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How U.S. Family Law Might Deal with Spousal Relationships of Three (or More) People

Edward Stein*

ABSTRACT

For much of this nation's history, the vast majority of people have believed that being married to more than one person at the same time is deeply problematic. Further, polygamous marriage has never been legal in the United States. Despite this, some people have been in plural or group relationships and some of these people have wished to gain legal recognition for these relationships. The arguments for recognizing such relationships are persuasive, but the prospects for legalization of polygamous marriage seem slim in the near future. This Article offers a suggestion of how the law of domestic relations might deal with such relationships, focusing on same-sex "triads." The proposal is that domestic partnership or civil union laws, which remain on the books in some jurisdictions, but are now rarely used, could be repurposed and adapted to recognize and protect triads and perhaps other group and plural relationships.

I.

In 2000, Allen and Brian began dating.¹ Within a year, they moved in together. About a year after they began cohabitating, they met Charles through mutual friends and the three of them became romantically and

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1. The names of the parties and some details of their relationship have been changed to protect their privacy. The information about their relationship was gleaned from separate in-person and telephone interviews with the three individuals.

sexually involved. At that time, they now say, Allen and Brian were happy as a new couple and neither of them nor Charles was particularly interested in a romantic or sexual relationship with two people at the same time. “It just happened,” one of them reported. Over the next several months, Charles began spending a great deal of time with Allen and Brian; within the year, the three of them moved to a larger home that they purchased together. “Our relationship with [Charles] developed organically over the course of the first year we knew him,” Allen explained. The three-person “marriage-like” relationship has continued through the present, for approximately twenty years (and counting). This Article offers a suggestion of how the law of domestic relations might deal with “triads” like Allen, Brian and Charles and other relationships like theirs.² My proposal is that domestic partnership or civil union laws, which remain on the books in some jurisdictions but that are, for the most part, rarely used anymore, could be repurposed and adapted to recognize and protect triads and other group and plural relationships.

Since its inception, marriage law in the United States has been characterized by a “one-at-a-time” rule: while a person can have multiple spouses over the course of a lifetime, a person cannot have more than one spouse at a time. In some eras in some communities in the United States, a non-trivial number of people have been in marriage-like relationships with more than one person at a time. From 1843 to 1890, the Mormon Church advocated plural or celestial marriages in which one husband had multiple wives.³ Also, there was a period of time from when slavery was legal in the southern part of the United States until shortly after the Civil War that some African-Americans were involved in multiple marriage-like relationships at the same time.⁴ And recently, there has been an increased openness about plural marriage,⁵ spurred in part by television shows (both fictional and “reality” TV) about such relationships.⁶ Still, there is no jurisdiction in the United States where a person who is presently married to another person may

2. A triad (also sometime called a “throuple”) is a marriage-like relationship among three people in which all three are romantically involved with each other. A marriage-like relationship among four people is called a “quad” and one involving more than four people is called a “moresome.” *See, e.g.*, RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 9 (2015).

3. *See, e.g.*, JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 41–52 (1987); RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 1–16 (2d ed. 1989).

4. KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015).

5. *See, e.g.*, JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 283 (2011).

6. *See, e.g.*, *Big Love* (HBO) (scripted TV show that ran for five seasons); *Sister Wives* (TLC) (reality TV show that ran for twelve seasons).

legally marry a third person.⁷ (Further, all jurisdictions in the U.S. still have the crime of bigamy on the books,⁸ five states specifically outlaw bigamy and/or polygamy in their state constitutions,⁹ and two states make it a crime to teach that polygamy is a good thing.¹⁰) So marriage is not, in its current form in the United States, of use to Allen, Brian and Charles and triads like them. If it weren't for Charles and their relationship with him, Allen and Brian acknowledge that they probably would have married by now. One of them said, "We would like legal recognition for our relationship, but it wouldn't be fair to [Charles] if we got married." Marriage is similarly unhelpful to triads like Brynn, Kitten, and Doll Young, two of whom were already married before they met the third.¹¹ Brynn and Kitten were married in Massachusetts in 2011 (same-sex marriage having been legal there since 2004).¹² They later met and fell in love with Doll.¹³ While the three of them had a commitment ceremony in 2014, this commitment ceremony had no legal effect because the prior marriage of Brynn and Kitten was an impediment to recognizing a marriage or marriage-like relationship with Doll.¹⁴

Of course, much has changed regarding relationship recognition in the United States since the time Allen and Brian met. When they met in 2000, two people of the same sex could not marry in any jurisdiction in the United

7. Recently, in Colombia, two surviving partners were granted pension benefits after the death of their partner in a group, marriage-like relationship. See Adam Veitch, *Medellin Judge Grants Pension to Polyamorous Husbands*, COLOMBIA REPORTS (June 4, 2019), <https://colombiareports.com/medellin-judge-grants-pension-rights-to-polyamorous-husbands/> [<https://perma.cc/6CJM-PRRJ>].

8. The distinction between bigamy and polygamy is often not kept clear. As I use it, *polygamy* is a type of relationship structure in which at least one party in it has more than one spouse at the same time. When I say that no state allows for polygamy, I am saying something about the domestic relations law of the several states—that is, it is not legally permissible for a person to be married to more than one person at a time. *Bigamy* is a crime (specifically, a felony) consisting of having, or attempting to have, two spouses at the same time. See Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 81–89 (collecting bigamy laws in the U.S.).

9. Arizona (ARIZ. CONST. art. XX, § 2); Idaho (IDAHO CONST. art. I, § 4); New Mexico (N.M. CONST. art. XXI, § 1); Oklahoma (OKLA. CONST. art. I, § 2); Utah (UTAH CONST. art. III).

10. Michigan (MICH. COMP. LAWS ANN. § 750.441); Mississippi (MISS. CODE ANN. § 97-29-43).

11. David K. Li, *Married Lesbian 'Throuple' Expecting First Child*, N.Y. POST (Apr. 23, 2014), <http://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/> [<https://perma.cc/6DBQ-UB88>]. Chief Justice Roberts mentioned this article in his dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting).

12. *Id.*; see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (allowing same-sex couples to marry for the first time in the United States).

13. Li, *supra* note 11.

14. *Id.*

States. Relatively soon after, however, relationship recognition for same-sex couples swept the country. By 2012, there was a complicated patchwork of recognition and nonrecognition for same sex-couples.¹⁵ In 2015, after the Supreme Court decided the landmark case of *Obergefell v. Hodges*,¹⁶ same-sex couples such as Allen and Brian could marry throughout the United States. But *Obergefell* did not change the landscape for the legal recognition of triads like Allen, Brian, and Charles. Or did it?

Chief Justice Roberts, in his dissent in *Obergefell*, said that “much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”¹⁷ Of course, Roberts did not intend this as an argument that states should be required to solemnize the second (or third) marriage of a person who is already married (and not divorced and whose first spouse is alive). Rather, he meant it as a “slippery slope” argument *against* the majority’s conclusion that the U.S. Constitution requires all states to solemnize marriages between same-sex couples.¹⁸

Even so, in 2015, shortly after *Obergefell* was decided, Nathan Collier, who had married Victoria Collier in 2000 (the same year that Allen and Brian met) sought, with Victoria’s knowledge and consent, a marriage license in Montana to solemnize his relationship with Christine, another woman with whom he was sexually and romantically involved and with whom he had a religious wedding ceremony in 2007.¹⁹ In federal district court, Nathan and Christine argued that they had a right to marry—even though Nathan was already married to Victoria—citing Chief Justice Roberts’ dissent.²⁰ A Magistrate Judge rejected the Colliers’ challenge to Montana’s marriage and bigamy laws on various grounds.²¹ The Judge noted that Roberts’ dissent explicitly did not “equate marriage between same-sex couples with plural marriage in all respects,”²² that he acknowledged that “[t]here may well be relevant differences [between same-sex marriages and plural marriages] that

15. Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 181–82 (2012).

16. 135 S. Ct. 2584.

