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SHOULD CIVIL MARRIAGE BE OPENED UP TO MULTIPLE PARTIES?

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ABSTRACT

In this Essay, we argue that civil marriage should not be opened up to multiple parties. Our focus is on civil, not religious, marriage, and we address polygamy in general, rather than any particular form of it. We highlight the important distinction between opening up civil marriage to multiple parties on one hand and recognizing valid foreign polygamous marriages on the other. We contemplate how a country can coherently recognize valid foreign polygamous marriages, while at the same time decline to open up civil marriage to multiple parties.

We distinguish decriminalization of polygamy, which we advocate, from opening up civil marriage to multiple parties. We then explain why we believe the rights of children should be a non-issue in deciding whether civil marriage should be opened up to multiple parties.

We consider the state's continuing interest in marriage in the context of changing social norms and legal developments and conclude that there is a compelling state interest in preserving and supporting civil marriage as a monogamous institution.

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INTRODUCTION

We formulate the symposium question as whether to open up civil marriage to multiple parties. We have three reasons to formulate the question this way. First, we intend to signal that we address only civil marriage law and not religious law in this Essay. The marriage and divorce laws of the various religions are not changed by amendments to the state's civil laws. In our country, Canada, civil marriage has been opened up to same-sex partners,¹ and divorce is available on the basis of separation of the spouses for one year.² Nevertheless, adherents to faiths with marriage and divorce laws that differ from the civil law may refrain from entering into a same-sex marriage or seek a religious as well as a civil dissolution of their marriage. And the civil law does not affect religious law or the ability of adherents to submit themselves to that law.

The civil law does, however, prevent parties from entering into polygamous marriages, and this prohibition applies equally to adherents of faiths that permit polygamy. The marriage laws of monogamous countries such as Canada and the United States do not permit polygamy. A legally married person cannot take an additional spouse unless the existing marriage is dissolved by death or divorce. The result of a legally married person going through a form of marriage with a third party is a legal nullity. Furthermore, parties to polygamous "marriages" may be subject to criminal sanctions.³ Thus, opening up civil marriage to multiple parties (and presumably repealing criminal sanctions against polygamy) would enable some religious adherents to practice polygamy in accordance with what is permitted by their faith. But, as we have noted above, it would not change any religious laws.

A second reason for our particular formulation of the question is to emphasize that we do not address any particular existing forms of polygamy. Countries that permit polygamous marriages do so in accordance with particular religious or customary laws, most of which allow men to take more

¹ Civil Marriage Act, S.C. 2005, c. 33, s. 3.1 (Can.), *available at* <http://www.canlii.org/en/ca/laws/stat/sc-2005-c-33/107292/sc-2005-c-33.html>.

² *Id.* at s. 7(1)(a); Divorce Act, R.S.C. 1985, c. 3 (2d Supp.), s. 8(2)(a) (Can.), *available at* <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/110927/rsc-1985-c-3-2nd-supp.html>.

³ Criminal Code, R.S.C. 1985, c. C-46, s. 293 (Can.), *available at* <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>. In the United States, polygamy is criminalized under states' polygamy provisions or under bigamy provisions. *See* MARTHA BAILEY & AMY J. KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD: MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 155 (2010).

than one wife.⁴ Given the principle of sex equality and prohibition on sex discrimination,⁵ it is very unlikely that Canada or any other Western country would introduce any of these religious or customary forms of polygamy. Rather than considering whether any existing form of polygamy should be adopted, we discuss whether multiple parties of any sex or combination of sexes should be permitted to enter into a civil marriage.

Finally, our formulation of the symposium question avoids any reference to “recognizing” polygamous marriages. By doing so, we hope to avoid any confusion between opening up civil marriage to multiple parties on one hand and, on the other hand, recognizing valid foreign polygamous marriages. We have argued elsewhere that recognition of valid foreign polygamous marriages should be continued and indeed expanded.⁶ But this assertion should not be confused with support for opening up civil marriage to multiple parties. We elaborate on this important distinction in Part II.

I. OPENING UP CIVIL MARRIAGE VERSUS RECOGNIZING FOREIGN MARRIAGES

Canada and many other monogamous countries have a long history of recognizing valid foreign polygamous marriages for various purposes.⁷ The question is not the parties’ ability to marry but instead the consequences of a marriage that has taken place elsewhere. Every country has its own marriage laws and its own rules regarding recognition of foreign marriages. The rules of recognition vary, but generally, countries apply the rule of *lex loci celebrationis* (the law of the place of celebration) or the “personal law of each

⁴ See BAILEY & KAUFMAN, *supra* note 3, at 7–9.

⁵ Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 15 (U.K.), *available at* <http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html> (prohibiting discrimination on the basis of sex).

⁶ Martha Bailey et al., *Expanding Recognition of Foreign Polygamous Marriages: Policy Implication for Canada*, 25 NAT’L J. CONST. L. 83, 99, 122–23 (2009).

