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# **This Is the Family I Chose: Broadening Domestic Partnership Law to Include Polyamory**

*By J. Boone Dryden<sup>1</sup>*

Relationships are a quintessential part of human existence. Relationships are broad in their meaning: friends, acquaintances, lovers, or family. While traditionally we have easily been able to define these things, more recently “family” has become a strange creature in the realm of relationships. So what is family?

Tradition has defined family as a nuclear one, consisting of two monogamous, heterosexual adults—with or without children.<sup>2</sup> This traditional family has long been backed by the law in America.<sup>3</sup> Since the implementation of the no-fault divorce, the strength of the Feminist Movement, and the increasing number of states legalizing same-sex marriage, the “traditional” family must be reconsidered.<sup>4</sup> In doing so, the broader understanding of consensual partnerships that do not conform to the traditional family or relationship should be taken into consideration when discussing the extension of family-like rights and status to individuals. One such consensual partnership is that of polyamory.

Polyamory, much like monogamy, as a familial construct, values commitment, longevity, predictability, and the freedom of private intimacy. Just as traditional marriage is the vehicle for those desires, and rights under the Constitution as stated by the Supreme Court, for monogamy, so too should there be a vehicle for polyamory. While the majority of Americans pursue monogamous relationships of some form, “majoritarian legislation” should be

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<sup>1</sup> 2016 JD/MFA candidate Hamline University School of Law. The author would like to thank the University for the Support and opportunity for this publication, his friends, family, and colleagues for support in such a charged topic, and his editors for offering intelligent and thoughtful critique to make for a well-positioned article.

<sup>2</sup> See discussion *infra* Part I.A.

<sup>3</sup> See generally Mary Patricia Treuthart, *Adopting a More Realistic Definition of “Family”*, 26 GONZ. L. REV. 91, n.7 (1991).

<sup>4</sup> See generally MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein, ed., 2006); see also WILLIAM J. O’DONNELL & DAVID A. JONES, THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES (1982); oNANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

“subject to *a more nuanced and equitable analysis* than before *Lawrence v. Texas*.”<sup>5</sup>

This “more nuanced and equitable analysis” ought to forward a discussion of how we as a society treat those who, in growing numbers, choose not to conform with the tradition of monogamy. It is important to understand the historical background of both bigamy and polyamory in this country. The last decade or more has seen a trend of refining our understanding of families and intimate association,<sup>6</sup> and this, in conjunction with the backdrop of bigamy and the contemporary movement of polyamory, shape a discussion of how “family” is changing, and how the law should change to accommodate those in polyamorous (and other consensually non-monogamous) relationships. An understanding of the history and current state of domestic partnership law will also be analyzed.

## I. Introduction

### A. Monogamy

The American Heritage Dictionary defines monogamy as “the practice or condition of having a single sexual partner during a period of time.”<sup>7</sup> Custom—or tradition—has also analogously defined family the same way as marriage, which is a “husband and wife (with or without children).”<sup>8</sup> This sense that family and monogamy are equivalent has long been the social norm, and time and again the Supreme Court has upheld such a definition.

Since the beginning of the 20<sup>th</sup> Century, however, American culture—as well as the court system—has refined its definition of family to include extended families, step families, adopted families, and many others. This refinement, further discussed in Part II of this article, has led to an inconsistent treatment in the law in equating *family* with *monogamy*, especially heterosexual monogamy.

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<sup>5</sup> *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013) (emphasis added).

<sup>6</sup> See discussion *infra* Part II.

<sup>7</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1137 (4th ed. 2000).

<sup>8</sup> MARRIAGE PROPOSALS, *supra* note 4, 42.

## B. Bigamy

This article will more fully discuss the history of bigamy (and more particularly polygamy in Fundamentalist Mormonism in Utah) in Part II.A.<sup>9</sup> As a quick note, however, it should be pointed out that there is an inconsistent idea of what bigamy and/or polygamy is. Polygamy, as defined by The American Heritage Dictionary, is “the condition or practice of having more than one spouse at one time.”<sup>10</sup> It is, essentially, the antithesis of monogamy. In this country, however, polygamy has been associated heavily with polygyny, which is “the condition or practice of having more than one *wife* at one time.”<sup>11</sup> This is due to the prominence—or perhaps notoriety—of the Fundamental sect of the Church of Jesus Christ of Latter-Day Saints [hereinafter FLDS].<sup>12</sup> Going forward the *Brown* court has given new guidance by giving a better working definition of bigamy as “the fraudulent or otherwise impermissible possession of two purportedly valid marriage licenses for the purpose of entering into more than one purportedly legal marriage.”<sup>13</sup>

## C. Polyamory

Polyamory, which is the relationship in focus in this article, has been raised in the social consciousness, most especially in the last few decades.<sup>14</sup> It has raised more than a few eyebrows from

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<sup>9</sup> See discussion *infra* Part II.A.

<sup>10</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1360 (4th ed. 2000).

<sup>11</sup> *Id.* at 1361 (emphasis added).

<sup>12</sup> See discussion *infra* Part II.A.

<sup>13</sup> *Brown v. Buhman*, 974 F. Supp. 2d 1170, 1234 (D. Utah 2013).

<sup>14</sup> See, e.g., Elisabeth Sheff, *Three Waves of Non-Monogamy: A Select History of Polyamory in the United States*, ELISABETHSHEFF.COM (Sept. 9, 2012), <http://elisabethsheff.com/2012/09/09/three-waves-of-polyamory-a-select-history-of-non-monogamy/> (stating that “polyamory ha[s] increased with the advent of Internet technology”). There have also been other media representations in television, books, magazine articles, websites, and other resources, such as in-person community groups. See generally Franklin Veaux’s website,

traditionalists who cling to the notion that the one-man-one-woman relationship (bound in marriage) is the only successful and healthy pairing. Millions of dollars have even been spent in lobbying for anti-gay or “pro-family” legislation or legislators who support such laws.<sup>15</sup> This resistance might be vocal, but it seems to be an increasing minority, especially in light of the Supreme Court’s recent decision to deny certiorari for the gay marriage ban appeals.<sup>16</sup>

The term “polyamory” was first circulated in the late 1980s and early 1990s, being published originally as the word “polyamorous” by Morning Glory Zell-Ravenheart in her 1990 article, “A Boquet of Lovers.”<sup>17</sup> At its core, it is the philosophy or practice of having multiple romantic partners. To those who actively seek other partners, that definition begins to fit them very particularly, with terms like “polyfidelity”, “mono-poly”, and even mixed marriage.<sup>18</sup> More broadly, and for the purposes of this article, the term “polyamory” is used to encompass all of those variations because of its consistent use among both practitioners and scholars.<sup>19</sup> It is the consensual part that distinguishes it from distinctly from most

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MORETHANTWO.COM, on the “Polyamory FAQ” page, <http://www.morethantwo.com/polyamory.html>, for more information about polyamory and other forms of consensual non-monogamy.