17. *Id.* at 2621 (Roberts, C.J., dissenting).

18. *Id.* at 2621–22. For discussion of slippery slope arguments against same-sex marriage based on polygamy, see, e.g., Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1170 n.45 (2005).

19. *Collier v. Fox*, 2018 U.S. Dist. LEXIS 39261, *2–4 (D. Mont. Feb. 22, 2018); *Montana Officials Deny Wedding License for Polygamous Trio*, DESERT NEWS (July 16, 2015, 3:19 PM), <http://www.deseretnews.com/article/765677586/Montana-officials-deny-wedding-license-for-polygamous-trio.html> [<https://perma.cc/5MDK-YH7L>].

20. *Collier*, 2018 U.S. Dist. LEXIS 39261, at *21.

21. *Id.* at *22–24.

22. *Id.* at *21 (quoting *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting)).

compel different legal analysis,”²³ and further, that Roberts’ dissent was not binding precedent.²⁴ After the district court adopted the Magistrate Judge’s findings in full, the Colliers decided not to appeal.²⁵ A higher-profile challenge to a state’s polygamy laws did receive a more favorable (pre-*Obergefell*) ruling in federal district court,²⁶ but—despite Chief Justice Roberts’ expression of concern about the fate of this decision on appeal²⁷—the Tenth Circuit found this challenge to be moot and vacated the lower court’s decision.²⁸

Despite increasingly powerful scholarly arguments in favor of legal recognition of plural and group marriage,²⁹ I do not expect that, in the near future, marriage law in the United States is going to be changed to accommodate such relationships either through legislative action or through a judicial decision finding that the “one at a time” rule that characterizes marriage law violates the U.S. Constitution or a state constitution.³⁰ Drawing on the idea that family law should be responsive to how people in fact structure and live their lives, in this Article, I suggest a more viable—given the political realities of the United States—form for legal recognition for plural and group relationships that is short of legalizing such marriages.³¹ Setting aside children in the context of these types of relationships,³² people

23. *Id.*

24. *Id.*

25. *Id.* at *21–23; see also Phoebe Tollefson, *U.S. Rules Against Montana Polygamist Trio Who Sued over Marriage License Denial*, BILLINGS GAZETTE (Mar. 12, 2018), https://billingsgazette.com/news/local/u-s-rules-against-montana-polygamist-trio-who-sued-over/article_01d1a02e-0b62-5fc6-9187-687de42c90fa.html [<https://perma.cc/LNG6-V34F>].

26. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013), *vacated by* 822 F.3d 1151 (10th Cir. 2016).

27. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

28. *Brown v. Buhman*, 822 F.3d 1511, 1179, (10th Cir. 2016), *rehearing en banc denied*, 2016 U.S. App. LEXIS 23522 (10th Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 794 (U.S. 2017).

29. See, e.g., DEN OTTER, *supra* note 2. But see JOHN WITTE, JR., *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (2015).

30. I admit that my published predictions about the expected evolution of marriage law in the United States have proven mistaken in recent years. See, e.g., Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 L. & INEQ.: J. THEORY & PRAC. 345, 348 (2010) (expressing my doubts that same-sex couples will have full marriage equality across the entire United States in my lifetime); *Obergefell* proved me wrong within five years.

31. Sally Goldfarb made quite similar proposals at the same roundtable where I first presented this project. See Sally F. Goldfarb, *To Recognize or Not To Recognize Plural Unions: Is a Non-Marital Relationship Status the Solution to the Dilemma?*, FAM. CT. REV. (forthcoming). Despite the similarities of our proposals, some—but not all—of the motivations for our respective proposals are different.

32. There are five U.S. jurisdictions with statutes that explicitly recognize three or more parents: California (CAL. FAM. CODE § 7612(c) (West 2017)), Louisiana (LA. CIV. CODE ANN.

in plural and group relationships need to deal with joint finances, ownership of property, estate planning, relationship dissolution, and financial security. They can do so through wills, living wills, cohabitation agreements, health care proxies, joint ownership of property, and other legal agreements (such as partnerships, limited liability partnerships, or limited liability companies), but most of these legal instruments take time and money to negotiate and draft and even the most elaborate and sophisticated versions of such documents cannot come close to replicating the benefits and protections associated with marriage. And children cannot always be set aside because some people in group and plural relationships do have children, children whose relationships with the adults in their lives warrant respect and legal protection.³³

As an alternative, my suggestion, based on the recent history of the development of legal recognition for same-sex couples, is to look to marriage-like relationships such as civil unions and domestic partnerships as

arts. 197 & 198 (2017)), Maine (ME. REV. STAT. ANN. tit. 19-A § 1853(2) (2017)), Vermont (VT. STAT. ANN. tit. 15C, § 206 (West 2017)), and Washington (WASH. REV. CODE ANN. § 26.26A.100 (West 2017)). Louisiana's is the most restrictive of these statutory regimes, insofar as it only allows for dual paternity in cases where the child's mother is married to someone other than the biological father of the child; if the biological father claims paternity promptly, Louisiana law allows for the child to have three parents. For more detailed discussion of Louisiana law on this point, see Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. L. 175, 183–85 (2018); and June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 20–23 (2017). At least two other U.S. jurisdictions have statutes that allow for the possibility of a child having more than two parents when a child's parent(s) gives permission to another adult to become a *de facto* parent of their child, namely Delaware (DEL. CODE ANN. tit. 13 § 8-201(c)(1) (West 2017)) and Washington, D.C. (D.C. CODE ANN. § 16-831.01(1)(A)(iii) (West 2017)). Courts in at least five more states have, in published opinions, held that children can have more than two legal parents: Minnesota (*LaChapelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000)), New Jersey (*D.G. v. K.S.*, 133 A.3d 703, 710 (N.J. Super. Ct. Ch. Div. 2015)), New York (*Dawn M. v. Michael M.*, 55 Misc. 3d 865, 871 (N.Y. Sup. Ct. 2017)), North Dakota (*McAllister v. McAllister*, 779 N.W.2d 652, 65859 (N.D. 2010)), and Pennsylvania (*Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007)). Other states may allow three parents to be listed on a child's birth certificate, see Quinn, *supra* note 32, at 198 (mentioning Florida and Nevada), and there are unreported decisions in various U.S. jurisdictions that seem to have held that a child can have more than two parents, *id.* at 199–200 (mentioning Alaska, New Jersey, Oregon, Virginia & Washington, D.C.). For further discussion of the possibility of a child having more than two parents, see Susan F. Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008); June Carbone & Naomi Cahn, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018); Carbone & Cahn, *Parents, Babies, and More Parents*, *supra* note 32; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007).

33. For a pathbreaking study of children of plural and group marriages, see ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES* 135–65 (2014).

a way of providing additional legal protections for triads (and other group and plural relationships). I emphasize *same-sex* triads like Allen, Brian and Charles or Brynn, Kitten, and Doll because one of the primary objections to polygamy in the United States has focused on the disadvantaged role of women in such relationships.³⁴ Because Allen, Brian, and Charles are cis-gender men—and, similarly, because Brynn, Kitten, and Doll are cis-gender women—asymmetrical power associated with gender differences is not an issue in their relationships (or, at least, it is not as prominent as in multi-sex triads, that is, triads that have one partner who is of a different sex from the other two partners). That said, my argument for legal recognition of triads through existing domestic partnership and civil union laws also applies to multi-sex triads. I focus on triads more than quads or moresomes for simplicity's sake. I suspect that almost everything I say about the legal recognition of triads also applies to quads but less so for moresomes.³⁵ Because this is a short article and because my goal here is start a conversation rather than, for example, provide a fully developed statutory proposal and a detailed argument for it, I focus on triads. Whether (and how) a fully developed statutory proposal would accommodate quads and other types of relationship forms consisting of more than two people besides triads would depend on details beyond the scope of this article.