⁷ *See, e.g.,* *Yew v. British Columbia (Att’y Gen.)* (1923), 33 B.C.R. 109 (Can. B.C. C.A.); *see also In re Dalip Singh Bir’s Estate*, 188 P.2d 499, 501–02 (Cal. Dist. Ct. App. 1948). The definition of “spouse” in the province of Ontario includes a party to “a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.” Family Law Act, R.S.O. 1990, c. F.3, s. 1(2) (Can.). Other Canadian provinces and territories also explore the subject. *See* Family Property and Support Act, R.S.Y. 2002, c. 83, s. 1; (Yukon) Family Law Act, S.P.E.I. 1995, c. 12, s. 1(1)(g) (Can.) (Prince Edward Island); Family Law Act, S.N.W.T. 1997, c. 18, s. 1(2), amended by S.Nu. 2011, c. 11, s. 8(2) (Can.) (Northwest Territories); Nunavut Act, S.C. 1993, c. 28, s. 29. Australia, too, has a pertinent law. *Family Law Act 1975* (Cth) s 6. The subject has also been explored in the United Kingdom. *See* CATHERINE FAIRBAIRN, LIBRARY HOUSE OF COMMONS, NO. SN/HA/5051, POLYGAMY 5 (2014), <http://www.parliament.uk/briefing-papers/sn05051.pdf>.

party,” that is, the law that defines the personal status of each party. Countries that determine validity of marriage in accordance with personal law vary in approach. Some, including Canada, apply the law of each party’s ante-nuptial domicile, some apply the law of each party’s nationality, and some apply the law of each party’s habitual residence.⁸ Generally, the principle of “universality” is applied to marital status: a status validly acquired under the forum’s choice of law rule will be recognized everywhere.⁹

An exception to the principle of universality applies when recognition of a foreign marriage would manifestly violate a country’s public policy.¹⁰ The public policy exception is narrowly defined. An English court, when considering whether to recognize a foreign marriage between an uncle and a niece that would have been within the prohibited degrees of consanguinity under English marriage law, said that “it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation.”¹¹ Generally, monogamous countries have not adopted a blanket rule that foreign polygamous marriages violate public policy in this narrow sense.

A foreign marriage may be recognized for some purposes but not others. It is important in this regard to distinguish between “status” and “the incidents of status.” R.H. Graveson defined status as

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.¹²

These “incidents” are the “special rights, duties, privileges or incapacities” that flow from the status of marriage.¹³ For example, a party to a valid subsisting marriage lacks the capacity to marry in monogamous countries but does have

⁸ Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L.Q. 497 (1995). The law of the intended marital domicile may also be applied in Canada. *Canada (Minister of Emp’t & Immigration) v. Narwal*, [1990] 2 F.C. 385 (Can.).

⁹ R.H. GRAVESON, STATUS IN THE COMMON LAW 119 (1953).

¹⁰ D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY 378 (2003).

¹¹ *Cheni v. Cheni*, [1962] 3 All E.R. 873 at 883 (Eng.).

¹² GRAVESON, *supra* note 9, at 2.

¹³ *Canada (Att’y Gen.) v. Canard*, [1976] 1 S.C.R. 170, 205 (Can.).

relational rights and obligations such as the right to claim and liability to pay spousal support.¹⁴

Some incidents of marriage may not be extended to foreign polygamous marriages that are recognized as valid under the forum's choice of law rules: "[A]cceptance of the principle of recognition of status does not of itself imply that all the incidents of that status will be recognised."¹⁵ For example, in the well-known 1866 case, *Hyde v. Hyde*, an English court refused to recognize a Utah polygamous marriage for the purpose of granting a divorce, while at the same time suggesting that the marriage could be recognized for such purposes as succession law.¹⁶ Other examples of specific incidents of marriage that could be extended, without extending *all* incidents of marriage, include the recognition of spouses' economic interests, support rights, or rights of one spouse to a share of the other's property.¹⁷

Furthermore, most monogamous countries have enacted mandatory laws that expressly prohibit immigration by those in polygamous marriages.¹⁸ Refusal to extend particular incidents of marriage has not required that there be a blanket refusal to recognize the validity of a foreign polygamous marriage that satisfies the forum's choice of law rules.

How can the long history of extending recognition to foreign polygamous marriages that are valid under the forum's choice of law rules coexist with the "cultural commitment to monogamous marriage" that is a feature of monogamous countries?¹⁹ Joost Blom explained the apparent anomaly between the public policy against permitting polygamy on one hand and the application of the universality of status principle to polygamous marriage on the other:

A polygamous marriage cannot be entered into in England, and the laws that say so can be described as founded on public policy in the

¹⁴ On the incapacity to marry, see, for example, *Bate v. Bate* (1978), [1978] O.J. No. 113 (Can. Ont. H.C.J.). On the right and obligation of spousal support, see, for example, Family Law Act, R.S.O. 1990, c. F.3, ss. 1(1), 30 (Can.).

¹⁵ GRAVESON, *supra* note 9, at 103.

¹⁶ *Hyde v. Hyde*, (1866) 1 L.R.P. & D. 130, 138 (Eng.).

¹⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 284 (1971).

¹⁸ For Canada, see Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.). For the United Kingdom, see Immigration Act, 1988, c. 14, § 2 (U.K.); Immigration Rules, 1993-4 H.C. Bill [395] (as amended), paras. 278-80 (U.K.), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370924/20141106_immigration_rules_part_8_final.pdf. For the United States, see 8 U.S.C. § 1182(a)(10)(A) (2012).