<sup>15</sup> See, e.g., *Proposition 8: Who gave in the gay marriage battle?*, L.A. Times, LATIMES.COM (Last visited Sept. 30, 2014), <http://projects.latimes.com/prop8>; See also *8: THE MORMON PROPOSITION* (David v. Goliath Films 2010).

<sup>16</sup> Andrew Hamm, *Afternoon round-up: Today’s orders in the same-sex marriage cases*, SCOTUSBLOG.COM (Oct. 6, 2014, 5:09pm), <http://www.scotusblog.com/2014/10/afternoon-round-up-todays-orders-in-the-same-sex-marriage-cases/#more-218623>.

<sup>17</sup> Morning Glory Zell-Ravenheart, *A Boquet of Lovers*, GREEN EGG MAGAZINE (1990), at 4, available at <http://www.paganicon.org/wp-content/uploads/2014/03/A-Boquet-of-Lovers.pdf>.

<sup>18</sup> Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 444 (2003). In the section of her article, entitled “I. What is Polyamory?” Strassberg goes to great lengths to define a variety of partnership options within polyamorous relationships, including those terms above.

<sup>19</sup> Amy Moors, et al., *Consensual Non-monogamy: Table for More than Two, Please*, THE INQUIZITIVE MIND (Aug. 2014), <http://www.in-mind.org/article/consensual-non-monogamy-table-for-more-than-two-please>.

polygamy, and the committed part that makes it more like the more modern definition of family.<sup>20</sup>

#### D. Distinction of Bigamy from Polyamory

Polygamy, as is most common in the United States, is with the Fundamentalist followers of the Church of Jesus Christ of Latter-Day Saints (FLDS or Mormons) and almost entirely those who live in Utah. Recently the practice has become more popular in the public eye with shows like “Big Love” and “Sister Wives”, thus adding to the confusion between or polygamy and polyamory.<sup>21</sup> The FLDS practice includes non-state-sanctioned plural marriage, and there have been three Federal acts passed<sup>22</sup> with language outlawing the practice in all 50 States and the U.S. Virgin Islands.<sup>23</sup> It is the history of this movement and the public disdain of it that is relevant to the discussion of polyamory and the public opinion of it when it comes

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<sup>20</sup> See Edward M. Fernandes, *The Swinging Paradigm: An Evaluation of the Marital and Sexual Satisfaction of Swingers*, 12 ELECTRONIC J. HUM. SEXUALITY at 12 (Jan. 2009) (on file with author), available at <http://www.ejhs.org/Volume12/Swinging2.htm>, for a discussion on swinging as having been in the dark corners of the American sexual understanding since the 50s. Swinging is a behavior that involves consensual extra-marital sexual relationships; however, it falls within the realm of marital non-monogamy, if not marital infidelity. Largely driven by couples, statistics consistently show that most of them are “white, middle to upper class individuals in their late 30s, conventional in a social sense, community-oriented and responsible civic citizens who do not identify with specific religious organizations.” “There is no seminal event” that marks the beginning of swinging, but it can be seen as rising out of the “Bohemian free love movement” and “took root especially in the popular Greenwich Village district of New York City between 1915 and 1925.” Later, “[i]t was in [Air Force] pilot communities that the concept of sharing began,” and “it was common to find couples engaged in non-monogamous, casual sex interactions.

<sup>21</sup> *Big Love* (HBO television broadcast 2006-2011); *Sister Wives* (TLC broadcast 2010-present).

<sup>22</sup> Bigamy in Territory (Morrill) Act, 12 STAT. 501 (1862); Bigamy (Edmunds) Act, 22 STAT. 30 (1882); Anti-polygamy (Edmunds-Tucker) Act, 24 STAT. 635 (1887).

<sup>23</sup> Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U.L. REV. 33, app. (2010).

to extending rights to those who practice *polyamory* as opposed to *polygamy*.

The popularity of “Sister Wives” sparked the Attorney General of Utah to threaten suit against Kory Brown, the show’s male focus, for violating both the bigamy and cohabitation sections of the Utah state code.<sup>24</sup> The Browns later brought suit against then-Attorney General, Gary Herbert, to enjoin the enforcement of Utah Code Ann. § 76-7-101 (called the “Anti-Bigamy Statute”).<sup>25</sup> The final opinion in the Utah Supreme Court case, *Brown v. Buhman*, made the declaration that “neither participation in a religious ceremony nor cohabitation can plausibly be said to threaten marriage as a social or legal institution.”<sup>26</sup>

With this decision in *Brown*, there is new direction for the difference between bigamy and polyamory. The court defined bigamy in the case as “the fraudulent or otherwise impermissible possession of two purportedly valid marriage licenses for the purpose of entering into more than one purportedly legal marriage.”<sup>27</sup> The court, however, made clear in its opinion, that polyamory, or plural marriage, which was the term used in the case, was distinctly different.<sup>28</sup> Citing *State v Holm*, the Utah Supreme Court states, “it is generally understood that the state is not entitled to criminally punish its citizens for making such a choice [of foregoing traditional marriage], even if they do so with multiple partners.”<sup>29</sup> Such multiple partners allows for a broad understanding that legal marriages are very different from consensual cohabitation or romantic partnerships with more than one person, including those who enter into religiously-based plural marriage consensually.

Polyamory, different from bigamy, is argued to have “relatively high levels of trust, honesty, intimacy, and satisfaction, as

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<sup>24</sup> See generally, *Sister Wives supra* note 21.

<sup>25</sup> *Brown v. Herbert*, 850 F. Supp. 2d 1240 (D. Utah 2012), *aff’d*, *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>26</sup> *Id.* at 1218.

<sup>27</sup> *Id.* at 1234.

