

11

(MIS)RECOGNIZING POLYGAMY

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INTRODUCTION

There is a burgeoning awareness that polygamy may require legal recognition. The increased liberality of law regarding LGBT families, culminating last summer in the US Supreme Court's overturning of state bans on same-sex marriage, has prompted scholars, judges, activists, and legislators to ask the question, "if same-sex marriage, why not polygamy?" In December 2013, a federal judge struck down the part of Utah's anti-polygamy statute that criminalizes cohabitation between a married person and someone other than their spouse. Activists have argued that the constitution requires recognition of polygamy or, conversely, that recognition is a mistake that will lead to the further entrenchment of women's subordination (Strassberg 2003). Debates about polygamy usually focus on decriminalization and the related question of whether polygamous family structures are inherently subordinating women. Recently, however, a handful of scholars have shifted from arguing about decriminalizing to theorizing what full-blown recognition would entail, analogizing polygamous relationships to business partnerships or corporations and arguing that business law provides a framework for the legal recognition of intimate relationships between more than two adults (Davis 2010; Drobac and Page 2007; Ertman 2001).¹

This essay considers the legal recognition of polygamy from a different perspective. Instead of tackling the normative question of whether recognition is a desirable goal or what legal form such recognition should take, it instead questions whether full recognition is a feasible, or even necessary, goal for polygamists and their allies. It argues that full recognition of polygamy is more difficult than commonly understood for two reasons: (1) our current family law protects family privacy to an extent that would be difficult with polygamous relationships, and (2) the current law of marriage involves public benefits not infinitely divisible among multiple parties. The essay then argues

that, despite these obstacles, we may see legally supported polygamous families in the near future, but not through the outright recognition of polygamy as a form of marriage. Instead, full recognition may not be necessary because elements of polygamous relationships are already being recognized through alternative means. Legal mechanisms, such as the enforcement of contracts for adult relationships, recognition of nonmarital cohabitants, registration schemes such as domestic partnership and reciprocal beneficiaries, and recognition of multiparent families are already beginning to make the simultaneous recognition of multiple relationships possible. Focusing solely on decriminalization misses the larger issue: polygamous marriage is an outdated way of thinking about adult relationships because marriage itself no longer captures the reality of many adult lives. Legal scholars may “misrecognize” the problem of polygamy when they focus on decriminalization and full recognition rather than scrutinizing the ways in which polygamy is already partially and unintentionally recognized by law. Rather than resisting polygamy as a threat to traditional marriage or embracing it as a civil rights issue, we instead could use it as an opportunity to reevaluate the law of marriage and its relationship to public benefits and legal parentage.

Part 1 of the essay begins by observing that, from a legal perspective, polygamy is a species of marriage. In order to define polygamy and understand how it might be recognized, we must first define marriage and understand what is at stake in the state’s recognition of personal, intimate relationships. Part 2 considers in detail the benefits and obligations conferred by civil marriage and explores how those benefits and obligations might—or might not—apply to polygamous marriages. It argues that providing recognition to polygamous marriage would dramatically change how state family law works by opening up ongoing marriages to state intervention. It then observes that these difficulties extend to the public benefits associated with marriage, which would be difficult to replicate with multiple spouses. Part 3 shows that despite the difficulties with full recognition of polygamy, partial recognition does occur, sometimes leading to unintended consequences. Part 4 then argues that although the many obstacles to recognition of polygamy identified in parts 2 and 3 may prevent full recognition, understanding polygamy as a form of marriage may be a distraction. As marriage declines in importance and is no longer the fundamental ordering principle of family law, trying to determine whether polygamy “counts” as marriage misses the mark. Polygamous families, if they want it, will be able to obtain recognition in many ways without being legally married,

and these other means may actually be more attractive to them than opening up traditional marriage to include multiple spouses.

WHAT IS MARRIAGE?

In order to consider the project of legally recognizing polygamy, we must first articulate the assumptions built into the notion of legal recognition of an intimate relationship. In the United States, as in most Western countries, monogamous marriage has long been the centerpiece of legal recognition of the family. Yet “marriage” is in the eye of the beholder and, indeed, can mean many different things depending on context. The definition of marriage has also shifted over time, with some features becoming increasingly important and some decreasing in importance or even falling away altogether.

Sex and Procreation

Traditionally, marriage was the legal status that provided a space for state-approved sexual relationships and the procreation of children. Fornication and adultery were criminal acts, and nonmarital children suffered numerous legal disabilities (Grossman and Friedman 2011). This bundling together of marriage, sex, and procreation meant that access to marriage was a necessary precondition for state-sanctioned sexual and procreative activity. In the famous case of *Zablocki v. Redhail*, where a man challenged a Wisconsin law barring him from marriage because he was in arrears on his child support payments for a nonmarital child, the US Supreme Court was explicit about the link between marriage, sex, and procreation:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships . . . it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society . . . if [Redhail’s] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.²

In the last fifty years, however, this tight link between marriage, sex, and procreation has unraveled. The US Supreme Court has also struck down laws discriminating against nonmarital children, bolstered the constitutional parentage rights of nonmarital fathers, and overturned laws criminalizing nonmarital sex.³ The state’s moral interest in linking

these three issues also declined. While in 1986 the court could compare homosexual activity to “possession in the home of drugs, firearms, or stolen goods,” by 2003 it insisted, in upholding the right of people to engage in sodomy, that “our obligation is to define the liberty of all, not to mandate our own moral code.”⁴ These changes in law track changes in social behavior. Between 1970 and 2000, the number of cohabiting couples rose from 523,000 to 5.5 million (Grossman and Friedman 2011, 125). Between 1980 and 2011, the percentage of births that were nonmarital rose from 18.4 percent to 40.7 percent.⁵