¹⁹ Benjamin L. Berger, *Moral Judgment, Criminal Law and the Constitutional Protection of Religion*, 40 SUP. CT. L. REV. (2D) 513, 549 (2008).

private international law sense. However, English law has long regarded parties who were validly, albeit polygamously, married elsewhere as being legal spouses in England for the purposes of remarriage, spousal support obligations, the legitimacy of children, and succession. The fact that the marriage took place in another country is obviously part of the reason why public policy does not intervene here, but so are the very different issues presented by these cases. The question is not as to the parties' ability to marry but as to the consequences of a marriage that has taken place. Protecting the interests of family members is a value shared by English and by the foreign law, and outweighs whatever anomaly is produced in the domestic legal system by recognizing a polygamous union as a marriage.²⁰

Thus, our continued support for expanded recognition of valid foreign polygamous marriages is not inconsistent with the argument that we will make here against opening up civil marriage to multiple parties.

II. DECRIMINALIZING POLYGAMY ≠ OPENING UP CIVIL MARRIAGE TO MULTIPLE PARTIES

It is important to clarify that repealing or failing to enact criminal sanctions against polygamy does not signal support for polygamy and is distinct from the issue of opening up civil marriage to multiple parties. Canada's criminal sanction against polygamy is not needed to bolster the country's "cultural commitment" to monogamy or character as a monogamous country.²¹ There are many monogamous countries in the world, including Great Britain, Canada's "mother country," that do not criminalize polygamy.

In this context, it is important to distinguish polygamy from bigamy. As the terms are used in Canada's Criminal Code and in this Essay, "bigamy" is defined as partaking in a form of marriage while married to someone else.²² "Polygamy" is the practice of living in a "conjugal relationship with more than one person at the same time."²³ The bigamy law is aimed at deceptive conduct.

²⁰ Joost Blom, *Public Policy in Private International Law and Its Evolution in Time*, 50 NETH. INT'L L. REV. 373, 382–83 (2003) (footnotes omitted).

²¹ Criminal Code, R.S.C. 1985, c. C-46, s. 293, available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html> (outlining Canada's criminal prohibition against polygamy). Berger describes the criminalization of polygamy as "a use of the criminal law to protect a cultural commitment to monogamous marriage." Berger, *supra* note 19, at 549.

²² Criminal Code, s. 290(1).

²³ *Id.* s. 293.

It punishes those who bigamously marry an innocent victim (and also couples who seek some advantage by entering into a bigamous marriage). The deceptive nature of bigamy was emphasized by an Ontario judge who said,

The essential gravity of the offence remains the deception which the bigamist exhibits, in some cases, where he has said nothing about the original marriage to the new partner; but, perhaps, more importantly which he exhibits in all cases by the falsification of state records in the application for the marriage licence.²⁴

While in cases of bigamy the existence of a prior marriage is kept secret from the innocent spouse, society at large, or both, polygamy involves no such secrecy or deception. There may be reasons to impose criminal sanctions against the deceptive practice of bigamy. But it is much harder to justify criminalization of the open practice of polygamy among consenting adults when behaviors such as adultery and group sex have largely been decriminalized. It is important to note, however, that some use the term “polygamy” to mean “bigamy.” For example, a reporter wrote that “polygamy” is illegal in Britain and punishable by imprisonment for up to seven years, but polygamy is not a criminal offense in Britain, and it is bigamy that is punishable by imprisonment for up to seven years.²⁵ This Essay addresses polygamy specifically, not bigamy.

The state’s purposes in criminalizing certain conduct are different from the state’s purposes in supporting marriage. The general purpose of criminalization is to deter, denounce, and exact retribution for harmful behavior.²⁶ It may be

²⁴ R. v. Sauve (1997), 203 A.R. 228, para. 3. (Can. Alb. P.C.) (quoting R. v. Friar (1983), unreported, Ont. Cnty. Ct.) (internal quotation mark omitted).

²⁵ Susan Martinuk, Editorial, *Polygamous Marriages Drain Taxpayer Dollars*, CALGARY HERALD, Feb. 15, 2008, at A26, available at <http://www.canada.com/calgaryherald/news/theeditorialpage/story.html?id=4584f9bc-04ce-4608-b740-72b422deef14>; see also Christina Hall, *Bay City Wife Charged with Polygamy St. Claire Shores*, DETROIT FREE PRESS, Sept. 5, 2009, at 4A; cf. Allen v. State, 87 S.E. 681, 683 (Ga. Ct. App. 1916) (“Bigamy, or polygamy, therefore consists in the making of the unlawful contract and the abuse of the formality which the law has enjoined as requisite to the creation of the marital relation. ‘And it is the abuse of this formal and solemn contract, by entering into it a second time when a former husband or wife is still living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. . . .’” (quoting State v. Patterson, 24 N.C. (2 Ired.) 346, 355–56 (1842))).