<sup>28</sup> *Cf. id.*

<sup>29</sup> *Id.* at 1219.

well as relatively low levels of jealousy in their relationships;”<sup>30</sup> whereas, “[c]ritics [of FLDS polygamy] rightly point to the physical, spiritual, and psychological abuse often associated with polygyny, including the taking of child brides.”<sup>31</sup> So while the state’s legitimate interest might be in protecting minors, criminalizing abuse, and alleviating exploitation in a variety of ways, what it eventually amounts to is punishing those in polyamorous relationships who “intimately love more than one other adult.”<sup>32</sup> Alternatively, critics of polyamory “argue that children are best cared for by *one father* and *one mother*.”<sup>33</sup> It is a similar argument against same-sex parenting, which has met with equal opposition and successively more expansive adoption rights for these parents. In polyamorous relationships, “parents in polyamorous relationships appear to benefit from the proverb ‘it takes a village to raise a child.’”<sup>34</sup>

## II. Historical and Contemporary Background

### A. History of Bigamy in the U. S.

“The birth of polygamy in Utah can be traced to the visions of a twenty-four-year-old New York farmer named Joseph Smith.”<sup>35</sup> Smith’s visions and interpretation of the golden tablets led to the belief in a strongly Israelite notion of male dominance.<sup>36</sup> This subsequently led to the “conclusion that the practice of polygamy was essential to what he called the ‘restitution of all things,’ and would become a principal tenet of the [Latter-Day Saints] faith.”<sup>37</sup>

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<sup>30</sup> Moors, *supra* note 19 at 3.

<sup>31</sup> D. Marisa Black, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J. L. FAM. STUD. 497, 500, note 17 (2006).

<sup>32</sup> Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

<sup>33</sup> Moors, *supra* note 19 at 3 (emphasis in original).

<sup>34</sup> *Id.*

<sup>35</sup> Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 227 (2001/2002).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



By 1852, however, in light of a public announcement by the Mormon leaders in Utah Territory, “[c]lergymen, women’s leaders, and newspaper editors urged those in power to put an end to the practice.”<sup>38</sup> In 1878 the country was given a public morality framework in the *Reynolds v. United States*, “which upheld a congressional criminal bigamy statute in the face of a Free Exercise challenge.”<sup>39</sup> Since this decision, polygamy has been struck down in a variety of cases, both state and federal, with reference to *Reynolds v. United States* as their basis. This consistent tradition of anti-polygamy can be seen as recently as 2003 with *Lawrence*.<sup>40</sup> There is little doubt it will continue into the foreseeable future.

*Reynolds v. United States*, decided in 1878, was the first case after the passing of the Bigamy in the Territories (Morrill) Act, which banned bigamy in areas such as Utah, that made a statement regarding bigamy, or polygamy as it was generally seen. The case was brought on appeal by Reynolds after he was convicted of bigamy for taking a second legal wife against the newly-passed law of the territories.<sup>41</sup> Later, the *Reynolds* Court’s declaration that “it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.”<sup>42</sup> The very strong, anti-polygamy language can also be seen throughout the *Reynolds* opinion.<sup>43</sup> This language has generally eroded, however, most notably in the recent *Brown v. Buhman* opinion, where the court rightly criticizes the *Reynolds* Court’s clear racism and discrimination toward polygamy.<sup>44</sup>

## B. History of Polyamory in the U.S.

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

<sup>39</sup> *Id.* at 228.

<sup>40</sup> *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (stating that bigamy was a justifiable law “based on moral choices.”).

<sup>41</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>42</sup> *Id.* at 165.

<sup>43</sup> *Id.* at 161-166.

<sup>44</sup> See discussion *infra* Part II(C).

Elizabeth Sheff, author of the book *The Polyamorists Next Door*,<sup>45</sup> succinctly describes in brief the history of polyamory as being divided “into three ‘waves’ occurring in the nineteenth, twentieth, and twenty-first centuries.”<sup>46</sup> There were several in the mid- to late-1800s who practiced various forms of multi-partner lifestyles.<sup>47</sup> In the 1960s and ‘70s, “[p]olyamory evolved as a direct result of the sexual revolution and intertwined with the alternative sexual forms . . . , especially the bisexual and free love movements.”<sup>48</sup> This movement also gave rise to communes (including polyamorous communes, such as Kerista in San Francisco)<sup>49</sup>, as well as “group marriage and swinging.”<sup>50</sup> Lastly, in the late twentieth and early twenty-first centuries, “the Internet has proved an especially important site for community building among marginalized populations” and “[s]exual non-conformists have populated the Internet in droves, forming personal and sexual connections online.”<sup>51</sup> This ability to make connections across the country, as well as worldwide, has “provid[ed] polys with a convenient way to create community, give each other advice, and find partners.”<sup>52</sup> “[T]he Internet has also significantly impacted how poly’s [sic] interact with other sexual minorities”<sup>53</sup> and has allowed for alliances with many bisexual and transexual communities for their marginalization, even from the LGBT community, as well as their almost intrinsic connection with multiple-partner relationships.

The article makes note that the term “plural marriage” should also be included in this discussion of polyamory, because it is more generally the case that such relationships are consensual and distinct

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<sup>45</sup> ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES* (2013).

<sup>46</sup> Sheff, *supra* note 14 at ¶ 1.

<sup>47</sup> *Id.* at ¶ 2.

<sup>48</sup> *Id.* at ¶ 5.

<sup>49</sup> Kerista was a “proto-polyamorous intentional community based in the San Francisco Bay Area between 1971 and 1991. Approximately 25 adults lived either in separate group marriages or in a single group marriage. *See id.* at ¶¶ 10-11.

<sup>50</sup> *Id.* at ¶¶ 7, 10; *see* Fernandes, *supra* note 20.

<sup>51</sup> Sheff, *supra* note 14 at ¶ 14.

<sup>52</sup> *Id.* at ¶ 15.

