Professor Courtney Megan Cahill suggests:
\end{itemize}
Various cultural mechanisms allow for this sexualization and disgust.\(^{55}\) First, sexual essentialism makes sex appear to be unchanging and uninfluenced by cultural forces even though it is impossible to examine sexuality outside of the social meanings attached to it.\(^{56}\) Thus, the

Unlike the other taboos on the slippery slope of sexual deviance, incest has become a term that signifies any deviation from the norm; consequently, the very term “incest” is a powerful way to provoke an almost visceral disgust toward any relationship to which it is compared. . . . The degree to which the incest taboo has been used to inspire disgust against a range of consensual relationships—its sheer overinclusiveness—is perhaps the best reason why we should not dismiss the incest/same-sex marriage comparison so lightly. Quite the contrary, the appearance of incest of the slippery slope as a disgust-provoking mechanism demands rigorous critique. . . . [D]isgust—or . . . ‘the wisdom of repugnance’—is simply an unacceptable ground for legal regulation.

\textit{Id.} Nonmonogamy is often equated with incest in our cultural psyche—though abusive incest does occur in some polygamous contexts, see \textit{supra} note 13, it also occurs in some traditional monogamous heterosexual marriages. \textit{See} Jocelyn Ho, \textit{Note, Incest and Sex Offender Registration: Who is Registration Helping and Who is it Hurting?} 14 \textsc{Cardozo} J. L. \& \textsc{Gender} 429, 432–33 \& nn.23, 27 (2008) (noting that most incestuous sexual abuse is perpetrated by fathers or stepfathers on their daughters or stepdaughters). It is not relationship forms themselves that cause abuse, it is abusive people who are in the relationships. Interestingly, in one case involving a polyamorous triad, the judge referenced the possibility of all three partners as well as their child in bed together, when in reality the triad never all slept in the same bed, much less in the same bed with their child. Emens, \textit{supra} note 10, at 338–39 (quoting In the Matter of A.M., No. K1719 (Juv. Ct., Memphis \& Shelby County, Tenn., April 16, 1999)).

\(^{55}\) \textit{See} Rubin, \textit{supra} note 9, at 11.

specific cultural values ascribed to a particular sexual practice or relationship form are taken as its reality. Second, this conception of sex as absolute is compounded by the general belief that sex is a “dangerous, destructive, negative force” and that “[s]mall differences in value or behavior are . . . cosmic threats.” Third, these small differences are organized into a hierarchical system of sexual value, where people whose sexual practices rank high on the scale are “rewarded with certified mental health, respectability, legality, social and physical mobility, 2003). Stoltenberg explains how certain expressions of sexuality become ingrained to the point where they seem to exist outside of culture even though cultural forces shaped them:

Male sexual identity is the conviction or belief, held by most people born with penises, that they are male and not female, that they belong to the male sex. In a society predicated on the notion that there are two “opposite” and “complementary” sexes, this idea not only makes sense, it becomes sense; the very idea of male sexual identity produces sensation, produces the meaning of sensation, becomes the meaning of how one’s body feels. The sense and the sensing of a male sexual identity is at once mental and physical, at once public and personal. . . . The idea gives the feelings social meaning; the idea determines which sensations are sought.

*Id.* at 257 (emphasis added).

57 See Rubin, *supra* note 9, at 11; *c.f.* Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 10–11 (10th anniversary ed., Routledge 1990). Butler argues that the very idea of sex—male and female—as essential or natural is a cultural construct. *Id.* She does not deny that physical sex exists but instead suggests that people can only see sex as it is interpreted and shaped by cultural forces. Judith Butler, *Imitation and Gender Insubordination, reprinted in The Lesbian and Gay Studies Reader* 307, 314 (Henry Abelove et al. eds., 1993). Sex—the act—is similarly interpreted and shaped by culture in such a way that it appears “natural,” free of cultural forces. See Rubin, *supra* note 9, at 11.

58 Rubin, *supra* note 9, at 11.
institutional support, and material benefits.”  For example, society rewards heterosexual monogamy for its normalcy and supposed morality with not only social acceptance and legal protection but also legal benefits through marriage.  However, people whose sexual practices rank lower on the scale are presumed to be mentally ill and face economic penalties for their behavior. People in relationships that do not fit the heterosexual monogamy standard are effectively excluded from the social acceptance and legal benefits that come with marriage.

Additionally, those lower on the hierarchy are not seen as being nuanced and complex or “exhibit[ing] the full range of human experience.” For example, the existence of abuse in some nonmonogamous relationships and families is cited as a reason for not recognizing any of

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59 Id. at 12.