²⁶ The Canadian Criminal Code sets out the purposes of criminal sanctions as follows:

- (a) to denounce unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders, (e) to provide reparations for harm done to victims or to the community; (f) to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

concluded that there is no justification for criminalizing the open practice of polygamy among consenting adults, but this does not automatically mean the state has an interest in supporting polygamous marriages. “What people do in the privacy of their own home with other consenting adults may be their own business, but when couples seek a public status, a state sanction, or state benefits, the matter becomes one of social and government concern.”²⁷ To refrain from criminalizing a behavior is distinct from supporting or promoting it.

III. MARITAL STATUS OF PARENTS SHOULD NOT AFFECT RIGHTS OF CHILDREN

In jurisdictions where children born outside of wedlock do not have the same rights as those born to married parents, it could be argued that civil marriage should be opened up to multiple parties so that the children born in these plural unions will be protected. For example, there may be concern that a child born to a second “wife” who is not legally married to the father will not have the same rights of support and inheritance as a child born to a first wife who is legally married to the father. Should a child suffer because of the extra-legal living arrangements of the parents? We would argue that this is not a good reason to open up civil marriage to multiple parties. If the concern is protection of the rights of children, it is better to address this concern directly.

In many jurisdictions the rights of children are not directly dependent on the marital status of the parents, and we argue that this is good policy and consistent with the Convention on the Rights of the Child (CRC).²⁸ Article 2(1) of the CRC provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion,

Criminal Code, s. 718.

²⁷ Brian H. Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 6 (2000).

²⁸ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/un_convention_on_the_rights_of_the_child_1.pdf. There are 194 State Parties to the CRC. The United States and Somalia have signed but not ratified the CRC. *The United Nations Convention on the Rights of the Child (CRC)*, EUR. COMMISSION, https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/united-nations-convention-rights_en (last visited May 17, 2015).

political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²⁹

When drafting the CRC, some parties proposed including a specific provision to ensure that children born outside of wedlock would enjoy the same legal rights as those enjoyed by children born within wedlock.³⁰ However, states were unable to reach agreement on such a provision.³¹ Nevertheless, the United Nations Children's Fund (UNICEF) and the Committee on the Rights of the Child have taken the view that children are entitled to the various rights under the CRC regardless of the marital status of the parents. For example, in regard to the right of a child to maintain contact with both parents, UNICEF has said, "Countries that do not enable fathers of children born outside marriage to assume parental responsibilities risk being in breach of the Convention (bearing in mind that article 9 allows for parents and children to be separated when necessary for the child's best interests)."³²

Many countries have taken steps to eliminate or at least reduce legal distinctions between children born within and those born outside of wedlock.³³ In Canada, the provinces and territories have enacted legislation to eliminate discrimination against "illegitimate" children. For example, in the province of Ontario, the Children's Law Reform Act provides, "Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section."³⁴ Similarly, the United States Supreme Court has repeatedly struck down statutes that differentiate between children born in and out of wedlock, stating that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal

²⁹ Convention on the Rights of the Child, *supra* note 28, at art. 2(1).

³⁰ SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 75-76 (1999).

³¹ *Id.* at 76.

³² RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 235 (rev. 3d ed. 2007), available at http://www.unicef.org/publications/index_43110.html; see also *id.* (featuring the country reports of the Committee on the Rights of the Child quoted throughout the handbook).

³³ See, e.g., European Convention on the Legal Status of Children Born Out of Wedlock, *opened for signature* Oct. 15, 1975, E.T.S. No. 85 (entered into force Aug. 11, 1978), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680076d9f>.

³⁴ R.S.O. 1990, c. C.12, s. 1(4), available at <http://www.canlii.org/en/on/laws/stat/rso-1990-c-c12/112472/rso-1990-c-c12.html>.

burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth.”³⁵

If the marital status of parents has no direct legal implications for their children, then disallowing polygamy (or any other form of marriage) will also have no effect on the legal rights of the parties’ children. Children born to unmarried parents will have the same rights of inheritance, support, etc., as children born within wedlock. In this legal context, opening up civil marriage to multiple parties is not required in order to protect these rights. The issue then becomes not whether to extend legal protections to the children but whether to extend marital status and spousal rights and obligations to multiple parties.

It could be argued that children are *indirectly* affected by the marital status of their parents, even if discrimination against “illegitimate” children is eliminated. For instance, in debates on same-sex marriage, it has been asserted that “children are better provided for in the setting of a male-female marriage.”³⁶ This argument was not successful in Canada or in other states that have opened up civil marriage to same-sex couples.³⁷ However, the state’s interest in providing the optimal environment for the rearing of children and whether this justifies restriction of marriage to two persons will be addressed in the next section.

IV. THE STATE’S INTEREST IN MARRIAGE

The state asserts an interest in marriage that justifies both the extension of status and incidents of marital status to qualifying parties *and* the exclusion of non-qualifying parties. Before moving to a discussion of the state’s interest in marriage, it must be acknowledged that legal developments over the past half-century have made the task more difficult.

Traditionally, marriage, and only marriage, conferred spousal status and the incidents of marriage. The rules regarding entry into and exit from marriage were relatively strict in the common law. A historic and often-quoted definition comes from the mid-nineteenth century English case, *Hyde v. Hyde*: “marriage, as understood in Christendom, may for this purpose be defined as

³⁵ N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619, 620 (1973) (per curiam) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)).