<sup>53</sup> *See id.*

from bigamy.<sup>54</sup> Similarly, the *Brown v. Buhman* case that drives much of this discussion involved a man with four consensually entered-into relationships with separate women, only one of whom was legally his wife.<sup>55</sup>

## II. The Evolution of the Traditional Family

Monogamy, as a tradition, has been in decline in the last decades, at least through the institution of marriage.<sup>56</sup> Similarly, unmarried partners are marrying later in life or choosing not to marry at all.<sup>57</sup> To degrade the tradition of marriage more, the rate of divorces has steadily increased since World War II, even more dramatically since the 1970's and the introduction of the no-fault divorce.<sup>58</sup> The idea of marriage does not conform now to what it did two decades ago: same-sex marriage is now allowed throughout many states in the country and others have overturned constitutional bans;<sup>59</sup> 45 years ago, interracial marriage was made legal.<sup>60</sup> We have continued to redefine marriage over the course of time, just as we continue to define relationships and the rights and privileges afforded them.

### *Polyamory as "family"*

In 1973, as more traditional families were divorcing and the no-fault divorce was on the horizon, the American Home Economics Association offered a new definition of family that better reflected

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<sup>54</sup> See discussion *infra* Part II(C).

<sup>55</sup> See *Sister Wives* *infra* note 20.

<sup>56</sup> Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, n. 6 (2005).

<sup>57</sup> Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them*, A State Survey, 37 BRANDEIS L.J. 245 (1998).

<sup>58</sup> Parkman, *supra* note 56, at 125, n.7.

<sup>59</sup> *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Oct. 2014), [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality\\_10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality_10-2014.pdf).

<sup>60</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

this changing American landscape. The defined a family as “two or more people who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time. The family is a climate that one ‘comes home to’ and it is this network of sharing and commitments that most accurately describes the family unit, regardless of blood, legal ties, adoption or marriage.”<sup>61</sup> As more and more Generation-X and Millennial adults choose not to marry but still create their own new families consisting of partners, children, and families, this 40-year-old definition seems even more appropriate today.

It is this sense of family that those in polyamorous relationships have grasped. The idea of crafting one’s own family from consensual partnerships (whether monogamous or polyamorous) based on love and commitment seems to embrace the very heart of family in this country. Polyamory easily fits within this definition of family and follows a trend in the courts, who have consistently found that family is not limited to one man and one woman.<sup>62</sup> Similarly, the ALI’s *Principles of the Law of Family Dissolution* provide an extensive and non-exclusive list of circumstances that go toward determining whether a domestic partnership has been established.<sup>63</sup> Many of these elements are foundational in maintaining long-term polyamorous relationships, just as they are in monogamous partnerships.

#### IV. Cases Bearing on the Discussion

*Roberts v. U.S. Jaycees*, *Lawrence v. Texas*, *Brown v. Buhman*, and other cases all highlight the Supreme Court’s desire to

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<sup>61</sup> NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 33 (2008).

<sup>62</sup> See generally *United States v. Windsor* (stating that Section 3 of the Defense of Marriage Act (DOMA) (which stated that marriage is between a man and a woman) is unconstitutional); see also *Moore v. City of East Cleveland* (holding that family includes non-immediate family members); see also *Braschi v. Stahl Associates Co.*, (holding that “the term family . . . was not to be rigidly restricted to those people who had formalized their relationship”).

<sup>63</sup> See generally *Principles of the Law of Family Dissolution* § 6.03 (2002).

“[p]rotect[] [intimate] relationships from unwarranted state interference” and the “ability independently to define one’s identity,”<sup>64</sup> and it should be recognized that relationships and our autonomous ability to privately form our intimate connections should trump what others consider morally unacceptable.

### 1. *Roberts v. U.S. Jaycees*

Decided in 1984, *Roberts* was a suit brought by the Minnesota Commissioner for the Department of Human Rights against the United States Jaycees, a fraternal organization for businessmen in the U.S.<sup>65</sup> The appeal by the Jaycees to the Supreme Court was based on the decision of the lower court requiring the U.S. Jaycees to admit women as full members was a violation of both their First and Fourteenth Amendment rights.<sup>66</sup> The Court’s decision was to reverse the Eighth Circuit’s decision, “conclud[ing] that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>67</sup>

### 2. *Romer v. Evans*

In 1992, Colorado adopted a referendum that repealed city ordinances that prohibited discrimination on the basis of sexual orientation.<sup>68</sup> The suit was brought against the State as violating, among other provisions, the Fourteenth Amendment to the Constitution.<sup>69</sup> The U.S. Supreme Court affirmed this decision with Kennedy’s restatement of Justice Harlan’s famous words that “the

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<sup>64</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); accord *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Buhnam*, 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>65</sup> *Roberts*, 468 U.S. at 616.

<sup>66</sup> *Id.* at 617-618.

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

<sup>68</sup> *Romer v. Evans*, 517 U.S. 620 (U.S. 1996).

<sup>69</sup> *Id.* at 625.

Constitution ‘neither knows nor tolerates classes among citizens.’”<sup>70</sup> Similar to the language later used in *Perry v. Schwarzenegger*, *Romer* concluded that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>71</sup>

Justice Scalia’s dissent in *Romer* is strikingly similar to that in *Lawrence* discussed below. In *Romer*, he looked to statutes in a number of U.S. states that ban the practice of polygamy, one of the things that ought to be banned, in his opinion, to “preserve [a state’s] view of sexual morality,”<sup>72</sup> which was the issue in contention, in his view, in *Romer v. Evans*. He states that these statutes are in question because “[t]he Court’s disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated . . . basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.”<sup>73</sup> Arguably, no one should have fewer rights than anyone else, as the *Romer* Court declares, and thus Scalia’s words should ring true—polygamists (or those who practice non-bigamous plural marriage or polyamory) deserve those same rights as homosexuals, at minimum to the extent to which those citizens are provided rights under domestic partnership.

### 3. *Lawrence v. Texas*

In 2003, the U.S. Supreme Court found that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places,” and that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>74</sup> After having been arrested and fined for “deviate sexual intercourse” (commonly referred to as sodomy) under the Texas Penal Code, two men sued the state of Texas for

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<sup>70</sup> *Id.* at 623.

<sup>71</sup> *Id.* at 633.

<sup>72</sup> *Id.* at 648.