60 See infra note 104 for a list of rights and benefits given to married couples.

61 Id. at 12.

62 Id. For example, heterosexual relationships are recognized as unique relationships between two people that may also happen to include sex while gay relationships are often assumed to be entirely about sex. Many people equate gay relationships with gay sex: an elementary school teacher was accused of inappropriately discussing sex with his students after a student asked him if he was married and he explained “that he was not, but that if he were to live with someone, he would live with a man that he would ‘love the way your mom and dad love each other.’” No one would have understood the teacher as talking about sex if he had told his students the same thing about being in a relationship with a woman. Ross, Sexualization of Difference, supra note 49, at 256 (citing Doreen Iudica Vigue, “Coming Out” Stirs Debate at School, BOSTON GLOBE, June 8, 2000, at B1).
them, no matter the positive potential of some such relationships and families. Because abuse exists in some nonmonogamous families, abuse is assumed to exist in all nonmonogamous families. In contrast, the fact that abuse sometimes takes place in the context of heterosexual monogamous married relationships and their families is not considered a reason for doing away with heterosexual monogamous marriage, much less criminalizing heterosexual monogamy.

The individuals who enter heterosexual marriages are seen as just that—individuals. Some of these individuals may be abusive, but their abuse is an individual problem, not linked to the fact that they are part of a heterosexual monogamous marriage. This example illustrates how certain types of relationships are not only sexualized—defined by the sexual acts that take place within them—but addressed as a group without potential for difference.

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63 See Gher, supra note 14, at 585 (noting that “although research indicates that women in polygamous marriages often face sexual, physical, and emotional abuse at the hands of their husbands, such abuse similarly occurs within monogamous heterosexual and LGBTQ, married and unmarried relationships”); c.f. Richard E. Redding, It’s Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust, 15 DUKE J. GENDER L. & POL’Y 127, 133 (2008) (listing promiscuity and the risk of sexual abuse in lesbian and gay households as often-cited but insufficient reasons for denying gays and lesbians parenting rights).

64 See Summer L. Nastich, Comment, Questioning the Marriage Assumptions: The Justifications for “Opposite-Sex Only” Marriage as Support for the Abolition of Marriage, 21 LAW & INEQ. 114, 144–46 (2003) (using case law to show the horrible abuse that can happen within legal, socially sanctioned marriages).

65 Rubin, supra note 9, at 9–14.
Nonmonogamous relationships and family forms are sexualized much like same-sex and interracial relationships and families have been in the past (and continue to be, to a lessening extent, today). These “outsider” relationships are seen as primarily sexual and other aspects of the relationship (love, commitment, family) are downplayed. This sexualization of nonmonogamous relationships both contributes to and is a product of the marginalization of these relationships and family forms.

In our not-so-distant past, interracial sex was criminalized and interracial marriage was banned. Interracial sexuality was considered perverse, deviant, and pornographic, and the veil of sexual privacy that is afforded socially/legally-acceptable relationships was not afforded interracial couples. Banning interracial marriage did not prevent interracial sexuality but did

66 Ross, Sexualization of Difference, supra note 49, at 260 (discussing the history of “outsider couples” and comparing the historical sexualization of mixed-race couples to the current sexualization of same-gender couples). In Rubin’s chart of The Charmed Circle v. The Outer Limits, included infra app. I, monogamy and promiscuity are opposites. Nonmonogamy is thus equated with promiscuity, which is considered necessarily sexually deviant and lacking in commitment. Ethical nonmonogamy—whether it be simply sexual or the basis for a family—is nowhere in this either/or picture. See DOSSIE EASTON & CATHERINE A. LISZT, THE ETHICAL SLUT 25, 3, 153 (Greenery Press 1997) (challenging the derogatory use of the word “promiscuous” and discussing ethical nonmonogamy, from the purely sexual to the stably polyamorous).

67 Ross, Sexualization of Difference, supra note 49, at 256.

68 Id. at 257–62.

69 Id. at 259. As Ross articulates, “[n]ormally, people announce they are married and no one asks if they are having sex regularly or what they do in bed. . . . marriage allows one to be very
push it underground by pressuring couples to keep their relationships secret, making interracial sexuality seem inferior to intra-racial sexuality. Pushing interracial sexuality underground made it appear to be about illicit sexual deviance instead of love, commitment, or family. Indeed, “the obsession with sexuality played a key role in maintaining the racist power imbalance and the continued second-class treatment of certain relationships”—namely, interracial relationships.

Treatment of same-sex sexuality and same-sex marriage is strikingly similar. Same-sex sexuality, which had previously been criminalized, was given constitutional protection in 2003. Same-sex marriage is sharply contested as some states allow relationship recognition for public about one’s relationship without sacrificing sexual privacy. However, this was not the case for many mixed-race couples.” Id.; Lenhardt, supra note 17, at 870 (stating in the context of antimiscegenation laws that “[R]ace, sexuality, [and] gender . . . have been mutually conditioning in the production of American whiteness,” and in social structures and norms”)

(quotating Randall Kennedy, Lecture, Race Relations Law in the Canon of Legal Academia, 68 Fordham L. Rev. 1985, 1997 (2000)).