³⁶ William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 158 (2004); see also Bix, *supra* note 27, at 7–8.

³⁷ Duncan, *supra* note 36, at 175.

the voluntary union for life of one man and one woman, to the exclusion of all others.”³⁸ The incidents of marriage were extended only to those who were validly married. And married parties had little freedom to modify the incidents of marriage by agreement in the common law world.³⁹

Once married, couples then had a public duty to remain married.⁴⁰ Divorce was available only if a marital fault, such as adultery, was proven, and the state was suspicious of attempts to obtain a divorce in the absence of marital fault simply because the parties no longer wished to be married. The King’s or Queen’s Proctor would investigate divorce proceedings where collusion or some other irregularity was suspected and oppose the granting of a decree absolute if the suspicion was founded.⁴¹

Today, the rules regarding who may marry have been liberalized in many Western jurisdictions. In Canada, for example, restrictions on marrying one’s relatives have been significantly reduced, and civil marriage has been opened up to same-sex couples.⁴² An increasing number of states in the United States now permit same-sex marriage, with states permitting same-sex marriage now forming a majority in the country.⁴³

Exit from marriage has also been made easier. We no longer take the view that, in the absence of a matrimonial fault, couples have a duty to their children and to the state to remain married. In most Western jurisdictions, no-fault divorce is now freely available.⁴⁴

³⁸ Hyde v. Hyde, (1866) 1 L.R.P. & D. 130, 133 (Eng.).

³⁹ See generally Martha J. Bailey, *Judicial Encouragement and Discouragement of Settlement in 19th-Century England*, 32 FAM. & CONCILIATION CTS. REV. 445 (1994) (noting ways in which state interests limited spousal freedom to continue or end the spousal relationship).

⁴⁰ On this duty, see *In re Elderton*, (1883) 25 Ch.D. 220, 229 (Eng.) (“[P]ersons who choose to enter the sacred bonds of marriage not only undertake to conduct themselves to one another so that they shall fulfil the vows which they have taken at the altar, but also take upon themselves a responsibility towards such children as they may have so to live that those children shall have that to which they are entitled, the benefit of the joint care and affection of both father and mother” (emphasis added)).

⁴¹ Wendie Ellen Schneider, *Secrets and Lies: The Queen’s Proctor and Judicial Investigation of Party-Controlled Narratives*, 27 LAW & SOC. INQUIRY 449, 454 (2002).

⁴² Marriage (Prohibited Degrees) Act, S.C. 1990, c. 46, s. 2, available at <http://www.canlii.org/en/ca/laws/stat/sc-1990-c-46/32255/sc-1990-c-46.html>; Civil Marriage Act, S.C. 2005, c. 33, s. 4.

⁴³ *Same-sex Marriage in the United States*, CNN, <http://www.cnn.com/interactive/us/map-same-sex-marriage/> (last updated Apr. 3, 2015, 12: 51 PM ET).

⁴⁴ For Canada, see the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.), s. 8. In the United States, “[a]lthough only a few states have entirely abolished fault as a basis for divorce, by 2001 all fifty states had included some type of no-fault provision in their divorce laws.” SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 94 (2d ed. 2015).

As well, the incidents of marriage have been “unbundled” from the status of marriage. Cohabiting couples now have many of the mutual rights and obligations enjoyed by married couples and are entitled to many of the same employment and government benefits. In Canada, most provinces and territories extend spousal support rights and obligations to unmarried couples who have cohabited for a certain period.⁴⁵ As well, three provinces and two territories have also extended marital property rights to unmarried couples.⁴⁶ Australia and New Zealand also extend varying degrees of marital rights and obligations to unmarried cohabitants.⁴⁷ By contrast, in the United States, it is rare for unmarried cohabitation rights to be conferred⁴⁸—though some states offer registered domestic partnerships.⁴⁹