<sup>73</sup> *Id.*

<sup>74</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

violating their right to privacy.<sup>75</sup> The Court determined that “[m]oral disapproval of a group cannot be a legitimate government interest . . . because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”<sup>76</sup>

Justice Scalia’s dissent in *Lawrence* is, again, particularly relevant in our discussion.<sup>77</sup> In it he argues that “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”<sup>78</sup> Such an argument does not seem justified if *Roberts* or *Romer* are to be followed; indeed, simply stating that tradition is the answer does not make that tradition one worthy of continuation. Scalia uses polygamy as an example of his very common slippery slope argument, stating that “[s]tate laws against bigamy, same-sex marriage . . . adultery, [and] fornication . . . are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”<sup>79</sup>

#### 4. *Perry v. Schwarzenegger*

This case is meant to highlight the debate that raged in California over same-sex marriage and domestic partnership laws.<sup>80</sup> *Perry v. Schwarzenegger* (later *Perry v. Brown*), stands for the notion that “domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage.”<sup>81</sup> This idea becomes important when discussing the expansion of the current domestic partnership laws to include polyamorous relationships, because it is not marriage that is being argued for but the “fundamental liberty interest in choosing to cohabit and maintain romantic . . . relationships, even if those relationships are termed ‘plural marriage’

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<sup>75</sup> *Id.*; TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

<sup>76</sup> *Lawrence*, 539 U.S. at 583.

<sup>77</sup> *See id.* at 586 (Scalia, J., dissenting).

<sup>78</sup> *Id.* at 589.

<sup>79</sup> *Id.* at 590.

<sup>80</sup> *See* discussion *infra* Part III.

<sup>81</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010).

[or polyamory].”<sup>82</sup> The court in California determined that Proposition 8 was unconstitutional because it proposed a “significant symbolic disparity between domestic partnership and marriage” and “fail[ed] to advance any rational basis for singling out gay men and lesbians for denial of a marriage license.”<sup>83</sup> Lastly, the court makes a strong statement by saying “[t]he evidence shows that the movement of marriage away from a *gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage.*”<sup>84</sup> It is arguably a statement on the evolution of our understanding, as a society and legally, of relationships and relationship structures<sup>85</sup> and further evidences that 1) marriage does not equal family, and 2) family is an evolved concept.

### 5. *Marvin v. Marvin*

In discussing cohabitation agreements, which a vital part of this article’s discussion,<sup>86</sup> *Marvin* was a case brought by Michelle Marvin against Lee Marvin for the enforcement of a cohabitation agreement signed in 1964.<sup>87</sup> While the court held that the Marvins’ agreement was void due to meretricious consideration, it held that “courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”<sup>88</sup>

While later courts have been split on the issue, it should be noted that California’s law is still valid, and other states have followed its decision.<sup>89</sup> This ability to protect rights, property, and benefits through contract, enabling partners to define family non-

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<sup>82</sup> *Brown v. Buhnam*, 947 F. Supp. 2d 1170, 1198 (D. Utah 2013).

<sup>83</sup> *Perry*, 704 F. Supp. 2d at 1003.

<sup>84</sup> *Id.* at 993 (emphasis added).

<sup>85</sup> See discussion *supra* Part II(B).

<sup>86</sup> See discussion *infra* Part III(B).

<sup>87</sup> *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976).

<sup>88</sup> *Id.* at 109 (implying the definition of meretricious as being a purely sexual arrangement with no other consideration).

<sup>89</sup> See discussion *infra* Part III.



traditionally, is again proof that marriage does not equal family: family is what we make of it ourselves, and that ability is what is and should be protected by the language of these cases.

### V. Origin of Rights for Polyamory

In 2012, “[a] recent poll by Loving More magazine found that nearly two-thirds of [polyamorous individuals] would seek legal recognition if they could.”<sup>90</sup> Practitioners of polyamorous relationships might not necessarily desire marriage, as defined by most courts, but the rights and protections afforded those who wish to choose domestic partnerships (both same- and opposite-sex) are well within the desired legal protections. “Domestic partnership[s] . . . ha[ve] tremendous possibility to create a more expansive version of what a relationship can look like.”<sup>91</sup>

As the definition of relationships, including marriage, have changed, so too must the laws that protect them. As *Roberts* lays out, our ability in America “to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>92</sup> Such intimate associations would be relevant to polyamory relationships because “people can exhibit aspects of attachment

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<sup>90</sup> Michael Cook, *Will Polyamory Follow Same-sex Marriage?*, LIFESITENEWS.COM, Aug. 7, 2013, <https://www.lifesitenews.com/opinion/will-polyamory-follow-same-sex-marriage> (citing a survey conducted by Loving More and the National Coalition for Sexual Freedom of 4000 participants between Feb. and Aug. 2012, the results of which can be found at <http://www.lovemore.com/polyamory-research/2012-lovingmore-polyamory-survey/>).

<sup>91</sup> Laura Essig, *Is It Time to Institutionalize Polyamorous Relationships?*, PSYCHOLOGYTODAY.COM, (Feb. 24, 2014) <http://www.psychologytoday.com/blog/love-inc/201402/is-it-time-institutionalize-polyamorous-relationships>; see also Roc Morin, *Up for Polyamory? Creating Alternatives to Marriage*, THEATLANTIC.COM (Feb. 14, 2014), <http://www.theatlantic.com/health/archive/2014/02/up-for-polyamory-creating-alternatives-to-marriage/283920/2/>.

<sup>92</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

security (i.e., low levels of avoidance) without being sexually exclusive.”<sup>93</sup> As well, “people in polyamory relationships are lower in avoidance.”<sup>94</sup> In other words, people in polyamory relationships have clearly learned to be in relationships in which they “are committed to one another to the same extent as married partners,”<sup>95</sup> the center-piece of all domestic partnership law today.

Like the Minneapolis statute discussed later, domestic partnership statutes have similar language directing those entering into the arrangement to be “committed adult partners.”<sup>96</sup> To date the general legal standing is that multiple-partner relationships cannot meet the requirement of the domestic partnership statute because those statutes universally require only two parties.<sup>97</sup> Psychologists believe that “polyamorous relationships can be viable and successful alternatives to more traditional concepts of monogamy,”<sup>98</sup> and this viability should be afforded reasonable recognition and protections.

*Roberts v. U.S. Jaycees* puts forth the broad freedom of private association that was applied in *Lawrence v. Texas* and later followed in *Brown v. Buhman*.<sup>99</sup> Not only is this freedom essential, but the argument put forth in Elizabeth Leshner’s article would further support both a contractual and Substantive Due Process right, which this article concurs with while expanding on it, for polyamorous relationships to be legally recognized through domestic partnerships.<sup>100</sup>

### ***1. Rights by Contract***

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<sup>93</sup> Moors, *supra* note 19 at 2 (defining “avoidance” as those who avoid commitment in relationships).