70 Ross, Sexualization of Difference, supra note 49, at 260.
71 Id.
72 Id. at 261. “[G]ender issues were completely intertwined with racial bigotry both in the origins and effects of the interracial marriage taboo,” Ross explains: the laws against interracial sex and marriage were meant to “protect” white women from black men. Id. at 260. White men, however, remained free to have sex with black women. Id.
same-sex couples and others ban same-sex marriage.\footnote{Supra note 45.} Underlying this debate is a perception of same-sex sexuality as deviant and the corresponding lack of sexual privacy afforded same-sex couples.\footnote{Ross, Sex, Marriage & History, supra note 18, at 1659–60, 1671; see Redding, supra note 63, at 134 (arguing that “public opposition to gay marriage . . . is animated in large part by a deeper concern—the proverbial ‘elephant in the room’ . . . is the visceral disgust reaction that many Americans feel toward homosexual sex, particularly gay anal sex, and the accompanying moral intuition that homosexuality and homosexual relationships are immoral”).} The sodomy laws of the recent past and the gay marriage bans of the present do not prevent same-sex sexuality and same-sex relationships.\footnote{C.f. Ross, Sexualization of Difference, supra note 45, at 260 (noting that interracial marriage bans did not prevent interracial sex or interracial relationships).} Instead, they push same-sex relationships underground by signaling societal disapproval of these relationship forms and encouraging couples to keep their relationships a secret, which in turn reinforces the focus on illicit sex rather than the potential for love, commitment, and family.\footnote{Id. at 262–88; see Rubin, supra note 9, at 9–14.}

Sexualization also contributes to negative attitudes toward nonmonogamous relationships. Polygamy is currently criminalized, and the potential for legalized polygamous marriage holds a prominent place in our cultural psyche because it is used to argue against same-sex marriage.\footnote{Gher, supra note 14, at 561–62.} Nonmonogamous relationships are perceived as deviant “sexual free-for-all[s]”, more about sex than anything else.\footnote{Emens, supra note 10, at 283.} Even polyamory, a nonmonogamous relationship form
meant to move away from the sexual negativity and gender-based oppression at the rooted of the institution of heterosexual monogamous marriage, has been stereotyped as a deviant sexual practice:

individuals and communities engaging in polyamorous practices are forced to negotiate monogamist normativities which pathologize them as untrustworthy partners and dysfunctional parents. These judgments are based in wider contexts of sex negativity which demonize all but a few practices and desires involving a small range of gendered bodies.\(^{81}\)

For example, actual polyamorous relationships are often equated with the multipartner sex that is a common theme in pornographic magazines and films, even though these pornographic images usually bear little resemblance to lived nonmonogamy.\(^{82}\) Polyamory is also often equated with swinging—which hinges on open social/sexual but not emotional relationships outside of marriage—even though polyamory emphasizes emotional intimacy.\(^{83}\) It is assumed to be the equivalent of adultery even though it emphasizes honesty among partners.\(^{84}\) Ultimately, “polyamory is generally invisible in our society, but . . . when it is present it is constructed as evil or, at best, strange” and almost invariably sexual.\(^{85}\)

One woman who tried polyamory herself even supports this view, suggesting that even if ethical polyamory is possible, actual polyamory is all about sex—sex that is damaging and degrading to women:

\(^{81}\) Haritaworn et al., *supra* note 30, at 518 (citations omitted).

\(^{82}\) Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity and Power*, Special Issue on Polyamory, 9(5) SEXUALITIES 251, 251 (SAGE 2006).

\(^{83}\) *Id.* at 253.

\(^{84}\) *Id.*

\(^{85}\) Barker, *supra* note 39, at 80.
[Polyamory] is not about sexuality that we are ‘reclaiming,’ but the sexuality that men desire us to have because it benefits them. Being open to the fuck, as all polyamorous women are supposed to be, is men’s definition of liberated female sexuality. However, having multiple partners at any given time is not liberating for women, for we are not seen as human, but as sexual chattel to be passed back and forth between brothers in arms.\(^{86}\)

In equating polyamory with deviant sex, this characterization does not address the potential for committed polyamorous relationships, much less polyamorous family forms. However, arguments for the acceptance of nonmonogamous family forms are also framed in terms of sexuality:

> [T]he Victorian prudery that triggered many of the political attacks of the late nineteenth century on the assumed sexual excesses of Mormon polygyny have been replaced by the late twentieth century attitude of sexual laissez-faire in which polygyny appears to many to be just another lifestyle choice made by consenting adults. Indeed, those who embrace contemporary alternative sexual lifestyles find it difficult to justify continued persecution of polygynists, perceived as another misunderstood sexual minority, while at the same time arguing for an end to legal sanctions and non-recognition for their own sexual lifestyle.\(^{87}\)

This sexualization contributes to negative attitudes toward nonmonogamous relationships and leaves them with a lack of privacy because sexuality overshadows the other potential aspects of the relationship. Much like with interracial and same-sex relationships, laws criminalizing nonmonogamy do not prevent it but push it underground by pressuring polyamorists to keep their relationships a secret to avoid not only negative stereotypes but legal consequences.\(^{88}\) In

\(^{86}\) Kimberley Kreutzer, *Polyamory on the Left: Liberatory or Predatory? OFF OUR BACKS* 40 (May/June 2004) *but see* Sheff, *supra* note 82, 253 (finding that polyamory helps some women develop their capacity to “make active sexual choices”).

\(^{87}\) Strassberg, *Polygamy, supra* note 12, at 364.