⁴⁵ The requisite period of cohabitation and relevant statute for each province and territory are as follows: Alberta requires three years cohabitation or less if the couple has a child or agreement. Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 3, *available at* <http://www.canlii.org/en/ab/laws/stat/sa-2002-c-a-4.5/latest/>. New Brunswick, Ontario, and Prince Edward Island require three years cohabitation or less if the couple has a child. Family Services Act, S.N.B. 1980, c. F-2.2, ss. 112, 113, *available at* <https://www.canlii.org/en/nb/laws/stat/snb-1980-c-f-2.2/latest/snb-1980-c-f-2.2.html>; Family Law Act, R.S.O. 1990, c. F.3, ss. 29, 30, *available at* <https://www.canlii.org/en/on/laws/stat/rso-1990-c-f3/latest/>; Family Law Act, R.S.P.E.I. 1988, c. F-2.1, ss. 29(1)(b), 30, *available at* <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-f-2.1/latest/rspei-1988-c-f-2.1.html>. Manitoba requires three years cohabitation or one year of cohabitation if the couple has a child. Family Maintenance Act, C.C.S.M., c. F20, ss. 1, 4, *available at* <https://www.canlii.org/en/mb/laws/stat/ccsm-c-f20/latest/ccsm-c-f20.html>. British Columbia, the Northwest Territories, Nunavut, and Saskatchewan require two years of cohabitation or less if the couple has a child. Family Law Act, S.B.C. 2011, c. 25, ss. 3, 160, *available at* <http://www.canlii.org/en/bc/laws/stat/sbc-2011-c-25/latest/sbc-2011-c-25.html>; Family Law Act, S.N.W.T. 1997, c. 18, ss. 1, 15, *available at* <https://www.canlii.org/en/nt/laws/stat/snwt-1997-c-18/latest/snwt-1997-c-18.html>; Family Law Act, S.N.W.T. (Nu.) 1997, c. 18, ss. 1(1), 15(1), *available at* <https://www.canlii.org/en/nu/laws/stat/snwt-nu-1997-c-18/latest/snwt-nu-1997-c-18.html>; Family Maintenance Act, S.S. 1997, c. F-6.2, ss. 2, 5, *available at* <https://www.canlii.org/en/sk/laws/stat/ss-1997-c-f-6.2/latest/ss-1997-c-f-6.2.html>. Newfoundland requires two years of cohabitation or one year if the couple has a child. Family Law Act, R.S.N.L. 1990, c. F-2, ss. 35(1), 36, *available at* <https://www.canlii.org/en/nl/laws/stat/rsnl-1990-c-f-2/latest/rsnl-1990-c-f-2.html>. Nova Scotia requires two years of cohabitation. Maintenance and Custody Act, R.S.N.S. 1989, c. 160, ss. 2(aa), 3(1), *available at* <https://www.canlii.org/en/ns/laws/stat/rsns-1989-c-160/latest/rsns-1989-c-160.html>. Yukon only requires that the couple have gone through a form of marriage plus cohabitation of some permanence but does not require a set period of cohabitation. Family Property and Support Act, R.S.Y. 2002, c. 83, s. 37, *available at* <https://www.canlii.org/en/yk/laws/stat/rsy-2002-c-83/latest/rsy-2002-c-83.html>.

⁴⁶ Family Law Act, S.B.C. 2011, s. 170 (British Columbia); Family Property Act, C.C.S.M., s. 7(1) (Manitoba); Family Law Act, S.N.W.T. 1997, s. 36 (Norwest Territories); Family Law Act, S.N.W.T. (Nu.) 1997, s. 36 (Nunavut); Family Maintenance Act, S.S. 1997, s. 21 (Saskatchewan).

⁴⁷ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 *FAM. L.Q.* 309, 324 (2008).

⁴⁸ *Id.* at 324–25 (pointing out that only Washington confers rights on unmarried cohabitants based on the fact of their cohabitation).

⁴⁹ KATZ, *supra* note 44, at 11 (noting that California, the District of Columbia, Hawaii, and Vermont “have enacted some form of registered domestic partnership statute”).

Parties also have more freedom to tailor the rules governing their relationship. Many jurisdictions permit parties to contract out of or modify the incidents of marriage (or for cohabiting parties to contract out of the incidents of marriage that have been extended to cohabitation).⁵⁰

These legal developments—easier entry into and exit from marriage and the unbundling of the incidents of marriage from the status of marriage—could make it harder for the state to credibly claim an interest in marriage. Because the door to marriage has been opened so wide, it is harder to justify barring it against advocates of polygamy.⁵¹ Because no-fault divorce is readily available and the incidents of marriage have been extended to unmarried couples, the legal significance of marriage has been reduced.

It is certainly possible to take from this that the state interest in marriage has diminished. Brian Bix has said,

When a state reduces the benefits that accrue from marriage (by either removing the benefits or making them available to non-married couples or individuals) or makes it easier to leave the institution of marriage, it is in effect expressing a reduced interest in people becoming and staying married,⁵² despite any contrary message conveyed through public rhetoric.

On the other hand, it may be argued that these family law reforms do not indicate diminished state interest but rather a shift in the nature of that interest. Nancy F. Cott has argued,

These divorce reforms not only intended to treat men and women equally but also addressed the state's interest in securing adequate support after divorce for all family members. . . . The reform of

⁵⁰ See, e.g., Family Law Act, R.S.O. 1990, ss. 29, 51 (defining "spouse" and "domestic contract"). In the United States, "[f]or the most part, parties are allowed to contract over almost all aspects of their married life," which is a stark contrast to the situation before 1960, when "individuals entering into marriage could only contract away certain inheritance rights. Contract provisions about divorce, especially its economic consequences, were considered beyond the legal powers of individual parties." KATZ, *supra* note 44, at 23–24, 28.

⁵¹ The Senate debates on Canada's Marriage (Prohibited Degrees) Act, which reduced restrictions on marrying relatives, despite objections from religious and other organizations, suggest a substantial withdrawal from any claim to state interest in marriage. The Senate approved the measure on the grounds that individuals could govern themselves by their own values and that the law of the land should be as unrestricted as possible. During the Senate debates it was said that "socially undesirable marriages . . . take place for many, many reasons and we cannot and do not attempt to legislate to prevent those marriages." 2 PARL. DEB., Sen. 1749 (Dec. 18, 1985) (Can.).