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

<sup>95</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES § 142.20 (2014)

<sup>96</sup> *Id.*; *see also* Essig, *supra* note 91.

<sup>97</sup> MINN. CODE OF ORDINANCES § 142.20.

<sup>98</sup> Moors, *supra* note 19 at 3.

<sup>99</sup> *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984)

<sup>100</sup> *See Elizabeth Cannon Leshner, Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 TUL. J. L. & SEXUALITY 127 (2013).

The American court system has a history of respecting and defending an individual's right to contract privately with whom they wish. Business law is robust and filled with private contract protections; marital and family law respects both pre-nuptial and post-nuptial agreements regularly; and, more recently, courts have begun to more consistently uphold cohabitation agreements.<sup>101</sup>

A solid argument has also been made for using cohabitation agreements for two-person, non-married partners.<sup>102</sup> These contracts, or cohabitation agreements, "will generally be enforced in the same manner as a "pre-nup" or "post-nup" is enforced in the state where the agreement is executed."<sup>103</sup> The rights and privileges that are afforded with these agreements can be fairly broad, including distribution of real estate, income, pensions, and personal property.<sup>104</sup> With the increase in both divorces and unmarried partners, "[i]t seems to be a logical time to reconsider whether marriage is the best institution for establishing long-term relationships or whether there are alternatives to it that will increase social welfare."<sup>105</sup> While some courts have argued that domestic partnerships are not contracts with the State<sup>106</sup> like marriages are, it can be argued to the contrary.

As it was with domestic partnership laws, California was one of the first to recognize the validity of cohabitation agreements for

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<sup>101</sup> See National Paralegal College, Cohabitation Agreements, NATIONALPARALEGAL.EDU, [http://nationalparalegal.edu/public\\_documents/courseware\\_asp\\_files/domesticRelations/ContractsMarriage/CohabitationAgreements.asp](http://nationalparalegal.edu/public_documents/courseware_asp_files/domesticRelations/ContractsMarriage/CohabitationAgreements.asp) (last visited Oct. 4, 2014)(stating "approximately 30 states recognize express agreements between unmarried cohabitants.").

<sup>102</sup> See Jeanne M. Hannah, *The Law and Living Together*, ABA.ORG(Fall 2010) [http://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_a\\_rea\\_e\\_newsletter\\_home/fl\\_feat3.html](http://www.americanbar.org/newsletter/publications/law_trends_news_practice_a_rea_e_newsletter_home/fl_feat3.html).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Parkman, *supra* note 56 at 126.

<sup>106</sup> *Appling v. Walker*, 2014 WI 96, ¶43, 2014 Wisc. Lexis 533, \*37 (Wis. 2014) (stating that "[a domestic partnership] does not identify the legal status as a contractual relationship.").

unmarried partners in *Marvin v. Marvin*.<sup>107</sup> While courts across the country are split on the definition of “meretricious” from the *Marvin* case, there is still a strong favoring of private contract between parties, even if those parties are unmarried and sharing financial obligations.<sup>108</sup> Minnesota, for example, has two cases in which the court lays out the considerations the parties must have when entering into such cohabitation agreements.<sup>109</sup> Section 513.075 of the state code lays out the rights and obligations of parties wishing to have an enforceable cohabitation agreement.<sup>110</sup> In comparison the Minneapolis Ordinance, Sec. 142.20, has language that is analogous to that in Sec. 513.075: subsection (a)(5) of the Minneapolis Ordinance states that partners “[a]re jointly responsible to each other for the necessities of life;” while subsection (a)(6) states that they “[a]re committed to one another to the same extent as married persons are to each other.”<sup>111</sup> Lastly, a domestic partnership requires that parties “[a]re competent to enter into a contract.”<sup>112</sup> If a domestic partnership requires that parties be competent to enter into a contract, then it seems counter to argue that domestic partnerships are not contracts.

If this is the case, then a polyamorous relationship should be capable of signing multiple such contracts with their other partners, just as a businessperson, with proper consideration for each contract, is capable of entering into multiple agreements with others. An individual’s private right to contract, as evidenced in the enforceability of contracts that specifically contemplate sexual

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<sup>107</sup> See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).denying the enforceability of the contract between the Marvins but stating that “[t]he courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services.”)

<sup>108</sup> *Id.*

<sup>109</sup> See generally *Estate of Peterson*, 579 N.W.2d 488 (Minn. Ct. App. 2010); see also *In re Estate of Leslie*, 2010 Minn. App. Unpub. Lexis 958 (Minn. Ct. App. 2010).

<sup>110</sup> See MINN. STAT. § 513.075 (2014).

<sup>111</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES §§ 142.20(a)(5)-(6)(2014).

<sup>112</sup> *Id.* § 142.20(a)(3).

relations between two parties,<sup>113</sup> should be protected, and polyamorous relationships should be able to “choose to enter upon [their] relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>114</sup>

## 2. *Rights by Substantive Due Process*

“Both polyamory and religious polygamy present a range of issues for substantive due process, such as freedom of intimate association, freedom of religion, and the right to privacy.”<sup>115</sup> In light of the decision in *Brown v. Buhman*, “the right to engage in private non-mongamous activity would be more useful to form an argument that any future government discrimination in custody decisions or employment of a polygamous or [polyamorous] person is a violation of his or her fundamental liberty, analogous to the right to be free from government intrusion on private intimate conduct in *Lawrence [v. Texas]*.”<sup>116</sup> The Pennsylvania Superior Court has spoken to this very concern in *V.B. v. J.E.B.*, stating that “the trial court’s observation that polyamory was unworkable in [a child custody] situation was irrelevant” and “fails to support its concomitant conclusion that the unorthodox lifestyle was detrimental to the children in this case.”<sup>117</sup> If this court has decided, even in dictum, that polyamory has no place in determining a parent’s capacity, it should equally have no place in deciding whether or not it fits within the definition of family.

While there is little case law that directly speaks to polyamory, domestic partnerships and cohabitation agreements both speak to the notion of sexual relationships and familial relationships, and “such intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships

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<sup>113</sup> See MINN. STAT. § 513.075 (stating that cohabitation agreements are in contemplation of a sexual relationship).

<sup>114</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

<sup>115</sup> Leshner, *supra* note 100 at 130 n.132.