\(^{88}\) See Elizabeth Marquardt, *Two Mommies and a Daddy: The Future of Polygamy, CHRISTIAN CENTURY,* July 25, 2006, at 8 (noting that polyamorists feel pressured to keep their relationships
this way, laws against polygamy reinforce the focus on illicit sex rather than the potential for love, commitment, and family in polyamorous relationships.

C. Marriage Law as Boundary Policing

The state polices the boundaries of “proper” sexuality and reinforces sexual hierarchy through marriage.\textsuperscript{89} Criminalization of certain types of sexuality is often linked in the cultural psyche with bans on marriage between the people who commit those sexual acts.\textsuperscript{90} Another

a secret: “They say they must keep their many loves in the closet; that they cannot risk revealing their personal lives for fear of losing their jobs or custody of their children; that being poly is just who they are”).

\textsuperscript{89} See Ricks, \textit{supra} note 9, at 272 (noting that “Marriage has traditionally functioned at least in part as a regulation of sexual activity. . . . Sexual regulation [has been] a prominent function of marriage”); \textit{c.f.} Rubin, \textit{supra} note 9, at 21 (referencing laws that explicitly regulate sexual behavior and stating that “sexuality is political. It is organized into systems of power, which reward and encourage some individuals and activities, while punishing and suppressing others”).

\textsuperscript{90} See \textit{e.g.} Ricks, \textit{supra} note 9, at 272–73 (in reference to regulation of same-sex sexuality and marriage); Ross, \textit{Sexualization of Difference, supra} note 45, at 262–63 (in reference to regulation of interracial sexuality and marriage). In \textit{Lawrence v. Texas}, the Court took care to note that by decriminalizing sodomy it was not making a statement on same-sex marriage. 539 U.S. 558, 578 (2003). In his dissent, Scalia disagreed, suggesting that the \textit{Lawrence} decision would in fact lead to recognition of same-sex marriage:

the Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it. . . . Today’s opinion dismantles the structure of
slippery slope worry is that decriminalization of a sex act will lead to state sanctions for the relationships culturally defined by that sex act.\textsuperscript{91} We have already slid down this slope in the case of interracial relationships: interracial sex is no longer criminalized, and interracial marriage is no longer banned.\textsuperscript{92} We may be sliding down that slope in the case of same-sex relationships: same-sex sex acts are no longer criminalized, and same-sex marriage is up for debate.\textsuperscript{93} Perhaps constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.

\textit{Id.} at 604 (Scalia, J., dissenting). Similarly, Law Professor Val D. Ricks argues that court decisions recognizing same-sex relationships have depended on a “right to free sex” articulated in \textit{Lawrence}. Ricks, \textit{supra} note 9, at 271–73 (citing Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. State 744 A.2d 864 (Vt. 1999)).

\textsuperscript{91} \textit{See} Ross, \textit{Sexualization of Difference}, \textit{supra} note 45, at 262–63.

\textsuperscript{92} \textit{Compare} Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding Virginia’s Racial Integrity Act 1924, which criminalized interracial marriage, unconstitutional), \textit{and} McLaughlin v. State of Fla., 379 U.S. 184 (1964) (invalidating as unconstitutional Florida’s criminal statute punishing “any Negro man and white woman or white man and Negro woman who are not married to each other and who shall habitually live in and occupy the same room in the nighttime”), \textit{with} Pace v. Alabama, 106 U.S. 583 (1882) (upholding an Alabama law that criminalized interracial sex and marriage).

\textsuperscript{93} \textit{See supra} note 45; Gher, \textit{supra} note 14, at 561–62.
nonmonogamy is next—it is currently both criminalized under polygamy/bigamy statutes as well as effectively banned by the monogamy requirement for civil marriage.

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This link between de/criminalization of certain sex acts and the sanctioning of the relationships in which those sex acts are thought to occur shows that marriage law regulates not only family form but also sexuality. Indeed, the current definition of marriage assumes that the partners are sexually involved with each other—if marriage law were not about sexuality, it would not have this requirement. When the state supports only certain family forms, it is necessarily also regulating the sexuality (or lack thereof) within those relationships.

Another way that the state controls sexuality through marriage is by sanctioning only families that are presumed to internally regulate sexuality in a state-approved way and perpetuate

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95 See supra note 75 (showing that some states recognize same-sex partnerships but all states limit marriage to two partners). For example, the Florida Statutes define marriage as follows: “For purposes of interpreting any state statute or rule, the term ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the term ‘spouse’ applies only to a member of such a union.” FLA. STAT. ANN. § 741.212(3).

96 Ricks, supra note 9, at 272–73 (arguing that “once the right to free sex (or the derivative right to marry) is held to trump marriage as sexual regulation, the legal analysis of marriage regulation changes . . . [and] the majoritarian choices in favor of traditional marriage must be justified against that right”).