Although marriage, sex, and procreation have unraveled, they have not become completely unbundled. Marriage still provides legal advantages to parents and children. A child born within a marriage, for example, is still presumed in many states to be the legal child of its birth mother’s spouse, regardless of whether there is actually a genetic relationship between them (Appleton 2012). Some states still criminalize adultery. And many people still consider marriage to be a desirable, if not necessary, precondition for childrearing (Cahn and Carbone 2010). But “love, marriage, and the baby carriage” no longer always occur in that order, or even together at all (McClain 2007).⁶

Privatized Dependency

Another purpose of marriage has been the privatization of dependency (Fineman 2004). At common law, a married woman’s legal being was suspended; she was “covered” by her husband—hence the term *coverture* to describe the law of marriage. In turn, husbands were required to support their wives (Grossman and Friedman 2011, 59–61). Modern family law views marriage differently; husbands and wives no longer have distinct and separate roles. But marriage law still encourages financial dependency and presumes that spouses will care for one another and provide for one another. Family law doctrines such as community property assume that under ordinary circumstances, couples will pool their resources; remedies such as maintenance (alimony) can require spouses to continue to fulfill their duty to support one another even after divorce. Marriage also can affect access to welfare benefits. Benefits can be terminated through marriage by imputing the income of a spouse to a recipient; conversely, some benefits under Social Security become available only through marriage. Underlying all of these rules is the assumption—and, sometimes, legally enforceable rule—that spouses have a duty to support one another. This duty, in turn, prevents married people from becoming a drain on the state. In the United States, the extent to

which the law relies on marriage to privatize dependency is much more extreme than in most other Western nations. Health insurance, for example, is not provided by the government but rather through employers to both employees and employees' spouses—hence the oft-repeated phrase that someone is *married to healthcare*.⁷ The notion of privatized dependency is also at least partially responsible for the other public benefits granted to (or requirements imposed on) married couples: eligibility for lawful immigration status, a fast track to citizenship, exemptions from the estate tax, and joint income tax filing are all examples of how the state presumes that married couples share a financial interdependence not shared by cohabiting couples, friends, roommates, or siblings.

Public Commitment

Despite its roots in the regulation of sex and procreation and the privatization of dependency, legal marriage has a cultural force that goes far beyond the bundle of rights and duties it encompasses. As the US Supreme Court put it in a case establishing the right of prison inmates to marry, marriages are “expressions of emotional support and public commitment,” and “many religions recognize marriage as having spiritual significance.” Even if the state were to stop attaching public benefits and private duties to marriage, many people would likely want to marry to demonstrate their commitment to each other or to their religious communities. Marriage confers the state’s seal of approval on a particular type of adult intimate relationship.⁸

Bundling

Marriage is a status that bundles all of these elements together. The benefits associated with the status change over time, but the status remains intact. The core element that remains the same is the bundling together of private obligations, public benefits, and religious, social, and state approval. When a plaintiff sues for the right to marry, the right claimed is entry into this preferred status with which various financial benefits and mutual obligations have been bundled. Take away any of these individual rights (e.g., the marital exemption from the estate tax, or the right to sponsor a spouse for immigration status) and the status still retains its importance but with a different combination of rights embedded in it. But take away the right to the status itself and the denial of the rights within it becomes an issue of constitutional magnitude (Sunstein 2005). In marriage, the whole really is more than the sum of its parts.

PRIVACY, MARITAL BENEFITS, AND POLYGAMY

Legally and culturally, then, marriage has many meanings. If polygamous groupings were to be recognized as legal marriages, what would this recognition look like? At first glance it appears simple. Multiple spouses could enter into legally sanctioned marriages by seeking licenses and marrying ceremonially through state-approved procedures. Plural marriages would be recognized as well at divorce or death. But recognizing multiple spouses at divorce or death creates a host of potential difficulties.

Divorce, Plural Marriage, and Family Privacy

Normally, state family law regulates marriage primarily at entry and exit (divorce). Between entry and exit, however, state intervention is the rare exception rather than the norm. The law intervenes in cases of criminal violence between spouses, but courts are inclined to stay out of spouses' midmarriage financial agreements, their injuries to each other, and their failures to support or provide services to each other. A spouse who is having marital problems cannot sue for enforcement of the marital contract; the only remedy is divorce.

Recognition of polygamous marriage, however, could dramatically alter this norm for the participants in polygamous marriages because in polygamy, there is no "mid-game" (Davis 2010, 1990). Polygamous relationships can be extremely unstable—think, for example, of FLDS (Fundamentalist Church of Jesus Christ of Latter-Day Saints) member Alex Joseph's eight divorces—and the frequent, if not constant, entry and exit of new spouses would create many more occasions and opportunities for state intervention (Emens 2004, 317). This ongoing state oversight would alter marriage, at least in the case of polygamy, in several important ways. Each time a new person entered or exited a marriage, the change would alter the interests of existing spouses in their marital or community property. At exit, just as in any other divorce, a court would have to approve a division of marital property. In marriages with plenty of wealth, this process would be costly for the court system because spouses might engage in protracted litigation where so much property was at stake. In marriages with little wealth, the divorce itself might be simpler, but the effects on the public fisc would be more problematic. Women's income decreases dramatically upon divorce, and, indeed, young women appear to be worse off if they marry and divorce than if they never marry at all (Hamilton 2012). Similarly, a court would have to determine eligibility for and the amount of maintenance to be

awarded at multiple points during a multiperson marriage, and the formula for determining maintenance would have to be altered to include the reality of multiple mutually obligated parties.⁹

Being in a legally recognized polygamous marriage, then, could involve much more state intrusion than being in a legally recognized monogamous marriage. People who stay in a monogamous marriage for fifty years experience family privacy—a lack of state intrusion—for each of those fifty years. Their interactions with the state regarding their families are limited to specific instances, such as filing joint tax returns, obtaining a child's birth certificate, or exercising their authority to make medical decisions on behalf of an incapacitated spouse. But a person who stays in a polygamous marriage for fifty years may see many husbands or wives come and go and experience the state's intrusion into the details of those comings and goings at multiple and unpredictable moments: Whose fault was it? Who owns what? How much support must the existing spouses pay the one who is leaving and for how long? Who has custody of the children? This family-state dynamic is much different from what we are accustomed to and might be undesirable to many people—including polygamous families themselves. Similar observations have been made about the law of inheritance (Davis 2010).