⁵² Bix, *supra* note 27, at 8; see also Patrick Parkinson, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, 16 SYDNEY L. REV. 473, 503 (1994).

custody and support arrangements reiterated that the government's stake in marriage and divorce in the late twentieth century was economic far more than it was moral.⁵³

In this context of apparently weakened legal significance of marriage and shifting, if not diminished, state interest in marriage, can a surviving state interest be identified that justifies the current support and regulation of monogamous marriage and the continued exclusion of polygamy? Marriage has been identified as a basic civil right.⁵⁴ “[M]arriage is a fundamental liberty right of individuals, and because it is that, it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason.”⁵⁵ The state must show that it has an interest that justifies exclusion of multiple parties from the right to civil marriage.

Courts have often asserted that the state has a strong interest in marriage, without elucidating the nature of this interest. For example, the Supreme Court of British Columbia stated in 2001, “The legitimacy of the state’s interest in marriage is beyond question. There is no need for scientific evidence. The importance of the essential character of marriage to Canadian society is a matter of common sense understanding and observation.”⁵⁶ In order to determine the nature of the purported state interest in marriage, it is helpful to look at the recent challenges to the restriction of marriage to couples of the opposite sex.

A. Procreation

Many assertions regarding the state’s interest in marriage have been made in the context of same-sex marriage debates.⁵⁷ One such assertion was that

⁵³ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 206–07 (2000).

⁵⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” (citation omitted) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))); see also *Civil Marriage Act*, S.C. 2005, c. 33, pmb. (Can.) (“[O]nly equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination . . .”).

⁵⁵ Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, *DISSENT*, Summer 2009, at 43, 53, available at <http://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law>.

⁵⁶ *Egale Can., Inc. v. Canada (Att’y Gen.)*, 2001 BCSC 1365, para. 209 (Can.).

⁵⁷ For a summary and discussion of the state interests in marriage canvassed in same-sex marriage debates, see Bix, *supra* note 27; Duncan, *supra* note 36; and Sarah Bolasina Fandrey, Comment, *The Goals of*

only opposite-sex “marriage advances the state’s interest in ensuring the birth of children in the setting most likely to ensure their well-being and protection.”⁵⁸ The importance of opposite-sex marriage to procreation was addressed by the Supreme Court of Canada in 1995, prior to the opening up of civil marriage to same-sex couples, when it addressed a challenge to the exclusion of same-sex couples from a state benefit scheme available to opposite-sex couples. The Court said,

Marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d’être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.⁵⁹

In the challenges to the exclusion of same-sex couples from civil marriage, it was again argued that “marriage remains the primary means by which humankind perpetuates itself in our society.”⁶⁰

In Canada and other jurisdictions that now allow same-sex marriage, the procreation argument was rejected, largely because of the fact that many same-sex couples have children as a result of adoption, assisted reproductive technologies, or from previous relationships, and some opposite-sex married couples do not have children.⁶¹ Therefore, the procreation argument would not be successful in regard to challenges to the exclusion of multiple parties from civil marriage. Even if the multiple parties who wished to marry were of the same sex, there would be the possibility of children. And if the multiple parties were not of the same sex, procreation by the parties to a polygamous marriage would be possible.

Marriage and Divorce in Missouri: The State’s Interest in Regulating Marriage, Privatizing Dependency, and Allowing Same-Sex Divorce, 32 ST. LOUIS U. PUB. L. REV. 447, 451 (2013).

⁵⁸ Duncan, *supra* note 36, at 165.

⁵⁹ *Egan v. Canada*, [1995] 2 S.C.R. 513, 515 (Can.).

⁶⁰ *Egale*, 2001 BCSC 1365, para. 207.

⁶¹ Duncan, *supra* note 36, at 169.

B. *Optimal Arrangement for Rearing Children*

Although the procreation argument is unlikely to succeed, it would be possible to argue that the state's interest in providing the optimal environment for rearing children justifies restriction of marriage to two persons (just as it was argued, generally unsuccessfully, in the same-sex marriage challenges that this interest justified the restriction of marriage to persons of the opposite sex, a claim we are not supporting here). A body of research shows that children born within polygamous marriages fare worse than other children. They are at greater risk of experiencing marital conflict, family violence and family disruptions, marital distress, particularly related to high levels of unhappiness of women in polygamous unions, the absence of the father, and financial stress.⁶²

C. *Equality of the Parties and Mutual Support*

A stronger argument would be that the state's interest in freely chosen, committed, stable relationships of equality that provide for the mutual support of the parties justifies the exclusion of multiple parties from civil marriage. Marriages involving multiple parties may be inherently unequal and undermine the well-being of the parties.

Polygamy in its usual historical form has almost always been in the form of polygyny, one husband with multiple wives. This form of polygamy has long been associated with gender inequality by Western commentators,⁶³ and this remains the case. In particular, the United Nations has consistently taken the position that polygamy contravenes women's equality rights. The U.N. Committee on the Elimination of Discrimination Against Women, which monitors compliance of states parties to the Convention, issued a general recommendation in 1992 that included the following:

⁶² Salman Elbedour et al., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, 5 *CLINICAL CHILD & FAM. PSYCHOL. REV.* 255, 258–60 (2002).