34. See Nicholas Bala et al., *An International Review of Polygamy: Legal and Policy Implications for Canada*, in POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY RESEARCH REPORTS 1, 36 (2005), <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf> [<https://perma.cc/VJ9H-6HY5>] (concluding “polygamy is associated with significant negative outcomes for women” and that “[t]he problems with polygamy are profound and inherent in the relationship, and are often caused by the polygamous relationship, not merely associated with it.”); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7, 9–10 (Joshua Cohen et al. eds., 1999); 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, 129–33 (2006); Reference re: Section 293 of the Criminal Code of Canada, [2011] BCSC 1588, ¶ 8 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm> [<https://perma.cc/FPZ7-QCAQ>] (finding “[w]omen in polygamous relationships are at an elevated risk of physical and psychological harm [and] face higher rates of domestic violence and abuse, including sexual abuse”). See generally JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH (2003).

35. Consider, for example, California's recently passed law that allows for a child to have more than two legal parents. CAL. FAM. CODE § 7612(c) (2017). This law and others like it do not limit a child to three or four legal parents. Concerns have been raised that a line needs to be drawn somewhere as to how many parents a child can have, and that, if the line is not drawn at two, then it should be drawn at three or four. See, e.g., Quinn, *supra* note 32, at 205–6. Given the limited scope of this article, I similarly do not try to justify my focus on triads and quads, rather than larger marriage-like groups—and my hunch that triads and quads can be distinguished from moresomes in a principled way—leaving that discussion for another occasion.

Before *Obergefell* held that U.S. constitutional law requires that same-sex couples have the right to marry across the United States,³⁶ advocates of marriage equality had successfully obtained, through litigation and legislation, various modes of relationships recognition for same-sex couples, including—starting in Massachusetts³⁷—marriage, but also including civil unions, domestic partnerships, and reciprocal beneficiaries. When Allen and Brian moved in together, they were living in California. At the time, California had a domestic partnership law which had been passed in 1999.³⁸ Being a registered domestic partner in California at that time had very few privileges associated with it including the right to visit one’s domestic partner in the hospital and to be treated as one’s domestic partner’s next of kin when he or she died.³⁹ In addition, a few California employers, including several municipalities, recognized registered domestic partners for purposes of health insurance and other employee benefits.⁴⁰ Allen and Brian were both in their thirties at the time and were both employed, so they did not register as domestic partners. Had they been registered as domestic partners, their legal relationship with each other would have necessarily excluded both from entering a domestic partnership with Charles. This is because California domestic partnership law at the time,⁴¹ like marriage and other relationship recognition laws in the United States now and then, followed the one-at-a-time rule.

Domestic partnerships and civil unions, while still on the books in thirteen jurisdictions in United States,⁴² have, even in those jurisdictions, become

36. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015).

37. *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

38. Assemb. B. 26, 1999–2000 Reg. Sess. (Cal. 1999). For discussion, see Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 152 (2014).

39. Assemb. B. 26, 1999–2000 Reg. Sess. (Cal. 1999).

40. See NeJaime, *supra* note 38.

41. Assemb. B. 26, 1999–2000 Reg. Sess. (Cal. 1999).

42. The following states that at one time had civil unions as a form of relationship recognition for same-sex couples still have civil unions and still allow same-sex couples to obtain civil unions: Colorado (COLO. REV. STAT. ANN. § 14-15-101 (West 2017)) (civil unions available to same-sex and different-sex couples), Hawaii (HAW. REV. STAT. ANN. § 572B (West 2017)) (civil unions available to same-sex and different-sex couples), Illinois (750 ILL. COMP. STAT. ANN. 75/1 (West 2017)) (same) and New Jersey (N.J. STAT. ANN. § 37:1-29 (West 2017)) (civil unions only available to same-sex couples).

The following states that at one time had civil unions as a form of relationship recognition for same-sex couples, in contrast, no longer allow couples to obtain civil unions but still have the status of civil union under state law, as couples who had obtained civil unions were allowed to retain that status: Vermont (VT. STAT. ANN. tit. 15, § 1201 (West 2017)) and Rhode Island (15 R.I. GEN. LAWS ANN. § 15-3.1-12 (West 2017)). Couples who entered into civil unions before Rhode Island permitted same-sex couples to marry were given three options: (1) maintaining civil

mostly moribund. Some states have retained these non-marital legal relationships, but stopped allowing couples to obtain such relationships soon after same-sex marriage become an option there.⁴³ Even in those states that continue to allow registration or solemnization of those relationship, few couples opt for civil unions or domestic partnerships now that marriage equality has been achieved.⁴⁴

union status, (2) designating the civil union as a marriage without a ceremony, or (3) getting married and merging the civil union into the marriage. *Civil Unions*, ST. OF R.I. DEP'T OF HEALTH, <http://www.health.ri.gov/records/about/civilunions/> [<https://perma.cc/9EBY-PM5R>].

The following states that at one time had domestic partnerships as a form of relationship recognition still have domestic partnerships and still allow couples to register for such relationships: California (CAL. FAM. CODE §§ 297–299 (West 2017)) (domestic partnerships available to same-sex couples and to different-sex couples with one partner over 62 years of age), Maine (ME. REV. STAT. ANN. tit. 22, § 2710 (2017)) (domestic partnerships available to same-sex couples and to different-sex couples), Nevada (NEV. REV. STAT. ANN. § 122A (West 2017)) (domestic partnerships available to same-sex couples and to different-sex couples), Oregon (OR. REV. STAT. ANN. tit. 11, Ch. 106 (West 2017)) (domestic partnerships available to same-sex couples) and Washington, D.C. (D.C. CODE §§ 32:701-710 (2017)) (domestic partnerships available to same-sex couples and to different-sex couples). Hawaii has reciprocal beneficiaries, which are tantamount to quite “weak” domestic partnerships. Under the Reciprocal Beneficiaries law, parties that are not otherwise eligible to marry under Hawaii law (but are not in another marriage or civil union) may enter into a reciprocal beneficiary relationship with a subset of the same benefits of marriage. HAW. REV. STAT. ANN. § 572C (West 2017). The Hawaii reciprocal beneficiary statute gives an example of parties who are not eligible to marry besides two people of the same sex: a widowed mother and her unmarried son. HAW. REV. STAT. ANN. § 572C-2 (West 2017).

Wisconsin, which at one time had domestic partnerships as a form of relationship recognition for same-sex couples, in contrast, no longer allows couples to obtain domestic partnerships but still has the status of domestic partnership under state law, as couples who had obtained domestic partnerships were allowed to retain that status. *See* WIS. STAT. ANN. § 770.001, *repealed by* 2017 Act 59, § 2225d.

43. New Jersey, Rhode Island, Wisconsin and Vermont. *See supra* note 42.

44. Data on civil unions in Denver, Colorado and Hawaii is illustrative. In 2013, 761 couples obtained civil unions in Denver. *License Statistics: Civil Union Statistics*, DENVER OFF. CLERK & RECORDER, <https://www.denvergov.org/content/denvergov/en/denver-office-of-the-clerk-and-recorder/marriage-civil-union-licenses/license-stats-and-records.html> [<https://perma.cc/GF2S-ANKM>]. In 2014, 223 couples did. *Id.* Colorado began allowing same-sex couples to marry on October 7, 2014. Ashley Atman, *Colorado AG: County Clerks Must Issue Gay Marriage Licenses*, HUFFINGTON POST (October 7, 2014, 1:27 PM), https://www.huffpost.com/entry/colorado-gay-marriage_n_5946752 [<https://perma.cc/M5W2-GBLK>]. In 2017, 23 couples obtained civil unions. *License Statistics: Civil Union Statistics*, DENVER OFF. CLERK & RECORDER, <https://www.denvergov.org/content/denvergov/en/denver-office-of-the-clerk-and-recorder/marriage-civil-union-licenses/license-stats-and-records.html> [<https://perma.cc/GF2S-ANKM>]. In 2018, 12 couples obtained civil unions. *Id.*

In 2012, 730 couples obtained civil unions in Hawaii. *Preliminary 2012 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2012/> [<https://perma.cc/6YPE-2V2Y>]. In 2013, 388 couples did. *Preliminary 2013 Vital Statistics*, ST. OF HAW., DEP'T OF HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2013/>

The rest of my discussion proceeds as follows. In Part II, I discuss the concepts and terminology used in this article. In Part III, I consider a certain class of arguments against the legal recognition of group and plural relationships—those that try to distinguish same-sex marriage, on the one hand, from plural and group marriage, on the other. I suggest that, while these legal arguments against such relationships are weak, it seems unlikely that marriage will be extended to them in the near future. In Part IV, I conclude with the suggestion that existing non-marital modes of relationships recognition, namely civil unions and domestic partnerships, be repurposed and adapted as what I call *multiple partner unions*, a mode of legal relationship recognition for triads.