Polygamy and Marriage-Based Public Benefits

The state law of marriage, divorce, and inheritance is not the only legal context within which and through which polygamy could be recognized. Marriage is a status category of central importance in the allocation of benefits in the modern welfare state. Tax benefits and burdens, food stamps, welfare payments, social security, pensions, health insurance, and immigration status all take marriage to be a stable and useful category for determining eligibility, noneligibility, and axes of dependency among individual people.

Marriage is often assumed to be largely private and contractual; spouses agree to take responsibility—financial and emotional—for one another. But many of the benefits of marriage are conferred by the state, and they cannot be easily divided among multiple spouses. A bank account could, in theory, be divided into thirds just like a pie if one member of a polygamous trio divorced the other two. This dividing up might be unfortunate for a spouse who would, under monogamous circumstances, have received half the pie instead of one-third, but we might justify it as the fruits of a joint venture to which that spouse is presumed to have contributed one-third of the profits.

Public benefits, in contrast, are not carved from “pies” owned by a partner to the marriage. Take, for example, the social security retirement system. The social security system protects low-earning married retirees with high-earning spouses at the expense of couples who earn similar amounts over their lifetimes and single people. For example, a retiree can claim either 100 percent of her own social security entitlement (determined, in part, by how much she earned over her lifetime) or, alternatively, if she is married, the equivalent of 50 percent of her spouse’s entitlement. This 50 percent is in addition to the 100 percent her spouse claims. The family where one spouse opts for the 50 percent instead of her own entitlement (presumably because it is more than her own entitlement) receives 150 percent of the higher-earning spouse’s entitlement; this additional money has to come from somewhere, and it comes from the income paid into the system by the many single people or worried married people who will not be claiming a spousal benefit.

When a spouse elects to take the equivalent of 50 percent of her spouse’s entitlement rather than 100 percent of her own, she is not taking part of a pie earned by her spouse; her spouse still gets to keep his or her whole pie. Instead, the availability of the spousal entitlement is a cash incentive, given to families who structure themselves into a breadwinner/homemaker model at the expense of those who do not (Liu 1999). Social security benefits are not simply marriage-based benefits; they are benefits that reward a particular type of marriage.

Were the federal government to recognize polygamy, it would have to decide what to do about multiple spouses. Imagine first a family of five spouses: one breadwinner spouse and four homemaker spouses who either made no income during their lifetimes or income so insubstantial that 50 percent of the breadwinner spouse’s entitlement would exceed 100 percent of their own. Would they each have the option of taking the equivalent of 50 percent of the breadwinner spouse’s payout? In other words, would that family receive 300 percent of the breadwinner spouses’ entitlement (100 percent of that spouse’s entitlement going to him or her, and 50 percent of the entitlement going to each of four spouses)? Or, instead, would the earning spouse have the opportunity or obligation to designate only one spouse, by premarital contract or other means, who would collect that portion of the payout, leaving three of the four spouses entirely without retirement income? Or perhaps the spousal entitlement would be divided into equal shares, with each homemaker spouse receiving 12.5 percent of the breadwinner spouse’s entitlement. Our current system already recognizes “serial polygamy.” As Nancy Polikoff has pointed out, the politician Newt Gingrich has been

married three times, and since each marriage lasted longer than ten years, each wife is eligible to receive the spousal benefit, which means his family could end up costing taxpayers 250 percent of his entitlement (Polikoff 2008). Recognition of polygamy would expand this form of federal subsidy beyond multiple serial marriages to multiple simultaneous ones.

Even more complex would be cases in which a polygamous family contained more than one breadwinner spouse. Could more than one spouse take the equivalent of 50 percent of more than one spouse's social security entitlement? Or would the non-earning spouses simply split 50 percent of each of the earning spouses' pensions? Currently, spouses cannot take social security retirement from more than one spouse; if they meet the requirements, because of divorce, based on more than one spouse, they must choose one. But polygamy might put a wrench in this system; if a reason underlying the spousal entitlement rule is that we think that marriage privatizes dependency and that married couples pool their resources, then why shouldn't spouses in a family with two breadwinners and three homemakers also get credit for pooling their resources? As in state family law, frequent divorce would further complicate this picture, making it likely that polygamous families would create complex webs of breadwinner and homemaker spouses, married and divorced in various combinations over time, a possibility that the social security system would be very ill-equipped to handle.

Social security is just one example of how marital benefits are not always analogous to dividing up a pie. Indeed, the flexibility of the size of the pie explains, at least in part, Utah's codification of "purporting to marry" or cohabiting with a second person as criminal bigamy (partially struck down in *Brown*). Utah's legislators were concerned that FLDS women were claiming to be single and collecting welfare benefits, including food stamps, based on their household size and income without considering their husbands' incomes. Thus, the legislature made it a crime to "purport to marry" or cohabit with another if that person was already married. One way of understanding this prohibition is that the pie available in public benefits had been fraudulently increased; by appearing to be fatherless, husbandless families, the individual households headed by wives were eligible for more than their fair share of state largesse. Of course, if the women had been single mothers, they would have been entitled to this support, and it is unclear why the existence of a spiritual husband necessarily makes him available for support. In this light, the law looks like a back-door attempt to reintroduce the "spouse in the house" rules struck down in the late 1960s by the