97 Rubin, supra note 9, at 22.
a particular moral code.\textsuperscript{98} In other words, by \textit{directly} sanctioning heterosexual monogamous marriage, the state also \textit{indirectly} supports the perpetuation of the heterosexual monogamous marriage standard: heterosexual married couples are assumed to be more likely to teach their children that heterosexual and monogamous relationships are proper or preferred and that other types of relationships are comparatively immoral or discouraged.\textsuperscript{99} Indeed, protecting children

\textsuperscript{98} \textit{See} Redding, \textit{supra} note 63, at 128. For example, courts and policymakers often worry that children raised by same-sex parents will be more likely to be gay or lesbian themselves and have gender identity issues. \textit{Id.} at 132–33. Indeed, parents—even same-sex parents—tend to hope that their children will grow up to be heterosexual because of the social approval that comes with reproducing heterosexual norms. \textit{See} José Gabilondo, \textit{Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction}, 28 B.C. THIRD WORLD L.J. 1, 3–4 (2008) (comparing parents’ “taste” for heterosexual children to adoptive parents’ well-documented “taste” for white children over black children). If same-sex sexuality were not taboo, however, preventing children from growing up to be gay, lesbian, or bisexual would not be a valid concern. Similarly, if gender-transgressive behavior were not taboo, then preventing children from having gender “issues” would not be a valid worry. Yet courts continue to treat the law as a boundary-policing mechanism by making “the normative status of heterosexuality a social engineering project in need of legal subsidies . . . as though this majority orientation would perish but for our efforts on its behalf.” \textit{Id.} at 10–11 (citing Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006)).

\textsuperscript{99} \textit{See} Redding, \textit{supra} note 63, at 132–33.
is one of the reasons often cited for banning gay and nonmonogamous marriage. Presumably, the state must protect children from the sexual perversity immorality of their parents’ relationship. One aspect of this protection is preventing children from understanding non-traditional family forms: if children are exposed to same-sex or nonmonogamous relationships, they might be more likely to accept these relationships as normal.

Perhaps the state should not use marriage law to regulate sexuality and perpetuate a certain moral code—particularly when these regulations are rooted in moral panic and gut reactions of disgust rather than rational argument. If regulating sexuality is not a legitimate task for marriage law, however, what exactly is its purpose?

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100 See id. (in reference to same-sex marriage); supra note 13 and accompanying text (in reference to nonmonogamous marriage).

101 Id.

102 Ross, Sexualization of Difference, supra note 49, at 268; see Marquardt, supra note 88, at 9 (relaying one polyamorous mother’s statement that “Polyamory is what my kids know. They know some people have two parents, some one, some three, and some more. They happen to have four. Honestly? Kids and polyamory? Very little of it affects them unless you’re so caught up in your new loves you’re letting it interfere with your parenting”).

103 Marriage laws are not based solely on regulating sexuality and morality. There are other reasons for keeping traditional marriage, though many of these are also illegitimate: “The state’s interest in marriage is not connected to the promotion of a particular conception of appropriate gender roles, nor is to reserve procreation and raising of children to marriage.” Law Comm’n of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships xviii (2001) [hereinafter Beyond Conjugality].
IV. HOW INTIMATE ADULT RELATIONSHIPS AND FAMILY STRUCTURES, INCLUDING POLYAMOROUS FAMILY FORMS, SHOULD BE REGULATED

The state should not use marriage law to regulate sexuality or to dictate a moral code by sanctioning only morally “proper” relationship forms. Instead, the state should support intimate adult relationships by providing a framework for people who are committed to caring for each other to receive state recognition, rights, and benefits, as well as take on obligations that will help them create a stable environment.\(^{104}\) Whether the people who are committed to caring for

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\(^{104}\) **BEYOND CONJUGALITY**, *supra* note 103, at xviii. Approximately 1,400 legal rights and benefits are currently attached to marriage—about 400 state benefits and 1,000 federal benefits. Most of these benefits cannot be arranged for outside of marriage. These rights and benefits include: joint home, car, and health insurance policies; joint parenting, adoption, foster care, custody, and visitation; automatic hospital visitation rights; the right to make medical decisions for an incompetent partner; bereavement or sick leave to care for a partner or child; divorce protections (community property and child support); joint filing of tax returns; ability (for American citizens) to petition for their spouse or fiancé to immigrate; automatic inheritance if partner dies without a will; right of survivorship (inheritance of jointly-owned real and personal property); pension plans, Social Security, and Medicare; wrongful death benefits for a surviving partner and children; right to decide or help decide where a spouse will be buried; judicial protections and evidentiary immunity; crime victims’ recovery benefits; loss of consortium tort benefits; and domestic violence protection orders. *See* U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Jan. 23, 2004); B.A. Robinson &
each other happen to be a heterosexual monogamous couple, a same-sex couple, a polygynous or polyandrous family, a polyamorous family, close friends or relatives who are not sexually involved with each other should not be the state’s concern. Indeed, if a single adult is committed to caring for a child, that relationship should similarly be recognized by the state because the state has an interest in supporting the stability of that caretaking relationship just as it has an interest in supporting other family forms.