II.

This Part introduces the terminology used in the rest of this article. Human sexual desire can be categorized in a variety of ways. Most typically in our society, we classify people in terms of the sex or gender of their sexual object choice, namely, whether they are gay, lesbian, heterosexual, or bisexual.⁴⁵ But sexual orientation is just one aspect of the broader notion of sexual desire, sexual taste, or sexual interest. People have a wide range of sexual tastes. Some people are particularly or primarily attracted to people of certain age ranges, body types, races, hair colors, personality types and/or

[<https://perma.cc/2K8P-8A29>]. Hawaii allowed same-sex couples to marry starting December 2, 2013. Trudy Ring, *First Same-Sex Couples Marry in Hawaii*, Advocate.com (December 2, 2013, 2:10 PM), <https://www.advocate.com/politics/marriage-equality/2013/12/02/first-same-sex-couples-marry-hawaii> [<https://perma.cc/F8WX-3UX4>]. In 2014, 32 couples obtained civil unions. *Preliminary 2014 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2014/> [<https://perma.cc/L4GM-3BWX>]. In 2015, 23 couples did. *Preliminary 2015 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2015/> [<https://perma.cc/KAS9-L279>]. In 2016, 29 couples obtained civil unions. *Preliminary 2016 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2016/> [<https://perma.cc/B6Y9-XNRC>]. In 2017, 39 couples did. *Preliminary 2017 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2017/> [<https://perma.cc/X2BV-H663>]. And, in 2018, only 30 couples obtained civil unions. *Preliminary 2018 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2018-vital-statistics/> [<https://perma.cc/Q3TD-C4ZB>].

45. EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION* 39–61 (1999). Some people, especially younger people, reject this framework because they see and/or experience sex, gender and sexual orientation as non-binary and more fluid. See, e.g., LISA M. DIAMOND, *SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE* (2008); RITCH C. SAVIN-WILLIAMS, *MOSTLY STRAIGHT: SEXUAL FLUIDITY AMONG MEN* (2017). For simplicity's sake, for my terminology, I use the more "traditional" terminology, but I do not think that doing so in any way impairs the core conclusions and proposal of this article.

professions, in addition to being attracted to people of a certain sex, gender, gender identity and/or certain sexual orientation.⁴⁶ People are not only sexually interested in certain sorts of people, some also have quite specific interests in certain sorts of sexual acts, sex in certain venues, and certain frequency of having sex. In particular, some people may be sexually attracted only to one person at a time and be completely satisfied having sex with just this person and may be happy in a companionate and sexual relationship with just that person. Such a person has *monogamous* desires. Most people, however, even if they are in a dyadic relationship (that is, a relationship between two people), remain sexually attracted to other people besides the person with whom they are romantically involved and are *tempted*—for this reason or others—to have sex with other people. These people have *non-monogamous* desires. For a significant percent of people with non-monogamous desires, it is very difficult to resist the temptation of non-monogamy and remain sexually active with just one person for an extended period of time.⁴⁷ Over time, such people who in relationships may become less interested in sex with their spouse or partner while remaining interested in sex with other people. Others may remain as attracted to their spouse or partner as they always were while still desiring sexual variety, especially as time goes on. And others may desire sex outside of their relationship when their spouse or partner becomes uninterested in sex or suffers from a health problem that leaves them unable to have sex.⁴⁸ Of course, a single person (someone who is *not* in a dyadic relationship)—even a single person who is not interested in being in a dyadic relationship—can have non-monogamous desires insofar as such a person would like to have sex with more than one partner outside of a marriage or a primary partnership.

Whether the focus is on behaviors or desires, non-monogamy takes many forms. A single person, if sexually active, can be non-monogamous both in terms of behavior and desire. The same is true of people in dyadic relationships who have sexual desires for people other than their spouse or partner. Some such people repress their desires for extra-dyadic sex, but

46. STEIN, *supra* note 45, at 49–67; Robin Dembroff, *What Is Sexual Orientation?*, 16:3 PHILOSOPHERS' IMPRINT 1 (2016); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22–27 (1990); Fredrick Suppe, *Curing Homosexuality*, in PHILOSOPHY AND SEX 391, 394–97 (Robert Baker & Frederick Elliston eds., rev. ed., 1984).

47. See, e.g., ERIC ANDERSON, *THE MONOGAMY GAP: MEN, LOVE, AND THE REALITY OF CHEATING* 37–70 (2012); DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY: FIDELITY AND INFIDELITY IN ANIMALS AND PEOPLE* (2001); CHRISTOPHER RYAN & CACILDA JETHÁ, *SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS* (2010).

48. See, e.g., ANDERSON, *supra* note 47, at 104–10; DAN SAVAGE, *AMERICAN SAVAGE: INSIGHTS, SLIGHTS AND FIGHTS ON SEX, FAITH, LOVE AND POLITICS* 23–28 (2013).

many others do not. Some people in dyadic relationships who have extra-dyadic sex do so secretly, that is, without admitting to their spouse or partner that they have extra-dyadic sex. This form of non-monogamous behavior is called *infidelity*. In contrast, some people in dyadic relationships agree that it is permissible for at least one of them to have sex with other people, at least under some circumstances. I call this *consensual non-monogamy*.⁴⁹

There are two particular flavors of non-monogamy that are usefully distinguished for my purposes here: *polyamorous* non-monogamy and *monogamish* non-monogamy. According to one definition, *polyamorous* people desire serious sexual and romantic involvement with more than one person at a time.⁵⁰ But according to another—perhaps more widely used—definition, the non-monogamy involved in polyamory is *necessarily* consensual. Hadar Aviram, for example, defines polyamory as desiring “more than one sexual . . . loving relationship at the same time, with the full knowledge and consent of all the partners involved.”⁵¹ Elizabeth Emens, similarly, defines polyamory as a lifestyle that prioritizes and privileges “self-knowledge, radical honesty, consent, self-possession, and [variety when it comes to] love and sex.”⁵² While I agree that consent is essential to many self-identified polyamorous people, I find the first sense of the term polyamory is also useful to distinguish one of several types of non-monogamy, independent of whether the non-monogamy is consensual or non-consensual.

Popular advice columnist Dan Savage coined the felicitous term *monogamish* for people who are “*mostly* monogamous,” open to non-monogamy on occasion but, generally, not “actively looking” for extra-

49. This paragraph and the preceding one are adapted from Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. (forthcoming). Similar terminology is, for example, used by Terri D. Conley, et al., *A Critical Examination of Popular Assumptions About the Benefits and Outcomes of Monogamous Relationships*, 17 PERSONALITY & SOC. PSYCH. REV. 124, 126 (2013). For discussion of different ways of structuring consensual non-monogamous relationships, see, for example, BLAKE SPEARS & LANZ LOWEN, BEYOND MONOGAMY: LESSONS FROM LONG-TERM GAY MALE COUPLES IN NON-MONOGAMOUS RELATIONSHIPS, (2010), http://thecouplesstudy.com/wp-content/uploads/BeyondMonogamy_1_01.pdf [https://perma.cc/FBU8-FU4V].