US Supreme Court. A lurking concern may have been that as a practical matter, most of the wives were turning over their welfare checks to their husbands; thus, the financial transaction ultimately looked like the “hub” of a plural marriage collecting from “the spokes” payments that were in turn provided by the state—payments that the “hub” was not entitled to even if the “spokes” were.¹⁰

PARTIAL RECOGNITION

Full recognition of polygamy seems, at this juncture, to be politically unlikely; the legal obstacles, as outlined above, add to this unlikelihood. But what about partial recognition? Could polygamy be recognized for some purposes but not others? To some extent, partial recognition already occurs in the United States. Some polygamous wives, for example, have had the marriage law of their countries of origin, where polygamy was legal, recognized in the context of inheritance. Other countries, however, have far more experience with recognition of polygamy for some purposes and not others. This partial recognition might at first glance seem like an attractive option since it could protect vulnerable second, third, or fourth wives in some circumstances without incentivizing polygamy by recognizing it for all purposes. When we take a close look at how partial recognition has played out, however, it seems less desirable because it is difficult for the government to predict how the particular combination of recognition and nonrecognition rules will play out. To consider how partial recognition works in various contexts, let’s examine how a decision about recognition of polygamy for immigration status works in tandem with recognition of polygamy for welfare purposes.

Whether a country recognizes polygamy for immigration purposes may seem relatively unimportant if the polygamists one has in mind are FLDS constituents. (Note, however, that the early LDS church attracted plural wives by advertising in Europe and offering to pay the immigration expenses of interested women.) Immigrants are likely to be the group that is most invested in the legal recognition of polygamy. For these polygamists, primarily Muslims from other countries seeking a better life abroad, immigration recognition would appear to be crucial. In fact, in its opinion upholding Canada’s antipolygamy law, the Supreme Court of British Columbia expressly mentioned the likelihood that polygamists would see Canada as an attractive target of immigration as a factor important to its decision.¹¹

The United States bans outright immigration by those who “intend to practice polygamy in the United States.” “Practicing polygamists”

are also ineligible for naturalized citizenship on the grounds that they are, by definition, not people of “good moral character.” These rules effectively deny second and subsequent wives the security that immigration status would confer. Thus, these wives usually enter the country on tourist visas, overstay, and become subject to deportation if detected and apprehended. As Claire Smearman (2009) has shown, the law is calibrated to confer protection on a husband and one wife. Because the husband may sponsor his children for lawful immigration status regardless of whether he is married to their mothers, second and subsequent wives may find themselves trapped in a relationship in which they may lose access to their children, either because the husband sponsors the children for lawful immigration status and leaves the wife behind or because the wife will be subject to deportation if she attempts to leave her husband and gain custody of the children. And because unauthorized immigrants are not eligible for welfare, she would have difficulty striking out on her own. Thus may nonrecognition for immigration purposes have unintended and very painful consequences for some of those living in polygamy.¹²

In contrast, the United Kingdom and France have each partially recognized polygamy, but neither country’s experience indicates that it has found a method of partial recognition clearly superior to the United States’. Like the United States, both of these countries are modern welfare states that give public benefits, including unemployment insurance and housing subsidies, to impoverished citizens and residents. And both are attractive destination countries for immigrants. But when a country partially recognizes polygamy, there can be unintended consequences.

The United Kingdom: No (at Least Officially) to Immigration, Yes to Welfare

The majority of families practicing polygamy in the United Kingdom are Muslim immigrants from Pakistan and, to a lesser extent, India and Bangladesh, although recent news reports indicate that polygamy is making a revival among second- and third-generation Muslims whose parents or grandparents emigrated from those countries. In the United Kingdom, individuals cannot legally enter into a polygamous marriage, but those who enter into a polygamous marriage abroad and then reside in the United Kingdom do not face criminal penalties. Recognition beyond this limited decriminalization is partial. Husbands cannot sponsor more than one wife for immigration status. Immigration law does provide, however, some legal avenues for entry of new wives: husbands sometimes sponsor new wives for immigration status by claiming them

as nannies for their children or as caretakers for sick relatives. Some women come on visitors' visas and overstay, so they are technically unauthorized but difficult to locate or deport. Finally, a husband can divorce his first wife but continue to live with her and be married to her under Islamic law and then sponsor an additional wife whom he legally marries (and he could continue to do this serially). The UK Immigration Rulebook requires that the new wife in this last circumstance be given entry clearance, even where the divorce of the previous wife "is thought to be one of convenience," the husband is still living with the previous wife, and "to issue the entry clearance would lead to the formation of a polygamous household." Taken together, these rules have made it fairly easy for husbands from countries where polygamy is practiced to expand their families by marrying new wives in Islamic (*Nikah*) ceremonies and then bringing them to the United Kingdom.¹³

Once present, wives in polygamous families have several options for obtaining welfare benefits. One is to simply admit that their family is polygamous and apply for income support benefits or jobseeker's benefits ("the dole"). Although polygamous marriages are not recognized for immigration status, the United Kingdom does recognize them for income-support benefits and jobseeker's benefits. In late 2007, the Department for Work and Pensions (DWP), after a multiagency investigation, issued new guidelines for income support, stating, "Where there is a valid polygamous marriage the claimant and one spouse will be paid the couple rate. . . . The amount payable for each additional spouse is presently £33.65 pounds (\$66.41)." This payment may be made directly into the husband's bank account if his wives agree. A Department of Works and Pensions spokesman justified the rule by arguing that it did not "reward" polygamy since second wives are worse off than single women, who are eligible for a greater jobseeker's allowance (£60 per week) than is a second wife (£33.65 per week). A husband with many wives may also be eligible for additional housing benefits and council-tax benefits in order to reflect the larger housing space needed for his family.¹⁴