<sup>116</sup> *Id.* at 138.

<sup>117</sup> *V.B. v. J.E.B.*, 55 A.3d 1193 (Pa. Super. Ct. 2012).

in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>118</sup>

## VI. Domestic Partnership & Family

Beginning with the passage of the “California Domestic Partner Rights and Responsibilities Act of 2003,” permitting domestic partnerships in California, more than half of the States have passed similar bills.<sup>119</sup> The rise of the domestic partnership law came in response to a growing number of cases regarding privileges and rights for insurance benefits and hospital visitation, as well as other privileges afforded those in traditional families. The first use of the term was in *Brinkin v. Southern Pacific Transp. Co.*, in which Brinkin requested to be compensated for funeral leave for his same-sex partner but lost and was later denied appeal.<sup>120</sup> This suit pushed many gay-rights activists to demand more protection as well as rights. Domestic partnerships, even in their humble beginnings, provided rights to hospital visits and medical proxy. As they have become more common throughout the country, the rights have been expanded to include a variety of rights.<sup>121</sup>

Domestic partnerships in the last decade have been evolving legally in similar ways that marriage has. In California especially, there has been a fluctuation with the original bill “Proposition 22”, which was overturned in 2004; the passing of “Proposition 8” in 2008; and then finally the overturning of that law in *Perry v.*

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<sup>118</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

<sup>119</sup> *Civil Unions & Domestic Partnership Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated Nov. 2014).

<sup>120</sup> *Brinkin v. S. Pac. Transp. Co.*, 572 F. Supp. 236 (Cal. 1983).

<sup>121</sup> *Federal Laws Impacting Domestic Partner Benefits*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/federal-laws-impacting-domestic-partner-benefits> (last visited Sept. 30, 2014).

*Schwarzenegger* in 2010.<sup>122</sup> The final case being, arguably, the impetus for the overturning of other similar bans across the country.

As previously noted, many states across the country have allowed for domestic partnership registries, with some governed by city ordinance and others by state statute.<sup>123</sup> Differences in registries also exist in whether or not they allow only same-sex partners, opposite-sex partners, or both.<sup>124</sup>

The cases previously illustrated show a successive redefining of the moral single-mindedness that the Court spoke so definitively on the United States having in *Reynolds v. United States*.<sup>125</sup> As the court stated, however, in *Perry* the evolution of the country's moral direction and understanding of gender, identity, and orientation should allow for a broader application of domestic partnership laws to include polyamorous relationships.

This discussion will begin with an analysis of *Reynolds v. United States*, calling into question, as did *Brown*, the discriminatory nature of that decision in upholding a bigamy conviction in Utah.<sup>126</sup> “The Supreme Court has over decades assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups.”<sup>127</sup> In direct contrast, *Reynolds* went so far as to state that “there never has been a time in any State of the Union when polygamy has not been an offence against society.”<sup>128</sup> Since 1878 both society and the courts have clearly had a change of opinion.

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<sup>122</sup> See CAL. CONST. art. I § 7.5 (proposed amendment, 2008); see also CAL. FAM. CODE § 300(a) (proposed amendment, 2000); *In re Marriage Case*, 183 P.3d 384 (Cal. 2008);

*Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>123</sup> *City and County Domestic Partner Registries*, HUMAN RIGHTS CAMPAIGN, (last visited Sept. 30, 2014), <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries> (last visited Sept. 30, 2014); see also *Legal Information and Resources by State*, Unmarried Equality, (last visited February 20, 2015), [www.unmarried.org/legal-information-resources-by-state/](http://www.unmarried.org/legal-information-resources-by-state/).

<sup>124</sup> See *Legal Information and Resources by State*, *supra* note 123.

<sup>125</sup> See generally, *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>126</sup> *Brown v. Buhman*, 974 F. Supp. 2d 1170 (D. Utah 2013).

<sup>127</sup> *Id.* at 1181.

<sup>128</sup> See *Reynolds*, 98 U.S. at 145.

As mentioned previously, many states, in contrast to city ordinances, have same-sex requirements for registering for domestic partnership rights.<sup>129</sup> This contrast seems likely to be on the brink of change as more states legalize same-sex marriage or overturn their constitutional bans.<sup>130</sup> Our understanding of sexual identity has also broadened our understanding of gender identity.<sup>131</sup> The same-sex and/or opposite-sex requirements seem to be based on a binary that is quickly eroding. This binary should be set aside, and a gender requirement removed to allow for all relationship pairings, including polyamory (which further requires removal of a numerical requirement, as discussed below).

What the *Brown* court describes as “religious cohabitation” is not entirely dissimilar from polyamory, and, for the purposes of this discussion, the article will use “polyamory” in lieu of “religious cohabitation” in subsequent citing of that case and others. The *Brown* court defined “religious cohabitation” as when “those who choose to live together without getting married enter into a personal relationship that resembles a marriage in its intimacy but claims no legal sanction.”<sup>132</sup> This definition is almost entirely equivalent to those in polyamorous relationships who live long-term with partners.

Kory Brown and his wives very carefully asserted the fundamental right at stake in their complaint not as a right to be polygamists but as “a fundamental liberty interest in choosing to cohabit and *maintain romantic and spiritual relationships*, even if those relationships are termed ‘plural marriage’.”<sup>133</sup> As the *Brown*

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<sup>129</sup> HRC, *supra* note 153; *see also* Unmarried Equality, *supra* note 124.

<sup>130</sup> Hamm, *supra* note 16.

<sup>131</sup> *See generally* The Asexuality Visibility & Education Network, ASEXUALITY.ORG, <http://www.asexuality.org/home/overview.html> ORG (last visited Sept. 30, 2014) (defining “asexual” as “someone who does not experience sexual attraction”); *see also* Intersex Society of North America, ISNA.ORG, <http://www.isna.org/faq/transgender> (last visited Sept. 30, 2014) (defining “transsexual” or “transgender” as “people who are born with typical male or female anatomies but feel as though they’ve been born into the ‘wrong body;’” also defining “intersex” as having “anatomy that is not considered typically male or female.”).

<sup>132</sup> *Brown v. Buhman*, 974 F. Supp. 2d 1170, 1197 (D. Utah 2013).