Polyamory is a uniquely illustrative example of a family form that should be recognized in this scheme, because polyamorous family forms do not fit into any of the fundamental structural requirements of the current marriage standard. Polyamorous families challenge the monogamy requirement because they involve more than two people. These families also challenge the heterosexuality requirement because, while some polyamorous families are completely heterosexual, they also often involve other sexualities: for example, Nan, John, Amy and Julio are all heterosexual, but Akin, Dawn, and Kay’s relationship involves both heterosexuality and bisexuality. Additionally, the partners in a polyamorous relationship are

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105 Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 Va. L. Rev. 385, 394 (2008). Murray states that “perhaps the most important function that the family serves is the privatization of care for dependent members, usually children” and argues that the state should recognize the roles that “caregiving networks and nonparental caregivers” play in raising children. *Id.* Additionally, the state should seek to recognize the care given to dependants who are not children.

106 *Supra* text accompanying notes 2 and 3.
not necessarily sexually involved, and yet these partners may be just as deeply connected to each other as any husband or wife—Nan and Amy, for example, are deeply emotionally connected to each other but not sexually involved with each other.\textsuperscript{107} But even if a person is raising a child and has not found a partner or partners to whom she wants to formally commit, she should be able to access marriage-like benefits to help provide for her child and stabilize their relationship. In the context of polyamory, an adult might wish to make a legal commitment only to her child(ren) if her family is open to adding new partners (not polyfidelous). Such a person and her child(ren) would be able to benefit from the social support of her partners but only be legally linked to each other.\textsuperscript{108} In the context of monogamy, if a person with a child has not found a partner to whom she wants to legally commit, she should also be able to receive marriage-like benefits to support her relationship with her child. In seeking to support the stability of all of these types of caretaking relationships, the state should use certain principles to guide its regulations—most fundamentally, the state should be guided by the principles of autonomy and consent, equality (both between relationships and within relationships), and the prevention of abuse.\textsuperscript{109}

\textsuperscript{107} \textit{Supra} text accompanying notes 4 and 5.

\textsuperscript{108} For a discussion of polyamorous family forms, see \textit{supra} note 32.

\textsuperscript{109} Interestingly, these principles correspond to and/or allow for the ideals embraced by polyamorists—self-knowledge, radical honesty, consent, self-possession, and the privileging of love and sex, discussed \textit{supra} note 31. Autonomy and equality most obviously would allow for self-possession but also allow for self-knowledge and radical honesty by giving people the freedom to choose the relationships that are best for them. Consent and the prevention of abuse are two aspects of the polyamorist vision of consent—to prevent abuse, everyone involved must
A. Guiding Values and Principles

1. Autonomy and Consensual Adult Relationships

Allowing adults the freedom to enter into consensual intimate relationships with each other should be the “baseline threshold” in the state’s regulation of adult relationships.\(^{110}\) Accordingly, sex acts and relationships among consenting adults should be decriminalized and deregulated—the state should not be able to “standardize citizens” supported “solely on the private preferences of the majority” without a public purpose at the very least.\(^ {111}\) The Supreme Court decision in \textit{Lawrence v. Texas} stands for this principle: “Liberty presumes an autonomy of self that includes freedom of thought, belief, and certain intimate conduct” and the Court’s “obligation is to define the liberty of all, not to mandate a moral code.”\(^ {112}\) Additionally, diverse freely consent to all aspects of the relationship (they must not be coerced). By deregulating sex and supporting committed (presumably loving) relationships, this vision of relationship recognition would also value sexual freedom and the many different ways that people love and support each other.


\(^{111}\) Eichner, \textit{Principles, supra} note 110, at 435–36. For example, “a citizen whose vision of the good life is to have sexual relationships with as many other citizens as possible should be able to fulfill that vision without interference by the state (barring issues such as public health concerns).” \textit{Id}. Other people—even a majority of people—may be disgusted by this sexual behavior and thus also morally opposed to it. However, moral opposition based purely on disgust should not replace rational argument. \textit{See} Redding, \textit{supra} note 63, at 134.

\(^{112}\) \textit{Lawrence}, 539 U.S. at 562, 571.
relationships should be respected as “experiments of living” that try different family forms and serve as examples to others, so that people may choose the best family form for their own personal lifestyle.\textsuperscript{113}

However, the state should go even further than mere decriminalization and deregulation: it should create a legal framework that “put[s] in place the conditions in which people can freely choose their personal relationships.”\textsuperscript{114} One way that the state can create a framework to allow freedom in personal relationships is to value privacy, including sexual privacy, so that people are able to form relationships without the fear that the state will intrude into that personal space—unless intrusion is truly needed to prevent violence or abuse.\textsuperscript{115}

2. The Value of Equality

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\textsuperscript{114} BEYOND CONJUGALITY, \textit{supra} note 103, at xi. The Law Commission of Canada named equality and autonomy as the two most important and fundamental values that governments should take into account when determining how best to regulate, recognize, a support intimate adult relationships. \textit{Id}. However, the Commission also discussed other important values that should be considered as well. \textit{Id}. Those values include “personal security, privacy and religious freedom, and pursuing legitimate government objectives in a coherent and efficient manner.” \textit{Id}.
\end{flushright}

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\textsuperscript{115} BEYOND CONJUGALITY, \textit{supra} note 103, at xii.
\end{flushright}
Another way the state can promote freedom in relationship choice is by valuing equality in any recognition of intimate adult relationships. Several types of equality are relevant to adult relationship regulation.

i. Relational Equality

Relational equality is equality between families; it “seeks to equalize the legal status among different types of relationships.” Most fundamentally, if the state values relational equality, it should not differentiate between families based solely on their form. Rather, the state should be able to differentiate between families based only on their function. For example, conjugal and non-conjugal couples should be treated equally, as should couples and groups—“To have our government define as ‘legitimate families’ only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships.”