Thus, the United Kingdom *partially* recognizes polygamy. It is illegal to enter into a plural marriage in the United Kingdom, but the country recognizes those formed legally elsewhere. The country does not confer on polygamous spouses eligibility for immigration benefits, but it does confer housing, unemployment, and welfare benefits, and there are alternative immigration routes. The British government estimates that there are 1,000 polygamous families living in Britain, but social workers interviewed by journalists estimate that the actual number is closer

to 20,000. This difference is likely reflected by the government's focus on polygamous families who are living together and potentially eligible for benefits. Families who choose not to live together can actually benefit more from the welfare system than can those who choose recognition, and the majority of polygamous families in the United Kingdom are likely not seeking recognition at all. As in Utah, many women in polygamous marriages simply live apart from their husbands and seek welfare benefits at the higher single rate. This practice has recently been the subject of several media exposés, with some critics recommending a requirement that those who enter into *Nikah* marriages register as married with the government, which would open the door to criminal sanctions against those who marry more than one spouse.¹⁵ The increased number of third-generation Muslims in the United Kingdom who are practicing polygamy may have resulted in part from the relatively lax approach the United Kingdom has taken toward public benefits.

France: No to Welfare, Yes to Immigration (at Least at First)

A contrasting example of this dynamic occurred in France. Until recently, France opted for a fairly open immigration policy. Prior to 1993, France legally recognized foreign polygamous marriages for immigration purposes as long as they were valid in the country in which they were performed (Starr and Brilmayer 2003, 245). France has a large immigrant population, due in part to its colonial presence in much of Africa, including Morocco, Tunisia, Algeria, and Guinea and in part to its post-war immigration policy, which encouraged the migration of guest workers in boom times and their deportation when the economy went bust (Scales-Trent 1999, 720). Taken together, these factors brought to France a much larger population of polygamous immigrants than that found in the United Kingdom. Indeed, many experts estimate that there were 200,000 people living in polygamous families in France by the 1990s (721). The majority of these families are immigrants from sub-Saharan Africa, and there is a sizeable population of such immigrants from Algeria and Morocco as well.

Like the United Kingdom, France recognizes polygamous marriages entered into in a jurisdiction where polygamy is legal. And just as the United Kingdom allows foreigners to follow the law of their domicile in marriage customs, France too recognizes polygamy if authorized by a noncitizen's personal status (Scales-Trent 1999, 721). Polygamous families are recognized by the systems that allocate some public benefits but not by others. For example, according to Judy Scales-Trent (1999),

family allowances are available based on the number of children in a family, but the father is the beneficiary of these allowances. Thus, he can claim and collect a family allowance for children from multiple wives. In contrast, a second wife in a family in which the first wife also is living in France cannot receive benefits that might otherwise be thought to accrue directly to her, such as health insurance with maternity coverage, since these benefits can only be assigned to one wife. This form of partial recognition enables men to create large families with multiple wives and children but places the second and subsequent wives in vulnerable, even perilous, positions.

Prior to 1993, then, France recognized polygamy in a partial and fractured way. Polygamy was recognized for immigration purposes and for family benefits flowing to fathers to support children from multiple wives, but it was not recognized in connection with personal benefits that could be paid directly to second and subsequent wives. During Charles Pasqua's term as interior minister, France began to adopt a much more conservative stance toward immigration. In 1993, France passed several new immigration laws, known as the Pasqua Laws, which limited spousal visas and working papers to only one spouse (Starr and Brilmayer 2003, 247). The Pasqua Laws also made the children of second spouses ineligible for the family allowance benefit. In other words, France moved from a partial recognition system to a system in which recognition was far more minimal than before. Indeed, the only recognition after the Pasqua Laws, at least prospectively, was that a polygamous marriage entered into elsewhere was not a crime. Retrospectively, however, the Pasqua Laws reshaped the formerly fractured recognition of polygamy in surprising ways. The law made the ban on recognition of polygamy for immigration and welfare purposes retrospective as well, but to avoid a clash with international human-rights norms, it gave families a loophole. If the husband divorced all of his wives but one and physically separated the household so that each wife lived separately, the wives would not be deported and would not lose their working and residence papers. Because French law lacked the power to invalidate any Muslim marriage, families were thus able to maintain their marital status for religious purposes so long as they were legally divorced and not cohabiting. French authorities have been strict about enforcement; renting apartments in the same building is not sufficient to constitute the "decohabitation" required by law (Starr and Brilmayer 2003, 248).

Partial recognition always occurs against the backdrop of a particular legal and cultural context, and it is the context that matters as much or perhaps even more than the formal recognition. The French experience

differs from the English one in important ways. First, and most obviously, the total number of immigrants practicing polygamy is much higher in France.¹⁶ Causation is difficult to infer from bare immigration statistics. Given the colonial relationships between France and many African countries and given its guest-worker-driven immigration policy, polygamist immigrants might have migrated there regardless of France's stance on polygamy. But it seems at least possible that its early recognition of polygamy, at least for immigration-status purposes, may have prompted larger numbers of polygamists to move there, whether they were polygamist immigrants choosing France as a destination country or deciding to practice polygamy upon their arrival. Important too are the different attitudes toward assimilation taken by the United Kingdom and France. The United Kingdom has generally approached immigration and citizenship through an integrationist policy, encouraging the maintenance of cultural ties and distinguishing integration from a more coercive assimilation. In contrast, France has more aggressively demanded that immigrants conform to French culture, an approach famously debated in the press when a Muslim woman who wore the *niqab* was refused citizenship in 2008 (Mullally 2010, 194–97).

Recognition of polygamy, then, can take multiple forms, and the forms can fluctuate depending on the social, cultural, economic, and legal terrain on which polygamy is practiced. In a country with a robust welfare system, full recognition may well require extending benefits to polygamous families. Indeed, the expansive view most Western democracies now take toward extramarital sex and childrearing may well require some form of recognition, in that the children of polygamous mothers are difficult to distinguish from the children of unmarried mothers, at least in terms of their moral claim to state support. In some ways, recognition in a strong welfare state is an easier proposition than it is in a country like the United States, where public benefits are still largely tied to marriage and, in particular, to incentivizing a division of labor within marriage.