50. This definition of polyamory follows Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1462 (2011) (defining polyamory as “a preference for having multiple romantic relationships simultaneously”).

51. Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 264 (2008); see also SHEFF, *supra* note 33, at 1 (“Polyamory is consensual, openly conducted, multiple-partner relationships . . . [involving] negotiated access to additional partners outside of the traditional committed couple.”).

52. Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 321 (2004).

dyadic sex.⁵³ Sometimes Savage uses this term in a way that seems to imply that a monogamish relationship is a consensual one, but other times it is less clear. As with polyamory, I find it useful to use the term monogamish for a type of non-monogamy, independent of whether the non-monogamy is consensual or not.

Focusing now on behavior, sexual behavior often does not accord with desire. A person with non-monogamous desires may be monogamous in terms of behavior, for example, either to avoid social and legal sanctions or because of the lack of opportunity to find willing and appealing extra-dyadic partners.⁵⁴ Similarly, a person who desires to be monogamous may, for various reasons, have extra-dyadic sex on occasion or may be celibate.

It is worthwhile to distinguish between two types of polyamorous behaviors. Polyamorous people sometimes seek to be married to more than one person at the same time. There are two distinct types of such relationships, *plural* marriages and *group* marriages. A person in a *plural* marriage is married to more than one person and the various people to whom he or she is married are not married to each other.⁵⁵ When a person is in a plural marriage with two other people, it is sometimes called a “vee” and when a person is in a plural marriage with more than two people, it is sometimes called a “hub and spoke” arrangement.⁵⁶ In contrast, a person in a *group* marriage is married to two or more people all of whom are also married to each other.⁵⁷ When I use the term *polygamy*, I mean to include *both* plural

53. Dan Savage, *Savage Love: Monogamish*, STRANGER (July 20, 2011), <http://www.thestranger.com/seattle/SavageLove?oid=9125045> [<https://perma.cc/E4SR-HF4Y>] (coining the word *monogamish*). For discussion of this concept and Savage’s use of it, see Mark Oppenheimer, *Married, with Infidelities*, N.Y. TIMES MAG. (June 30, 2011), http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?_r=0 [<https://perma.cc/64DL-D4N2>].

54. Emens, *supra* note 52, at 330.

55. Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 1977 (2015).

56. See, e.g., Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 47–48 (2010). For various reasons, including simplicity, I more often refer to triads and group marriages/relationships than I do to vees and plural marriages/relationships. For purposes of this article, my more frequent mention of triads than vees is not meant to be significant. Exploring the legal and policy differences between them is something left for another time. I do, however, have a hunch that concerns relating to consent may play out differently in group relationship forms like triads than in plural relationship forms like vees.

57. Some people define plural marriage as when a person is married to more than one person at a time regardless of whether or not the person/people to whom he or she is married are also married to each other. On this alternative definitional scheme, all group marriages are plural marriages but not all plural marriages are group marriages. For example, Chief Justice Roberts talks about plural marriage in his dissenting opinion but cites to an example of a group marriage (a “throuple” involving three women “married” to each other). *Obergefell v. Hodges*, 135 S. Ct.

marriage and group marriage. Of course, polygamy is not legal anywhere in the United States because of the aforementioned “one-at-a-time” rule that restricts marriage to people who have never been married or those whose prior marriages have ended through annulment, divorce, or due to the death of all prior spouses.⁵⁸ Despite this, *de facto* plural and *de facto* group marriages—as well as other plural and group relationships—exist throughout the country.⁵⁹

III.

In this Part, I consider post-*Obergefell* arguments for and against plural and group marriages. Before *Obergefell*, opponents of marriage between people of the same-sex tried to base arguments against same-sex marriage on the strong intuitions held by many Americans that polygamy should be illegal and is morally problematic.⁶⁰ As previously noted, Chief Justice Roberts made this type of argument in his *Obergefell* dissent; while allowing that there may be significant differences between same-sex marriage, on the one hand, and plural and group marriage, on the other,⁶¹ Roberts maintained that

2584, 2622 (2015). Roberts seems to include group marriages as a type of plural marriage. For clarity, I distinguish among them, although for much of my discussion, I consider them together.

58. Typical of this structure is New York’s marriage law, which states “[a] marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless . . . [s]uch former marriage has been annulled or . . . dissolved.” N.Y. DOM. REL. LAW § 6 (2019).

59. See BENNION, *supra* note 5, at 4–7; Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1966–75 (2010); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 1–3 (2015). For an earlier discussion of group marriage, see LARRY CONSTANTINE & JOAN CONSTANTINE, *GROUP MARRIAGE: A STUDY OF CONTEMPORARY MULTILATERAL MARRIAGE* 148–61 (1973).

60. See, e.g., Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321, 326 (1995) (“If the notion of marriage were separated . . . from the fact that only . . . a man and a woman[] could beget a child[,] then on what ground of principle could the law confine marriage to ‘couples?’”); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47 (“If same-sex marriage must be legalized to accommodate the subjective, identity-defining sexual-intimacy preferences of gays and lesbians, it would be very difficult to refuse to recognize . . . polygamy . . . on a principled basis.”); Stanley Kurtz, *Beyond Gay Marriage*, WKLY. STANDARD (Aug. 4, 2003, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/beyond-gay-marriage> [<https://perma.cc/53TR-EYXL>] (“[G]ay marriage [will] take us down a slippery slope to legalized polygamy and ‘polyamory’ (group marriage).”).

61. *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting) (“I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But . . . petitioners have not pointed to any.”).

Obergefell's constitutional argument “appl[ie]d with equal force to the claim of a fundamental right to plural marriage.”⁶²

In *Obergefell*, Justice Kennedy, writing for the five-judge majority, found that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”⁶³ In reaching this conclusion, he built on existing “right to marry” cases including *Loving v. Virginia*,⁶⁴ *Zablocki v. Redhail*,⁶⁵ *Turner v. Safley*,⁶⁶ and *United States v. Windsor*.⁶⁷ In so doing, he articulated and drew on four principles that he said demonstrate why marriage is both fundamental and should be available as a matter of right to same-sex couples: (1) “the right to personal choice regarding marriage” that flows from the core notion of individual autonomy,⁶⁸ (2) the importance of marriage to “safeguard[ing] children and families,”⁶⁹ (3) marriage “is a keystone of our social order,”⁷⁰ and (4) there is something special and unique about coupling—the two-person union—that is crucial to the centrality of marriage to the Court’s jurisprudence.⁷¹

For purposes of this article, this fourth principle is the most significant. Chief Justice Robert’s dissent takes direct issue with this principle. Roberts said, “[a]lthough the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.”⁷² It is to discussion of this point that I now turn.

Before *Obergefell*, advocates of access to marriage for same-sex couples had to frequently respond to this type of invocation of polygamy by distinguishing same-sex marriage from plural and group marriage. Among the main distinctions they offered were the unequal roles of men and women in plural relationships, the lack of consent in plural and group relationships, the negative impact on children whose parents are polygamous, the complexity of plural and group marriages, and an argument based on the

62. *Id.* at 2621.

63. *Id.* at 2604 (majority opinion).

64. 388 U.S. 1 (1967).

65. 434 U.S. 374 (1978).

66. 482 U.S. 78 (1987).

67. 570 U.S. 744 (2013).

68. *Obergefell*, 135 S. Ct. at 2599.

69. *Id.* at 2600.

70. *Id.* at 2601.

71. *Id.* at 2599.

72. *Id.* at 2621 (Roberts, C.J., dissenting).

simple fact that having two or more spouses is different from having one.⁷³ Now that same-sex marriage is the law of the land, advocates of same-sex marriage are off the hook when it comes to having to answer these arguments; opponents of allowing group and plural marriages—some of whom no doubt support access to marriage for same-sex couples—must take up the work of distinguishing plural and group marriage from dyadic marriage (whether between people of the same or different sex). What follows is a survey of the possible arguments that might be made to that effect. I suggest that none of these arguments succeeds as a matter of logic or public policy.