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116 See id. at xi.

117 Id. (emphasis omitted).

118 Id.

119 Id.

120 Beyond Same-Sex Marriage: A New Strategic Vision for all Our Families & Relationships 2 (July 26, 2006) (available at http://www.beyondmarriage.org/BeyondMarriage.pdf) [hereinafter Beyond Same-Sex Marriage]. The relationships that would be recognized in this vision include:

- Senior citizens living together, serving as each other’s caregivers, partners, and/or constructed families
- Adult children living with and caring for their parents
- Grandparents and other family members raising their children’s (and/or other relative’s) children
- Committed, loving households in which there is more than one conjugal partner
- Blended families
ii. Equality within Relationships

Any regulation of intimate adult relationships should endeavor to “overcome unequal distributions of income, wealth and power, . . . based on historic inequality between men and women, or lack of state support for persons with disabilities.”\(^\text{121}\) For example, heterosexual relationships are inextricably tethered to the patriarchal history of heterosexual marriage—even though marriage laws do not explicitly discriminate against heterosexual women, they do tend to disadvantage women.\(^\text{122}\) To try to remedy this disadvantage, the state could implement policies

- Single parent households
- Extended families (especially in particular immigrant populations) living under one roof, whose members care for one another
- Queer couples who decide to jointly create and raise a child with another queer person or couple, in two households
- Close friends and siblings who live together in long-term, committed, non-conjugal relationships, serving as each other’s primary support and caregivers
- Care-giving and partnership relationships that have been developed to provide support systems to those living with HIV/AIDS

*Id.*

\(^{121}\) *BEYOND CONJUGALITY, supra* note 103, at xi (emphasis omitted).

\(^{122}\) Eichner, *Principles, supra* note 110, at 448–49. Historically, marital rights and duties were distributed to husbands and to wives unequally. *Id.* Today, the gender bias in marriage is more subtle but still detrimental to women—for example, “both the cultural resonance still attached to marriage and the failure to adjust societal norms that reward only those so attached to the workplace that they require partners at home who will take care of their households continue to place women in heterosexual relationships at a disadvantage to men.” *Id.*
to encourage equality between husbands and wives, same-sex partners, nonconjugal partners, as well as among members of a group marriage.\textsuperscript{123}

3. Addressing Abuse

By regulating relationships and families based on their function (not their form), the state should seek to discourage abuse in relationships but should do so by regulating family function instead of family form.\textsuperscript{124} The worry that same-sex couples or polyamorous groups might be abusive—to the other adults in the relationship but also to the children in the family—should not be, therefore, an issue of family form but instead should be an issue of family function.\textsuperscript{125} Indeed, abusive behavior could be a concern in any relationship or family form, including heterosexual monogamous marriage.\textsuperscript{126} As attorney Jason Gratl suggests in the context of polygamy, “It’s tempting to point at polygamy as the determining factor which creates abuse . . . But one should resist that temptation in light of the fact that similar abuses occur in quite ordinary marriages.”\textsuperscript{127}

B. Privileging/Supporting Caretaking Relationships

\textsuperscript{123} Id. at 448–49. For example, the state could encourage parents to share childcare responsibilities in an effort to more evenly distribute caretaking responsibility between the sexes.

\textsuperscript{124} Id.

\textsuperscript{125} Id.

\textsuperscript{126} See supra notes 64–63 and accompanying text.

Though all consensual adult relationships should be decriminalized and deregulated, the state should also create a framework for supporting personal adult relationships because “[p]eople want stability and certainty in their personal relationships, as in other aspects of their lives. The state must provide adequate legal structures to support the relationships that citizens develop . . .”\(^{128}\) Similarly, the state should support stable family environments for children.

Law Professor Maxine Eichner argues that the state should create such a structure by privileging caretaking relationships.\(^{129}\) “[I]t is simply not the case that the state has an equal


\(^{129}\) Eichner, *Principles*, supra note 110, at 448–49; *see also* MARtha ALBERTSON FINEMan, The NeuterED moTHEr, the sExUAl famIly, ANd oTher TwENTIETH CEntURY TraGEDIeS 8
interest in the success of all consensual relationships,” Eichner states; “Rather, long-term caretaking relationships contribute to particular, important benefits to the polity because they satisfy dependency needs in a way that, for example, casual sex between two (or more) people does not.” Eichner, Principles, supra note 110, at 438. Two of the most obvious benefits that these relationships promote is caretaking of adults (because even healthy adults need care and support) and children (because children do better in stable environments). For Eichman, the state’s interest in the health of its adult citizens and the welfare of dependents (including but not limited to children) justifies privileging caretaking relationships, even nonsexual relationships and family groupings of more than two adults. Some LGBT activists have similarly argued for “[r]ecognition of interdependence as a civic principle” These schemes would allow polyamorous families—along with single parents, nonsexual partners, and same-sex partners—to be legally recognized as legitimate sites for caretaking.