ARE WE ALL POLYGAMISTS NOW?

So far, this essay has focused on the ways in which full recognition of polygamy would substantially change the law of marriage and the ways in which partial recognition could have unintended consequences. There is a third, and important, piece to the puzzle. Some of the benefits and obligations of marriage can be granted even without formal recognition of a relationship as a marriage. This form of recognition is

becoming increasingly common in nonpolygamous families. When we add together the various forms of recognition of functional families, what we end up with may look very much like formal recognition of polygamy, or formal recognition of polygamy for some purposes, making full recognition less important.

Recognition of Nonmarital Adult Relationships

In many jurisdictions, cohabiting couples are treated like married couples for some purposes. Often, this form of recognition treats the couple as married for joint property purposes but not state benefits, although the reverse is sometimes true. Take, for instance, Washington state. Under Washington case law, if a couple is in a “committed intimate relationship,” property obtained during that relationship will be treated as community property to be equitably divided upon dissolution of the relationship, just as property obtained during marriage would be at divorce. The factors courts consider in determining whether a couple is in a committed intimate relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties. This recognition maps fairly neatly onto the theory of marriage as privatized dependency, expanding recognition beyond married couples to all who intend to become mutually dependent. The American Law Institute Principles of Family Dissolution suggest a similar rule that would make both property division and maintenance available to committed couples.¹⁷

Other jurisdictions allow unmarried adults to contract into relationships that mimic some, but not all, of the elements of marriage. California famously adopted this contractual approach in *Marvin v. Marvin*, a case involving the actor Lee Marvin and his long-term girlfriend Michele Triola, who went by Michele Triola Marvin.¹⁸ Similarly, New Jersey has recognized contractual relationships, and courts have enforced contracts even where the contract is oral and implied rather than written and express.¹⁹

In addition to all of these judicially created doctrines recognizing nonmarital adult relationships, some jurisdictions have adopted legislatively created statuses. Most famously, many states and countries have passed civil-union, domestic-partnership, and reciprocal-beneficiary legislation that allows same-sex couples, and in some instances different-sex couples, or specifically senior-citizen couples, to enter into binding, legally recognized relationships without marrying. The primary feature

these schemes share is that the couples must opt in by registering; they cannot accidentally become “civil unioned.” Other jurisdictions, however, have legislatively adopted standards that resemble the judicially adopted “committed intimate relationships” rule. New Zealand, for example, recognizes marriages, civil unions, and “de facto relationships.” A de facto partner is entitled not only to property division at dissolution but also access to alimony payments and inheritance rights (Atkin 2009). New Zealand also extends joint tax treatment, social assistance, and immigration benefits to people in de facto relationships. Some Canadian provinces have adopted similar schemes.²⁰

So what do these instances of recognition of nonmarital relationships have to do with polygamy, which is, after all, a form of marriage? Some of them may provide a back door to recognition of multiple intimate relationships without using the *marriage* or *polygamy* labels. In the *Marvin* case, for example, Lee Marvin and Michele Triola had lived together from 1965 to 1970 and presented themselves to the world as a married couple. But Marvin was legally married to another woman through 1967. The court nevertheless held that if she could demonstrate that she and Marvin had entered into a contract, Triola could recover on the contract. Similarly, *Roccamonte*, a New Jersey case, involved a married man and his single female partner who lived together for thirty years while the man remained married to his wife. The court found that the couple had entered into an agreement that he would support his girlfriend for life, despite the financial effect this agreement could have on his ability to also support his existing wife. The New Zealand legislation uses “emotional connection,” not monogamy, to determine whether a “de facto relationship” exists; multiple relationships, and de facto relationships combined with marriages or civil unions, are certainly possible.²¹ (In contrast, Washington state will not recognize a committed intimate relationship if either party is married to someone else; similarly, civil unions and domestic partnerships are generally available only to the unmarried.) In those jurisdictions that do allow for the possibility of multiple legally recognized relationships, the state’s refusal to recognize polygamy may be irrelevant to the day-to-day lives of polygamous families. In these instances, the state *does* recognize multiple affective adult relationships, or at least partially recognizes them (granting, for example, property division but not immigration benefits, or inheritance rights but not welfare access). With a menu of options available, individuals, couples, and groups of affiliated people can largely tailor their relationships to their own needs and purposes. In fact, they might actually be better off than if they were all legally married to each other. Remaining

single, for example, might make some eligible for welfare benefits, and the group could devise strategies for using the law to shape the varying relationships among family members through cohabitation contracts or establishing eligibility for recognition of nonmarital status relationships.

Recognition of Multiple Parent-Child Relationships

In addition to the recognition of nonmarital relationships, many jurisdictions are also increasingly recognizing multiple parent-child relationships. As recently as 1989, US Supreme Court Justice Scalia could declare, “California law, like nature itself, makes no provision for dual fatherhood.”²² That is no longer so. In 2013, the California legislature passed a statute that allows more than two parents to be declared the legal parents of a child. The Dutch legislature is considering a similar move. The United Kingdom has long allowed an additional adult, beyond a child’s two parents, to obtain “parental responsibility” without full legal parenthood. Delaware’s “de facto-parent” doctrine allows a child, under certain circumstances, to have full legal parenthood. A Pennsylvania court recognized a genetic mother, her former lesbian partner, and their sperm donor as the legal parents of a child. The District of Columbia allows a sperm donor to contract with a child’s intending parents so that all three retain legal parentage. Several states in the United States have allowed “third parent adoption,” in which both genetic parents retain legal parent status but allow a third party (often the partner or spouse of one of the parents) to adopt the child as well. And many states now allow a parent to relinquish a child for adoption but retain visitation rights. Some of these jurisdictions are actually allowing three or more parents to be legal parents; others (like the United Kingdom and the postadoption-contract-agreements states) only allow two parents but give partial recognition, through the right to enforceable visitation, to a third adult.²³