<sup>133</sup> *Id.* at 1198 (emphasis added).



court clarified, “plural marriage” would not legally qualify as bigamy. Such an interest is directly related to those in polyamorous relationships, because the “[polyamorous] relationships fall within the fundamental liberty interests given to families and relationships.”<sup>134</sup> Further, the *Brown* court states “that ‘it is generally understood that the state is not entitled to criminally punish its citizens for making such a choice, even if they do so with multiple partners.’”<sup>135</sup> This very nearly states that polyamory (or some other variation of consensual non-monogamy) could arguably be legalized. If the court is willing to admit that polyamory is outside the bounds of prosecution, because it doesn’t fit the legal definition of bigamy, then it is argued that there is not a strong moral disapproval that the *Reynolds* opinion once professed.

## VII. Application of the Law & Its Effects

Were a hypothetical polyamorous triad (three persons in a polyamorous relationship) to seek domestic partnership benefits under any state’s law, they would be denied.<sup>136</sup> It would arguably be a violation of their “right to be free from government interference in matters of consensual sexual privacy.”<sup>137</sup> This denial is argued as having fewer constitutional rights, as Justice Scalia claims that polygamists (and polyamorists by extension) don’t have in his dissent in *Romer v. Evans*, stating that “[p]olygamists, and those who have a polygamous ‘orientation,’ have been ‘singled out’ by [provisions of previously cited state statutes] for much more severe

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<sup>134</sup> Leshner, *supra* note 100 at 143.

<sup>135</sup> *Brown*, 947 F. Supp. 2d at 1218 (citing *State v. Holm*, 137 P.3d 726 (Utah 2006) (Durham, J., dissenting)).

<sup>136</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES § 142.20(a)(2014).142.20(a) (stating that “[d]omestic partners are two (2) adults . . .”); *see also* PHX., ARIZ. CODE § 18-401 (2011) (stating that “domestic partnership means two individuals . . .”);

SALT LAKE CITY, UTAH, CODE § 2.10.020 (2014) (stating “any two individuals . . .”).

<sup>137</sup> *Brown v. Buhman*, 974 F. Supp. 2d 1170, 1223 (D. Utah 2013) (citing *Seegmiller v. Laverkin City*, 528 F.3d 762, 771 (10th Cir. 2008)).

treatment than merely denial of favored status.”<sup>138</sup> As an extension of the language in *Perry v. Schwarzenegger*, in which the courts states that there was a “significant symbolic disparity between domestic partnership and marriage” and that “domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage,”<sup>139</sup> polyamorous relationships are not afforded the privileges of either domestic partnerships or marriage, because they have, in fact, been “singled out.”<sup>140</sup> Subsequently they would be forced to make the undignified choice to pick one of their relationships over the other when deciding rights and privileges. The majority in the *Romer* opinion addresses this by stating, “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>141</sup>

This article, and specifically this section, does not seek to provide a comprehensive solution to the legal issue of expanding the argued rights. There are other articles that speak to this issue.<sup>142</sup> This section merely provides a simple framework for a solution to a complex issue. For the sake of discussion, the legal debate will be limited to the city of Minneapolis, Minnesota<sup>143</sup> if only because its domestic partnership ordinance is favorable to the argument made previously.<sup>144</sup> To most appropriately further to stated goal of the ordinance, the legislature need only strike the “*of two (2) non-married . . . persons.*”<sup>145</sup> To put this in context, Diana Klein puts forth

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<sup>138</sup> *Romer v. Evans*, 517 U.S. 620 (U.S. 1996).

<sup>139</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010).

<sup>140</sup> *Romer v. Evans*, 517 U.S. 620, 648 (U.S. 1996). (Scalia, J., dissenting).

<sup>141</sup> *Id.* at 633.

<sup>142</sup> See generally Klein, *supra* note 23; see also Parkman, *supra* note 56; Strassberg, *supra* note 153.

<sup>143</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES §§ 142.20(a)(5)-(6) (2014)§ 142; accord PHX., ARIZ. CODE §§ 18-400(2011); SALT LAKE CITY, UTAH CODE § 2.10.020 (2014).; see also CAL. FAM. CODE § 297 (2014); WIS. STAT. § 770.05 (2014).

<sup>144</sup> See discussion *supra* Part III(B).

<sup>145</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES § 142.10 (emphasis added).

a few options for a variety of legal arrangements that can be used were polyamorous relationships to be afforded some rights.<sup>146</sup>

The argument can more broadly be applied to both state statutes and city ordinances, with the knowledge that those states with a same-sex requirement would need to follow the argument laid out in section 5A. Like a number of other states, Minnesota has chosen to let city ordinance govern the definition of, and privileges granted to, domestic partners. The statutory section entitled “Civil Rights and Domestic Partnerships” has seven sections that detail the requirements and benefits of the union created by this partnership.<sup>147</sup> Distinguished from most states, which require same-sex partnerships, Minneapolis has no gender or orientation requirement for partners to enter into the agreement.<sup>148</sup> The city has chosen to “recognize[] that nationwide debate has advanced an expanded concept of familial relationships beyond traditional marital . . . relationships.”<sup>149</sup> Section 142.20 goes further to require that partners “[a]re committed to one another to the same extent as married persons are to each other.”<sup>150</sup>

### VIII. Conclusion

In 1967, the Supreme Court decided that marriage could no longer be restricted by race.<sup>151</sup> Since that decision, America has begun to open its collective mind and adjust its sensibilities to understand that, “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>152</sup> This is evidenced by the Supreme Court’s refusal to hear the cases regarding same-sex marriage in 2014.<sup>153</sup> It seems even

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<sup>146</sup> See generally Klein, *supra* note 23.

<sup>147</sup> MINNEAPOLIS, MINN. CODE OF ORDINANCES §§ 142.20(a)(5)-(6)(2014).

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

<sup>149</sup> *Id.* § 142.10.

<sup>150</sup> *Id.* § 142.20(6).

<sup>151</sup> See generally *Loving v. Virginia*, 388 U.S. 1 (U.S. 1967).

<sup>152</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>153</sup> Hamm, *supra* note 16.

more relevant given the same court's interest in hearing those cases in 2015 after more and more states have overturned such bans.

While marriage might yet be a distant achievement, polyamorous relationships deserve dignity, as the *Lawrence* Court defined it, in choosing their partners and, as *Perry* decided, a level of equality in choosing how to protect and have recognized their committed relationships, regardless of number.