A. Polygamy Is Sexist or Bad for Women

Most polygamous relationships in the United States have been and are *polygynous* (a plural or group marriage—typically, a plural marriage—in which a person—typically, a man—has two or more wives).⁷⁴ Historically, women in polygynous relationships have had less power than the men in such relationships, and some of them have suffered from abuse.⁷⁵ In some polygamous relationships, however, women do not play subservient roles and the history of polygamy may not be as bad for women as some have claimed.⁷⁶ Further, there are plural and group relationships in which all of the parties involved are of the same sex or in which the parties are “sex-equal”;⁷⁷ women in these relationships are not subservient and are no more likely to be abused than women in other sorts of relationships.

Also note that “traditional” marriages—that is, marriages between one man and one woman—were historically deeply sexist in their legal character and women in such relationships were typically subservient to their

73. See, e.g., DEN OTTER, *supra* note 2, at 69, 72.

74. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997).

75. See, e.g., Bala et al., *supra* note 34, at 7, 12–13; EMBRY, *supra* note 3, at 178.

76. See IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 364–65 (1996); BENNION, *supra* note 5, at 37–38; PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 41–43 (1994). See generally Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis*, in POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY RESEARCH REPORTS 1, 3–11 (2005), <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf> [<https://perma.cc/V99V-HK5E>].

77. See Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1040 (2005); Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, DISSENT (2009), <https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law> [<https://perma.cc/5HV5-LX8M>].

husbands.⁷⁸ That said, although some problematic gendered assumptions remain associated with marriage, even before same-sex marriage reached all fifty states, the institution of marriage had evolved to become more egalitarian and had, as a formal legal matter, shed virtually all of its sexist character.⁷⁹ Plural and group relationships might similarly become more egalitarian; perhaps legalizing polygamous marriage would speed up this process. But even if many polygamous relationships are bad for women, some are not. It is problematic to reject polygamy because some polygamous relationships are bad for women.⁸⁰

B. Consent

Another related possible distinction between group and plural marriages and relationships, on the one hand, and same-sex marriages, on the other, concerns whether all parties to a polygamous relationship have consented. At the oral argument for *Obergefell v. Hodges*, Justice Alito asked Mary Bonauto, the lawyer arguing on behalf of the same-sex couples seeking marriage equality, “Suppose that we rule in your favor . . . and then . . . a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them a license?”⁸¹ Bonauto started her answer by citing “concerns about coercion and consent,”⁸² but Alito tried to preclude this response by modifying his hypothetical as follows: “[T]hey’re all consenting adults, highly educated. They are all lawyers.”⁸³ Bonauto continued to focus on consent in her reply to Justice Alito’s modified question involving the hypothetical four-lawyer group marriage.⁸⁴ It may well be true that, in some non-sex-equal polygynous marriages, the first wife does not consent to the husband taking on a second wife. In Alito’s group marriage hypothetical and many actual examples, such as Allen, Brian, and Charles or Brynn, Kitten, and Doll, all parties have consented. Of course, it is possible that a person who *appears* to consent to a group or plural marriage—or to

78. See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 58–60 (2011) (discussing gender asymmetry in marriage law focusing on doctrine of coverture and its demise).

79. For a similar point, see Calhoun, *supra* note 77, at 1040.

80. For a lengthy and, I think, persuasive discussion that arguments based on harms to women and gender inequality are not strong arguments against polygamy generally, see generally DEN OTTER, *supra* note 2, at 69–122.

81. Transcript of Oral Argument at 17, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

82. *Id.* at 17–18.

83. *Id.* at 18.

84. *Id.* at 17–19. The Justices returned a second time to polygamy in the oral arguments for *Obergefell*. *Id.* at 57.

his/her spouse's plural marriage—is not truly consenting and/or is suffering from a kind of false consciousness.⁸⁵ But the same is true with respect to some “traditional” marriages (that is, dyadic “man-woman” marriages): some women are pressured into marrying, some women marry because they feel they have no choice, and the like. We do not reason from the lack of consent in some dyadic marriages to the prohibition of all such marriages; nor should we reason about plural and group marriages in that way either. Although Alito was wrong to imply that the educational background or occupational status of the people in his group marriage hypothetical is determinative of their having consented, he was right to be dissatisfied with Bonauto's appeal to lack of consent as a response to arguments for polygamy. Some people do knowingly choose to be in plural or group relationships, and some of them wish to obtain legal recognition for their relationships.⁸⁶ Even if someone does not truly consent to his or her spouse seeking to bring an additional person into their marriage—whether in a group or plural marriage—this does not mean all plural or group marriages suffer from problems related to consent.

C. Children

Another argument distinguishing same-sex marriage from plural and group marriages is that children born to people in polygamous marriages will be negatively affected compared to other children including children of same-sex couples. This argument takes various forms including that, compared to children in other types of families, children whose parents are in plural or group marriages are more likely to be abused, neglected, and are more likely to have psychological problems. While there are disturbing instances of children in polygamous communities marrying—or entering de facto or “celestial” marriages—when they are below the age of consent,⁸⁷ such occurrences are neither a necessary nor a common feature of plural or group marriages. There are civil and criminal procedures and penalties for dealing with people who knowingly marry or have sex with underage

85. See Martha Bailey & Amy Kaufman, *Should Civil Marriage Be Opened Up to Multiple Parties?*, 64 EMORY L.J. 1747, 1765–66 (2015). See generally CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW passim* (1978) (discussing problems with women's consent).

86. See, e.g., Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 (“feminist” defense of polygamy). For a more general discussion of consent, see Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615 (2017); cf. PATRICIA DIXON-SPEAR, *WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGAMY BY CONSENT* 25 (2009).

87. See Chatlani, *supra* note 34, at 129.

children just as there are for dealing with parents who neglect or abuse their children or allow them to be neglected or abused. The best way to prevent such serious problems is to attack them directly, not by using polygamy as a proxy for the actual cause of these ills.⁸⁸

There is no direct link or established correlation between parents who are in plural or group relationships and the neglect of children. And, while there is some limited empirical research to support the claim that children of polygamous parents have increased psychological problems, there is a more robust empirical literature suggesting this is not the case.⁸⁹ In fact, because children in polygamous families may have more than two parents who care for them, their upbringing may well be characterized by increased stability, support and love. Although the claim that polygamy is bad for children is widely held and has been used to justify raids on polygamous communities, this claim is unsupported and the raids carried out based on this claim have been disastrous.⁹⁰ More generally, with the expansion of no-fault divorce, the increased use of joint custody, and the frequency with which divorced people remarry, it has become increasingly common for children to have more than two parental figures.⁹¹ In fact, several states now allow for three or more legal parents.⁹² It is no longer unusual for children to have more than two parental figures in their lives and this may well be good for them. This cuts against making a distinction between same-sex marriage and plural/group marriage based on the impact on children.

88. *State v. Holm*, 137 P.3d 726, 774–76 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part).

89. Compare Salman Elbedour et al., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, 5 *CLINICAL CHILD & FAM. PSYCHOL. REV.* 255, 258–61 (2002) (identifying multiple psychological risk factors for children in polygamous households), with Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 *J.L. & SOC. DEVIANCE* 150, 242–43 (2013) (concluding that it is in the best interest of some children to live in a polygamous household that provides them more love and support). See generally SHEFF, *supra* note 33.

90. See *In re Steed*, No. 03–08–00235–CV, 2008 WL 2132014 at *1 (Tex. Ct. App. May 22, 2008) *aff'd*, *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008); see also DEN OTTER, *supra* note 2, at 136–53 (providing detailed discussion of the argument that polygamy is bad for children). See generally Ralph Nader, *The Law v. Plural Marriages*, 31 *HARV. L. REC.* 10 (1960).