As discussed previously, the law has already come very far from when it considered marriage to be the solely appropriate space for parenting. The dismantling of illegitimacy as a salient legal category and the decriminalization of extramarital sex went far to disaggregate sex from marriage from procreation. Sex and procreation have become further disaggregated as a practical matter through sperm and egg donation, in-vitro fertilization, and surrogacy. The recent recognition of multiple parenthood takes this disaggregation one step further. It’s not just that a couple doesn’t have to be legally married to be a child’s parents but that the individuals claiming parenthood don’t have to be a couple at

all. They could be a sperm-donor friend of a lesbian couple; they could be a married heterosexual couple and the wife's ex-husband; they could be three friends who decide to have a baby.

A Menu of Options

Taken together, complete or partial recognition of multiple adult relationships and complete or partial recognition of multiple-parenting relationships could provide many of the benefits of recognition of polygamy while avoiding some of the problems. The state could decide, for example, that public benefits such as Social Security or estate-tax exemptions would only apply to married couples or, perhaps, require individuals to designate their "plus one" for benefits that are not pie-like in their ability to be divided. But individuals could contract or register their way into legally recognized relationships with multiple adult partners in order to foster financial and emotional interdependency or to ensure their children are emotionally and financially supported (or both). For some polygamists, this form of self-selecting specific forms of recognition might be preferable to wholesale recognition of polygamy as a form of marriage. Contract regimes, especially, enable spouses in plural marriages to negotiate the terms of each relationship within the group. Functional tests, such as the New Zealand "de facto-relationship" law, on the other hand, would be more difficult to use for planning purposes. Since the relationship is recognized only when a claim for benefits is made or a relationship dissolves, it would be difficult to know in advance whether the requirements for a de facto relationship had been met; it is the *facts* in de facto, after all, that determine whether the relationship passes muster, not only the parties' intent. This uncertainty might make this form of recognition less attractive to polygamists.

It is important to acknowledge that the law in this area is developing. We are not all polygamists—not yet. Many jurisdictions do not recognize multiple parenthood; many more do not recognize nonmarital intimate relationships as having a meaning beyond a personal one. But the direction the law is moving in is toward increased recognition of sexual and parenting relationships independent from marriage (and independent from each other) and toward abolishing the "rule of two," both for intimate adult relationships and for the number of parents a child can have. If this trend continues—and it seems likely that it will, given the increased number of LGBTQ families and blended stepfamilies creating families in which multiple parents are a reality—opening up the category of *marriage* to polygamists may not be the legal avenue most likely to provide

recognition for polyamorous groups. And many people who benefit from these new doctrines may not think of themselves as polygamous, or even polyamorous, at all. They may be blended families who are coparenting children, married adults having affairs, or even roommates or siblings who want to create legally binding, mutual financial arrangements. In twenty years, we may well wake up to discover that the partial recognition of alternative family structures has crept into our lives and realize that whether the law recognizes polygamy as a form is entirely irrelevant.

CONCLUSION

This essay has evaluated the recognition of polygamy and concluded that polygamy is likely to pose numerous challenges to recognition. Polygamy is particularly fraught because it exposes the ways in which the law of marriage already does not adequately reflect the needs of many families, and then exacerbates these inadequacies. Of course, this legal analysis is no substitute for an ethical one. It is, however, a necessary consideration in any ethical analysis. Abstract ethical concepts can fall apart in the implementation of legal rules. Refusing to recognize polygamy, as in the example of US immigration policy, can put plural wives in an untenable situation, forcing them to choose between staying in an abusive or unwanted marriage and losing custody of their children. Partial and full recognition, however, can have unintended consequences as well by encouraging dependency and fostering subordination within the family, and by sending mixed messages to individuals in polygamous families. And polygamous families may not use partial or full recognition in the way lawmakers might expect; they may prefer contractual relationships or nonrecognition to control by the state.

Thinking hard about recognition forces us to articulate what core values (if any) marriage protects in the first place. A careful analysis of what recognition of polygamy might look like demonstrates how difficult it would be to transform the work currently done by marriage law to a polygamous context. In contrast, the work that family law *beyond* marriage law is currently doing may be where polyamorous relationships are most likely to be recognized, in part or in full. Instead of arguing about decriminalization—which appears at this point to be constitutionally required—legal reformers should pay closer attention to how partial or full recognition of multiple adult-adult and adult-child relationships would help or hinder the family lives of all people, those who consider themselves polygamists and those who do not.

