

Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality

“**W**ILL THE POLYGAMY DEBATE ever be the same?” This is the question the *Salt Lake Tribune* posed shortly after the debut of *Big Love*, the hit HBO series about a Utah polygamous family gone suburban. ... The highly acclaimed hit series self-

consciously invites viewers to consider analogies between same-sex and polygamous families. In the show’s much-anticipated second season, the invitation became more pointed and persistent, with intermittent references to “coming out,” “closeted families,” and “the state” as repressively surveilling nonconforming “big love.”

Curiously, this gay analogy is popular among both supporters and detractors of expanded recognition for alternative family structures. Polygamy’s proponents liken it to same-sex marriage, urging both as equally legitimate “alternative” lifestyles that should be tolerated and given legal recognition—plural marriage is “the next civil rights battle,” proclaims Pro-Polygamy.com. Meanwhile, opponents of gay marriage liken it to polygamy, invoking fears of a fast slide down a classically slippery slope. This article argues that, while the gay analogy may make for splashy punditry and good television, it distracts us from what is truly distinctive, and legally meaningful, about polygamy—namely, its challenges to the regulatory assumptions inherent in the two-person marital model. ...

This article ... shifts attention from the more common constitutionality and decriminalization debates to a new set of questions: whether and how polygamy might be effectively recognized and regulated, i.e., licensed, consistent with contemporary social norms. ... Polygamy’s defining feature—marital multiplicity—generates specific costs and vulnerabilities, as well as opportunities for exploitative and opportunistic behavior. ... Of course, for some, multiplicity also generates upsides, which this article also considers. Hence, this article approaches polygamy as a problem of bargaining, cooperation, strategic behavior, and the issues they engender. ...

But, is the law up to regulating marital multiplicity? This article contends that, in contemplating the design of a plural marriage regime, we are not starting from scratch. While conventional family law, with its assumptions of the marital dyad, may not be up to the task, other legal regimes have addressed polygamy’s central conundrum: ensuring fairness and establishing baseline behavior in contexts characterized by multiple partners, ongoing entrances and exits, and life-defining economic and personal stakes.

In particular, commercial partnership law has addressed precisely these concerns through a robust set of off-the-rack rules.



This article contrasts polygamy with aspects of partnership law to derive a set of default rules that might accommodate polygamy’s marital multiplicity, while addressing some of the costs and power disparities that polygamy has engendered. The point is not to use partnership law as a “map,” but rather to make the point that there are already conceptual models for what might be

thought of as plural marital associations. ...

Legalization incorporates decriminalization, but also entails some sort of official recognition, i.e., licensing and positive legal regulation. ... While this article does not advocate for polygamy, explicitly declining to endorse it as the “next civil rights battle,” it does attempt to move beyond the polygamy question framed as good versus bad, disputes between liberalism and pluralism, and decriminalization versus prohibition, to a pragmatic assessment of whether and how polygamy might be recognized and regulated, consistent with contemporary norms of equality and fairness in family life.

This article starts with a brief primer in Part I, summarizing some of the anthropological, economic, and sociological insights on polygamy. It then describes contemporary criticisms of polygamy, as well as the dominant discourses urging it as a lifestyle in the United States, distinguishing religious fundamentalism from various strains of identitarian pragmatism and idealism, including two odd bedfellows, feminism and black nationalism. Contrary to popular imagination, ... there are diverse stakeholders in the polygamy debate.

Part II of this article focuses on a curious alliance between proponents of polygamy and opponents of same-sex marriage. It shows how polygamy’s advocates are increasingly “coming out of the closet” to piggyback on the lobbying, legal, and cultural work done to achieve civil rights for “conventional” sexual minorities, i.e., gays and lesbians. On the other hand, those who oppose gay marriage frequently urge that it will open the door to more intimacy horrors, chief among them, polygamy. Thus the gay analogy features prominently in what I will characterize as the alternative lifestyles defense and the slippery slope invocation.