Such a vision could be implemented with a registration scheme that allows any intimate adult partnerships (including groups as well as single adults with children) to register for marriage-like benefits. The Law Commission of Canada suggests a registration scheme that (Routledge 1995) (arguing that marriage should be abolished and that the sexual couple should be replaced by the mother/child dyad as the core family unit).

Eichner, Principles, supra note 110, at 438.

Id. at 438–39.

Id. at 439–40.

Beyond Same-Sex Marriage, supra note 120, at 5.

Registration could determine certain private rights and duties among partners, such as property and support responsibilities, caretaking arrangements, and medical-consent obligations.
would “provide a vehicle for recognizing a broader range of caring and supportive relationships, both conjugal and non-conjugal.”\textsuperscript{135} Under such a scheme, couples would be free to register

\textit{Beyond Conjugality}, supra note 103, at 121. As a threshold issue, however, the state should evaluate what rights and benefits should be tied to relationship recognition in the first place. Sufredini & Findley, supra note 7, at 598–607. Where relationships are relevant to right and benefit distribution, individuals—not the government—should, if possible, be able to choose which relationships are relevant. For example, the Law Commission of Canada recommended that in the context of bereavement and caretaking leave, individuals should be able to choose which relationships are relevant. \textit{Beyond Conjugality}, supra note 103, at 99–100. In other contexts, these choices should be limited but only in terms of the functional attributes of the relationship: immigration law could allow sponsorship of people “known and emotionally important” to the sponsor; pension laws could allocate survivor’s benefits based on “economic interdependency.” \textit{Id.}

\textsuperscript{135} The Law Commission of Canada did not recommend doing away with the couple requirement—so, in its view, a broad range of \textit{couples}, including non-conjugal couples, should be given legal recognition. This type of scheme might look similar to Hawaii’s Reciprocal Beneficiaries Act (the Act), which gives couples who are prohibited from marrying access to many of the benefits of marriage by allowing them to register as “reciprocal beneficiaries.” \textit{Haw. Rev. Stat.} § 572C-1 (2008). Though the Act is a progressive system in that it allows non-conjugal and same-sex couples to receive legal benefits similar to marriage, the Hawaii legislature expressly created it to “preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman” after the Hawaii Supreme Court found the state’s same-sex marriage ban violated equal protection principles. \textit{See Haw. Rev. Stat.}
their relationship (any intimate adult relationship) and in doing so be legally recognized by the state.\footnote{Beyond Conjugalit\textbackslash y, supra note 103, at xvi.} After registering, the couple would have access to various rights and duties—including a framework for resolving disputes if the relationship ends.\footnote{\textit{Id.} at xvi–xvii.} A registration scheme “provide[s] an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.”\footnote{\textit{Id.}} Within such a registration scheme, the state could create a menu of options for registrants to choose from, reflecting different levels and different types of commitment.\footnote{See e.g. infra app. III (providing a table of partnership recognition options that different jurisdictions offer and the rights and responsibilities that come with each option. Note that the menu with \textit{all} of the listed options available is still hypothetical, however, and that a menu of options would not necessarily have to use or conform to existing relationship labels like “marriage” and “civil unions”).} Partners would be able to simply pick an entire pre-packaged bundle of rights and duties or customize those rights and duties by opting out of certain provisions and adding others.\footnote{See Brian H. Bix, \textit{Choice of Law and Marriage: A Proposal}, 36 Fam. L. Q. 255, 265 (2002); James Herbie DiFonzo, \textit{Unbundling Marriage}, 32 Hofstra L. Rev. 31, 32–33 (2003).} Such

a scheme would allow for personal choice while providing a supportive framework for intimate relationships—without unfairly privileging certain families and disadvantaging others solely because of their form or the type of sex that is imagined to take place within them.

V. CONCLUSION

Current marriage law revolves around the ideal of heterosexual monogamous marriage as the best and thus most privileged relationship form. Heterosexual marriage, however, should not be seen as ideal because it is defined by the number, gender, and sexual involvement of the partners. It certainly should not be used as a proxy for imposing a moral code on sexual relationships or casting “improper” relationships as deviant. Instead, heterosexual monogamous marriage should be valued as a site for caretaking of both healthy adults as well as true dependents. There are other family forms that can—and do—fulfill the same function: nonmonogamous families, same-sex partners, single-parent families, and nonsexual partners are all sites for caretaking, whether they are state-recognized or not. The state should support this caretaking—an essential need for most people—in whatever family forms it exists.

APPENDIX I

The Sex Hierarchy: The Charmed Circle vs. The Outer Limits

**APPENDIX II**

*The Sex Hierarchy: The Struggle over Where to Draw the Line*

**APPENDIX III**
### A Menu of Partnership Recognition Options

<table>
<thead>
<tr>
<th>Domestic Partners</th>
<th>Cohabitation</th>
<th>Cohabitation-Plus</th>
<th>Civil Unions</th>
<th>Marriage</th>
<th>Covenant Marriage</th>
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