Notes

1. See *Brown v. Buhman*, Memorandum Decision and Order Granting in Part Plaintiffs' Motion for Summary Judgment, Case 2:11-cv-00652-CW-BCW (D. Utah, Dec. 13, 2013) (striking down cohabitation clause in Utah statute); <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (listing states that have adopted marriage equality).
2. *Zablocki v. Redhail* 434 U.S. 374 (1978).
3. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (nonmarital children); *Caban v. Mohammed*, 441 U.S. 380 (1979) (nonmarital fathers); *Lawrence v. Texas*, 539 U.S. 558 (2003) (nonmarital sex).
4. *Bowers v. Hardwick* 478 U.S. 186 (1986); *Lawrence v. Texas*.
5. US Department of Health and Human Services (2013, 9).
6. Several states still criminalize adultery although the constitutionality of these provisions is in dispute. See Peter Nicolas (2011, 97, 108, noting that twenty-four states still have criminal adultery laws on their books); *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at #1 (N.C. Super. Ct. Aug. 25, 2006) (striking down a law criminalizing fornication and adultery on grounds that it violated substantive due process rights).
7. The effect of the Patient Protection and Affordable Care Act (popularly known as *Obamacare*) on the relationship between health insurance and marriage is complex and largely still unknown. Most married couples are likely still better off than singles, assuming whatever premiums they pay to their employers are lower than those they would pay buying insurance using an exchange. For uninsured couples, however, marriage may make access to health insurance more difficult because it could push their family income over the eligibility line for a subsidy. See Mary Chastain (2013).
8. *Turner v. Safley*, 482 U.S. 78 (1987) (inmate restrictions on marriage); *Windsor v. United States* (seal of approval).
9. In the Recognition of Customary Marriages Act of 2008, South Africa developed an approach to multiple spouses that allows a first wife to demand a division of family property and registration of a property regime governing a new polygamous marriage if her husband marries an additional wife. Failure to give the first wife notice has been interpreted to invalidate the additional marriage (see Mbatha and Joffe 2012).
10. See Utah Code § 30-1-4.5 (Supp. 2005); see also *Brown v. Buhman*, Memorandum Decision and Order Granting in Part Plaintiff's Motion for Summary Judgment), case No. 2:11-cv-0652-CW (C.D. Utah, Dec. 13, 2013) (striking down "cohabitation" language in a Utah statute as violating the free exercise clause for the First Amendment and the due process clause of the Fourteenth Amendment); *State v. Holm*, 137 P.3d 726 (Utah 2006) (upholding constitutionality of a Utah statute despite holding in *Lawrence v. Texas*); *King v. Smith*, 392 U.S. 308 (1968) (striking down an Alabama law that made ineligible for dependent child benefits children of mothers who "cohabited" with a man, even where that man was married to someone else).
11. Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588s, paras. 557–76.
12. INA §212(a)(10)(A) ("practicing polygamy"); INA § 101(f) ("good moral character"). As Claire Smearman has shown, there is a way around the prohibition. The inadmissibility grounds do not apply in asylum cases. And although in order to adjust status to become a permanent resident after one year, an asylee must show that she is admissible, §209(c) of the INA permits DHS officers to waive the requirement "for humanitarian purposes, to assure family unity, or when it is otherwise in

- the public interest,” thus potentially opening the door to LPR status for polygamists (Smearman 2009, 437).
13. Immigration Law of 1988, cited in Malik (2008). Prior to 1988, husbands could sponsor a second (or subsequent) wife if both parties had a domicile in a country that allowed polygamy (Reid, *Daily Mail.com*, Sept. 24, 2011; Wintour, *Guardian*, Nov. 7, 1987).
 14. Income support is an income-related means-tested benefit for low-income people. To be eligible, a person must have savings of under £16,000, work fewer than sixteen hours per week, and have a reason that they are not actively seeking work, such as illness, disability, or the care of children (“Parental Rights” 2014). Jobseeker’s benefits have similar financial eligibility requirements but require that the recipient be actively seeking employment (Malik 2008). See also Jonathan Wynne-Jones (*Sunday Telegraph*, Feb. 3, 2008), who discusses the four departments—Treasury, DWP, HM Revenue and Customs, and the Home Office—involved in the review and their consensus that recognizing multiple marriages conducted overseas was “the best possible” option. See also Tom McTague (*Mirror* [London], Dec. 28, 2011), who states that a man and his “first wife” can jointly claim £105.95 in dole payments made up of a £67.50 single-person payout and a couple’s top-up of £38.45, and “subsequent” wives get £38.45 top-up. See also Tom Savage (*Daily Star*, Aug. 29, 2007). The council-tax benefit is essentially a rebate against the council tax (a tax loosely analogous to local property taxes in the United States) for eligible low-income homeowners.
 15. Sue Reid (*Daily Mail Online*, Sept. 24, 2011), Baroness Flather (*Daily Mail.com*, Sept. 16, 2011).
 16. To compare: in 2010, the two largest immigrant groups in the United Kingdom after Irish immigrants were Indians and Pakistanis, 693,000 and 431,000, respectively, in a country with a population of 62,300,000 (Office for National Statistics 2010). Estimates of the number of immigrants and citizens practicing polygamy in the United Kingdom range from 1,000 to 20,000 families. The 2011 population of metropolitan France was 65,821,885, with 713,334 immigrants from Algeria, 653,826 from Morocco, 234,669 from Tunisia, and 669,401 from sub-Saharan Africa. The government estimates that 200,000 immigrants and citizens are practicing polygamy in France.
 17. American Law Institute, *Principles of the Law of Family Dissolution* (2002), Ch. 6, Domestic Partners, Sec. 6.02-03. The leading case on committed intimate relationships in Washington state is *Connell v. Washington*, 127 Wn. 2d 339, 898 P.2d 831 (1995). Washington stops short of granting *all* marital benefits to couples in committed intimate relationships. Such couples are not eligible for alimony, and separate property remains separate (which differentiates them from married couples in Washington, for whom divorce courts may consider all property—including property obtained before marriage and inherited during marriage—as property to be equitably divided upon divorce.) See also ALI Principles.
 18. *Marvin v. Marvin* (Cal. 1976).
 19. See *Roccamonte* (NJ 2002).
 20. See New Zealand Property (Relationships) Act 1976, Public Act 1976 No. 166, as amended 1 Feb. 2002, Part 2C (meaning of de facto partner), 2D (meaning of de facto relationship).
 21. *Ibid.*
 22. *Michael H. v. Gerald D.* 491 U.S. 110 (1989).
 23. See *Michael H. v. Gerald D.* (holding California law allows for only one father); *Jacob v. Shultz-Jacob*, 923 A.2d 473482 (Pa. Super. Ct. 2007); 13 Del. Code sec. 8-201(c) (setting forth de facto parent status that allows for the possibility of three

or more parents); "Parental Rights and Responsibilities" (2014), explaining parental responsibility; Nancy Polikoff (2012 blog post at <http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html>), discussing various jurisdictions.

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