91. See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 16–23 (2010).

92. See *supra* note 32.

D. Two Is More Complicated than Three

Another commonly proposed distinction between polygamy and same-sex marriage is that polygamy is simply much more complicated. It has been observed that because “marriage is already structured to involve only two people, the recognition of same-sex marriages [had] no economic costs. In contrast, recognizing polygamous marriages would have significant potential ramifications in terms of additional costs to the state”⁹³ Note, however, that various non-trivial changes had to be made to many states’ family laws when same-sex marriage became legal in those states. Even so, it is certainly true that U.S. family law is set up for two-person marriage and that, in order to incorporate group and plural marriages, non-trivial changes would be required to the default rules, statutes, common law, regulations, etc., that make up family law. The changes involved would surely be more complicated than those required when states started recognizing marriage between people of the same sex. That said, marriage is a supple institution. Numerous significant changes have been incorporated into family law over the years, including, for example, the abolishment of coverture,⁹⁴ the gradual elimination of gender asymmetries in family law,⁹⁵ and the advent of no-fault divorce.⁹⁶ Further, as Adrienne Davis and others have shown, it is far from impossible to adapt the law of domestic relations to allow plural and group marriages.⁹⁷ Along these lines, family law did evolve to deal with “serial polygamy” and the complicated family structures that result when people marry three or more times and have children with different people. Further, as previously mentioned, state laws allowing for three or more legal parents are now in place in several states, showing that this sort of change in family law is quite possible.⁹⁸ If living in a more complicated legal structure is better for the people involved or required by constitutional considerations,

93. Bala et al., *supra* note 34, at 38.

94. On marriage as an evolving institution, see generally NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 205–07* (2000) and HENDRIK HARTOG, *MAN & WIFE IN AMERICA: A HISTORY passim* (2000).

95. On elimination of gender asymmetries in family law, see, for example, GROSSMAN & FRIEDMAN, *supra* note 78, at 70–71.

96. On development of no-fault divorce, see GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION 161–68* (1991).

97. See generally Martha M. Ertman, *The Business of Intimacy: Bridging the Private-Private Distinction*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY* 467, 467–69 (Martha Albertson Fineman & Terence Dougherty, eds. 2005); Davis, *supra* note 59, at 1958–61; Klein, *supra* note 8, at 33–34. For further discussion of the complexity of polygamy, see DEN OTTER, *supra* note 2, at 153–58.

98. See generally CAL. FAM. CODE § 4057 (West 2013).

administrative complexity alone is not a strong argument against such alternative legal relationship forms.

E. The Right To Marry Some One You Love

Jonathan Rauch has pointed out a possible disanalogy between laws that prohibit same-sex couples from marrying and laws that prohibit polygamy: arguments for same-sex marriage involve the demand by LGBT people for the right to marry someone they love, while arguments for plural and group marriage involve the demand by polyamorous people for the right to marry *everyone* they love.⁹⁹ Rauch's argument is, in effect, that it is greedy to make a demand for more than one spouse. This is a misleading critique of polygamy.

To help see this, contrast the current "one-at-a-time" rule with the more restrictive "one-bite-at-the-apple" rule that would allow every adult the possibility to be married to only one person over the course of a lifetime. Under the "one-bite-at-the-apple" rule, a person whose spouse dies or whose marriage ends in divorce is not permitted to marry again.¹⁰⁰ Part of what is problematic about the "one-bite-at-the-apple" rule is that it seems to be a restriction of the right to marry. A person whose spouse has died seems entitled to marry again if he or she so desires. We might admire the widow who decided not to remarry because she already married her one true love, but it seems wrong to *prevent* her from remarrying if she wishes to. A person who wants to marry again is not being greedy even though he or she has already been married. Our current marriage system allows for "serial polygamy" but not "contemporaneous polygamy." What justifies this difference if not one of the considerations I discussed above? This suggests that Rauch's argument is circular.

F. Immutability and Innateness

I turn now to a proposed difference between same-sex marriage and polygamy that appeals to immutability based on the idea that sexual orientations are innate or immutable while the desire for polygamous relationships is not. As William Saletan put it, "[i]mmutability is the biggest

99. See Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON, A READER 284, 286 (Andrew Sullivan ed., 1997).

100. This is not unprecedented in United States family law. South Carolina, for example, did not allow divorce until 1948. See GROSSMAN & FRIEDMAN, *supra* note 78, at 161.

difference between homosexuality and polyamory.”¹⁰¹ Similarly, Jonathan Rauch distinguished polygamy from same-sex marriage, noting that “some people are constitutively attracted only to members of the same sex” while no one is “constitutively attracted . . . to groups rather than individuals.”¹⁰² Especially in light of Justice Kennedy’s invocation of the immutability of same-sex sexual orientations,¹⁰³ this might be a promising way to distinguish same-sex marriage from group and plural marriage in the eyes of constitutional law: same-sex sexual desire “occupies a deeper level of human consciousness”¹⁰⁴ than the desire to have more than one sexual or romantic relationship at the same time.

To begin, while it is well established that sexual orientations are (i) not consciously chosen and (ii) are very difficult or impossible to change,¹⁰⁵ it is far from proven that sexual orientations are innate.¹⁰⁶ To easily distinguish desire for polygamous relationships from desire for same-sex relationships, polyamory would need to either be consciously chosen or relatively easy to change. There is, however, very little research on the origins of polyamory. That said, some (but not all) polyamorous people claim they never chose to have the desire for multiple contemporaneous romantic relations and they have felt polyamorous as long as they have had sexual desires; this fits with the idea that polyamory is innate and not chosen.¹⁰⁷ In fact, given how robust

101. William Saletan, *The Case Against Polygamy*, SLATE (June 29, 2015, 2:47 PM), http://www.slate.com/articles/news_and_politics/politics/2015/06/is_polygamy_next_after_gay_marriage_chief_justice_roberts_obergefell_dissent.html [<https://perma.cc/3PYE-CTMX>].

102. Rauch, *supra* note 99, at 286.

103. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

104. Andrew Sullivan, *Three’s a Crowd*, NEW REPUBLIC (June 17, 1996), *reprinted in* SAME-SEX MARRIAGE: PRO AND CON, A READER, *supra* note 99, at 279.

105. *See, e.g.*, Jack Drescher, “*Sexual Conversion (‘Reparative’) Therapies: History and Update*,” *in* MENTAL HEALTH ISSUES IN LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITIES 71 (Billy E. Jones & Marjorie J. Hill eds., 2002); SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL, AND RESEARCH PERSPECTIVES (Ariel Shidlo et al. eds., 2002); STEIN, *supra* note 45, at 258–74.

106. *See, e.g.*, DIAMOND, *supra* note 45; LOUIS GOOREN & WILLIAM BYNE, *Sexual Orientation in Men and Women*, *in* 4 HORMONES, BRAINS AND BEHAVIOR 164 (Donald W. Pfaff et al. eds., 3d ed. 2017); STEIN, *supra* note 45. Recently, a sophisticated large-scale scientific study of sexual orientation was conducted. This study suggests that sexual orientation does have a genetic component, but to the degree that most human characteristics do, that a significant component of sexual orientation is environmental, and that there is no single gene sequence that is responsible for same-sex sexual attraction. *See* Andrea Ganna et al., *Large-Scale GWAS Reveals Insights into the Genetic Architecture of Same-Sex Sexual Behavior*, 365 SCIENCE 882, 882–85 (2019); Melinda Mills, *How Do Genes Affect Same-Sex Behavior*, 365 SCIENCE 869, 869–70 (2019).

107. *See* Emens, *supra* note 52, at 350–52; Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity and Power*, 34 J. CONTEMP. ETHNOGRAPHY 251, 274 (2005); Tweedy, *supra* note 50 *passim*.

sexual desires are and the fact that many people have a hard time being monogamous,¹⁰⁸ even given the social pressure and legal norms that push in this direction, indicates that polyamory is at least difficult, and perhaps impossible, to change. Just as, in the past, lesbians, gay men and bisexuals tried to change their sexual orientation and failed,¹⁰⁹ and this was seen as supporting the immutability of sexual orientation, so too do many people who want to remain “faithful” to their spouses or partners (that is, to be monogamous) but cannot “control themselves.” This suggests the desire to be non-monogamous may also be immutable. Because of the lack of evidence about the origins of polyamory combined with some suggestive evidence polyamory might be neither chosen nor changeable, it is not clear how different sexual orientation and polyamory are in terms of innateness, lack of choice, and changeability.