While the gay analogy is a compelling one, this part ends by disputing it as a miscue from what is legally distinctive about polygamy: its multiplicity. Marital multiplicity both increases the costs of intimate negotiation and complicates it in several ways, including raising questions about how power is bargained for and distributed in marriage, and, as long as marriage is limited to heterosexuals, inevitably then between men and women.

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Part III turns to partnership law to propose some tentative default rules that might accommodate marital multiplicity, while insuring against some of its historic and ongoing abuses. This part starts with a brief recounting of how the scholarship on default rules has sought to address bargaining dilemmas in arms-length contexts, giving particular weight to the Ayres/Gertner penalty default norm and the notion of sticky versus slippery default rules. It then rehearses some proposed defaults for plural marital associations. It argues that because both the stakes (intimacy) and the context (intimacy) make arms-length, self-regarding bargaining difficult, the rules might incorporate penalty defaults (as information-forcing devices or to discourage opportunistic behavior) and also be particularly sticky, to avoid easy contrary negotiations.

Finally, this part confronts polygamy’s effects on third parties, or its “externalities”: concerns that it injures children and encourages fraud against the state. This part contends that sunlight is the best disinfectant against fraud and that, with regard to children, family law already accommodates intimate multiplicity, or what might be thought of as “de facto” and “serial” polygamy.

As described in Part IV, this article is inextricably tied to the broader debate about whether the state should remain in the marriage “business.” A dominant trend within debates over state recognition of intimate relations is to analogize marriage and intimacy commitments to business associational models, or to turn to private ordering more generally. The article concludes in this part by contemplating the significance of incorporating polygamy into the marriage pantheon for the broader debate over state regulation of intimacy. It parses the debate over recognition, abolition, and privatization into what it calls intimacy exceptionalism, urging instead a functional approach. ...

IS IT BETTER to channel legal energy into continuing to root out, repress, and punish polygamy, or into admitting polygamy into the marriage pantheon? This article concludes that the answer may hinge on whether polygamy could be effectively regulated. It has confronted polygamy not as an abstract question of religious or intimacy liberty, but rather as a set of actual relationships that, if licensed as a state-recognized regime, would require regulation. ...

Anticipating concerns, the article contends that at least some of the harms and costs of polygamy, particularly its effects on children, are not limited to formal plural marriages, but rather are seen in what the article has called serial and de facto polygamy as well. Moreover, these proposed defaults may very well resolve what the article described as the polygamy paradox. At

bottom, one of the biggest concerns about polygamy is its effects on women’s well-being. Economics and bargaining scholars such as Becker and Posner have endorsed polygamy as “good for women,” while many whose first principles are sex equality remain skeptical. Indeed, when viewed ex ante, from a “courtship” perspective, women may well be advantaged as a group as men compete for multiple wives.

On the other hand, the bargaining dynamics ex-post, during the long life of the marriage itself, may very well disadvantage plural spouses, particularly wives. Neither those who advocate nor those who oppose polygamy on gender grounds have grappled with how regulatory norms might shape bargaining power in marital multiplicity. If we vest plural intimates with rights, it then will be a (very tough) open question as to whether they will exercise them in favor of their own self-interest, or, rather, whether cultural and social norms will prevail. If the latter, is plural intimacy markedly different from dyadic?

Undoubtedly, some readers will remain skeptical that partnership principles, designed to govern arms-length commercial formations, can have anything meaningful to say about the bargaining uncertainties and vulnerabilities generated in plural marriage. Although the literature on household bargaining is robust, many legal scholars still resist the notion that private law could have much to say about distributive justice within the household. ... This article has challenged this segregation of market and intimate norms, suggesting that the bargaining dynamics and justice concerns are similar. ...

My intention here is not to advocate for polygamy, but to show it as a serious topic of legal and policy debates. As one practitioner of plural marriage stressed to me, polygamy is not for everyone, and probably not for most. But then, marriage is not for some at all. The question is not whether any of us would enter plural marriage, but whether we should prohibit others from doing so. And, I argue, this boils down to a question of whether we can effectively regulate it consistent with social goals of egalitarianism and fairness in intimate relationships. Can we even consider it? The answers lie in our response to the question, how big is our love? ||||

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