Some scholars and courts, when talking about immutability, have invoked a different sense of immutability, what I call “soft” immutability, according to which a trait is immutable if changing it is very difficult or if the trait is so important to a person’s identity that it is deeply problematic for the government to force a person to change that trait.¹¹⁰ The Connecticut Supreme Court, for example, in a case concerning relationship recognition for same-sex couples, held “sexual orientation is . . . an essential component of personhood [such that] even if there is some possibility that a person’s sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so.”¹¹¹ Sexual orientation is surely immutable in this sense of the term, but so too is polyamory. Just as the state should not try to change a person’s deeply-held attraction to people of the same sex, even if this were possible to change, for the very same reasons, the state should not try to change a person’s deeply-held desire to have multiple, contemporaneous partners.¹¹²

108. See generally BARASH & LIPTON, *supra* note 47; RYAN & JETHÁ, *supra* note 47.

109. See Tia Powell & Edward Stein, *Legal and Ethical Concerns About Sexual Orientation Change Efforts*, HASTINGS CTR. REP. Sept.–Oct. 2014, at 32, 33 (2014).

110. See Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 633–35 (2014) (discussing “soft” immutability); see also Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 652 (2001) (trying to resuscitate an argument based on immutability by reading immutability “softly”).

111. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008).

112. For related arguments about immutability, see DEN OTTER, *supra* note 2, at 251–54; SONU BEDI, *BEYOND RACE, SEX AND SEXUAL ORIENTATION* 238–44 (2013). This is especially clear for people who want to marry more than one person at the same time for religious reasons since religious affiliation and beliefs are canonical examples of characteristics that are softly immutable. See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1508 (2011); Douglas Laycock, *Taking*

G. Summary

My discussion in this Part shows that none of the attempts to distinguish arguments for same-sex marriage from arguments for group and plural marriages succeed. This does not, however, lead to the conclusion Chief Justice Roberts was aiming for in his *Obergefell* dissent; that is, my conclusion does not make for an argument against same-sex marriage any more than it makes for an argument against access to marriage generally. Further, my discussion in this Part, combined with the absence of strong arguments against group and plural marriage,¹¹³ does not lead me to think that the legalization of group or plural marriage is forthcoming soon—quite the contrary, especially given the negative attitude that most Americans have towards polygamy. According to Gallup, which conducts an annual survey of the “values and beliefs” of Americans, in 2019, eighty percent of Americans believe that polygamy is “morally wrong.”¹¹⁴ That said, there are a growing number of triads like Allen, Brian, and Charles and Brynn, Kitten and Doll in spouse-like relationships and who would like legal protections for their relationships, who need such legal protections, and who deserve them. If it is plural and group *marriage* that Americans find morally wrong, then a promising pathway for relationship recognition for triads and quads could be existing domestic partnership and civil union laws. My suggestion is to repurpose and adapt these existing legal structures to create what I call multiple partner unions.

IV.

Domestic partnerships were created starting in the 1980s after early attempts to get access to marriage for same-sex couples failed.¹¹⁵ For some advocates of LGBT rights, the goal in creating such alternative modes of relationship recognition was not to get access to marriage. Rather, the idea was to create state-sanctioned non-marital family forms that could provide benefits and protections for same-sex couples and others who did not wish

Constitutions Seriously: A Theory of Judicial Review, 59 TEX. L. REV. 343, 383 (1981) (book review).

113. See generally DEN OTTER, *supra* note 2.

114. Megan Brenan, *Birth Control Still Tops List of Morally Acceptable Issues*, GALLUP NEWS SERV. (May 29, 2019), <https://news.gallup.com/poll/257858/birth-control-tops-list-morally-acceptable-issues.aspx> [<https://perma.cc/N32J-79PX>].

115. See, e.g., Edward Stein, *The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples*, in FAMILY LAW STORIES 27 (Carol Sanger ed., 2007); Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015); NeJaime, *supra* note 38, at 87.

to—and/or could not—marry.¹¹⁶ But, by the end of the twentieth century, the non-marital family forms that some states had created had become almost equivalent to marriage in those states. Vermont civil unions provide a clear example.

In 1999, the Vermont Supreme Court held that Vermont's state constitution required that same-sex and different-sex couples have access to the same benefits, rights, responsibilities and duties associated with marriage.¹¹⁷ The court was unanimous in finding Vermont's failure to provide same-sex couples the opportunity to obtain the rights, benefits, duties and obligations of marriage unconstitutional, although the justices used different theories to reach that conclusion.¹¹⁸ In terms of the remedy, the court ordered the state legislature to change its law of domestic relations to allow same-sex couples access to the same benefits (and responsibilities) as different-sex couples.¹¹⁹ In response, in 2000, the Vermont state legislature did just that, passing a civil union law that created a new legal relationship for same-sex couples.¹²⁰ Vermont's civil union law, like California's domestic partner law starting in 2005, provided all the rights, benefits and duties associated with marriage under state law.¹²¹ What it did not provide were any federal benefits or any benefits in other states that did not have an equivalent form of relationship recognition.¹²² The federal government did not—and still does not, for the most part—provide recognition to civil unions and domestic partnerships. That said, creating multiple partner unions that, like Vermont civil unions, provide all the benefits of marriage provided under state law, is the next best alternative short of allowing plural or group marriages. And creating multiple partner union with fewer benefits than marriage, like the weaker domestic partnerships that California had before 2005 (and that other jurisdictions had more recently), would be better than the status quo for plural and group relationships.

Of course, there is significant work that would need to be done to repurpose and adapt existing civil union and domestic partnership law for multiple partner unions. In particular, there are three main issues that need to be dealt with: *entrance* into a multiple partner union, *exit* from a multiple partner union (whether through partial or complete dissolution/divorce of a

116. See, e.g., Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L LESBIAN & GAY Q., Fall 1989, at 9, reprinted in SEXUALITY, GENDER AND THE LAW 337 (William Eskridge et al. eds., 4th ed. 2018).

117. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

118. *Id.*

119. *Id.* at 889.

120. VT. STAT ANN. tit. 15, § 1201 (West 2017).

121. VT. STAT ANN. tit. 15, § 1204 (West 2017).

122. See *id.*

multiple partner union), and the *benefits* available to those in multiple partner unions. Fortunately, a handful of scholars have made some significant proposals for what multiple partner unions would look like. The two most promising, in my view, are found in Adrienne Davis's article *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality* and in Diane Klein's article *Plural Marriage and Community Property Law*.¹²³ These articles are an ideal starting point for crafting an implementation of my proposal to adapt existing civil union and domestic partnership laws for multiple partner unions.

Fifty years ago, the idea of two people of the same sex getting married was shocking to most Americans. Twenty years ago, some jurisdictions started allowing for robust legal protections for same-sex couples and five years ago marriage for same-sex couples was a reality throughout the entire United States. The pathway to legal recognition for plural and group relationships in the United States is surely going to be different, as plural marriage has been a topic of debate for much of this nation's history, long before same-sex marriage was an issue in this country. That said, the legal arguments in favor of plural and group marriage seem in the process of going from being "off the wall" to being "on the wall," that is, they seem to be starting to shift from being arguments that "most well-trained lawyers think are clearly wrong" to "arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them."¹²⁴ Families consisting of triads and quads and their children deserve the dignity and respect that are accorded other families through the law of domestic relations. It is time to start figuring out how to give these families the dignity and respect that they deserve.

123. Davis, *supra* note 59; Klein, *supra* note 8.

124. Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [https://perma.cc/B4VP-HBT2].