⁶³ 2 HENRY HOME, *SKETCHES OF THE HISTORY OF MAN* 99 (Dublin, James Williams 1775) (“Polygamy sprung up in countries where women are treated as inferior beings: it can never take place where the two sexes are held to be of equal rank.”). Responding to “advocates for polygamy” who supported polygamy as a means to regain male superiority, eighteenth-century philosopher David Hume argued that “this sovereignty of the male is a real usurpation, and destroys the nearness of rank, not to say equality, which nature has established between the sexes.” DAVID HUME, *Essay XIX: Of Polygamy and Divorces*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* 181, 184 (Eugene Miller ed., Liberty Classics rev. ed. 1987) (1758).

Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law.

This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.⁶⁴

Social scientists who have closely studied the condition of women in societies that practice polygamy support the conclusions of the United Nations. In one study of Sudanese women, the researchers concluded:

Women do not like polygamy but cannot do anything about it. Divorce is the de facto right of men in the Sudan, whatever the behaviour of the husband. Only one of the respondents tried to gain a divorce from her husband and she could not make the legal system work in her favour and so gave up. Men can and do divorce women when they want too, although this was comparatively rare among our interviewees. The fact that men can take another wife or divorce their existing wife is a source of insecurity and anxiety for women and helps to ensure their adherence to conservative social norms in areas like reproduction, circumcision, work etc.⁶⁵

Polygamy has almost always taken the form of polygyny, in accordance with religious or customary law.⁶⁶ Nevertheless, a new civil law could allow for multiple-party marriage that was not limited to polygyny but would allow for one wife with multiple husbands or multiple parties of one sex. Martha Nussbaum has suggested that there are no good legal arguments for opposing

⁶⁴ Comm. on the Elimination of Discrimination Against Women, Rep. on its 13th Sess., Jan. 17–Feb. 4, 1994, ¶14, U.N. Doc. A/49/38; GAOR, 49th Sess., Supp. No. 38 (Apr. 12, 1994), available at <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm>. Article 5(a) of the Convention provides as follows:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Convention on the Elimination of All Forms of Discrimination Against Women, art. 5(a), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, (entered into force Sept. 3, 1981), available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>.

⁶⁵ MAITRAYEE MUKHOPADHYAY ET AL., NETH. MINISTRY OF FOREIGN AFFAIRS, MUSLIM WOMEN AND DEVELOPMENT ACTION RESEARCH PROJECT, Annex 6, at 4 (2001) (reporting on Sudan).

⁶⁶ BAILEY & KAUFMAN, *supra* note 3, at 4.

such marriages: “The legal arguments against polygamy, however, are extremely weak. The primary state interest that is strong enough to justify legal restriction is an interest in the equality of the sexes, which would not tell against a regime of sex-equal polygamy.”⁶⁷

We contend that the state’s interest in freely chosen, committed, stable relationships of equality that provide for the mutual support of the parties justifies the exclusion of multiple parties from civil marriage, even if the proposed regime is “sex-equal polygamy.” We speculate that even under a sex-equal regime, most multiple party marriages would involve one man with multiple wives. This speculation is based on the fact that while there is little support or demand for polygamous marriage in monogamous countries, the extra-legal “plural unions” that do exist within them involve one man with multiple “wives.”⁶⁸ There is some evidence that more men than women approve of polygamy.⁶⁹ Islam, a major world religion that permits polygamy, allows only polygyny, not polyandry.⁷⁰ It seems likely, then, that those taking up the option of “sex-equal polygamy” would largely be one man and multiple wives and that the problem of sex inequality would play out, even within a purportedly “sex-equal” regime.

But even if this were not so, the free choice of parties to enter marriage would be undermined by the opening up of civil marriage to multiple parties. This is because in cases where a couple disagrees as to whether or not to take another spouse, the party who did not want an additional spouse may be pressured to accept a new spouse or face divorce. Patrick Parkinson has suggested a possible solution to this problem: “One approach would be to require the consent of the Family Court to a polygamous marriage, after an enquiry, assisted by the Family Court Counselling Service, to ensure that the parties to the initial marriage and to the new marriage gave a full and free consent.”⁷¹ But this sort of arrangement would not address the problem that a choice between a new spouse or divorce is not a free choice. Many polygamous regimes around the world include the requirement that the spouses consent to the taking of a new spouse, but in the context of freely available

⁶⁷ Nussbaum, *supra* note 55, at 53.

⁶⁸ For a description of such plural unions, see DAPHNE BRAMHAM, *THE SECRET LIVES OF SAINTS: CHILD BRIDES AND LOST BOYS IN CANADA’S POLYGAMOUS MORMON SECT* (2009), and see also Reference re: Section 293 of the Criminal Code of Can., 2011 BCSC 1588, paras. 135–136 (Can.).

⁶⁹ Press Release, Reginald W. Bibby, Univ. of Lethbridge, Polygamy and the Same-Sex Debate (Jan. 25, 2005), *available at* http://www.reginaldbibby.com/images/Polygamy_Same-sex_Debate_Jan2505.pdf.

⁷⁰ *Qur’an* 4:3.

⁷¹ Parkinson, *supra* note 52, at 499.

divorce, this consent requirement does not protect against having a new spouse imposed against one party's wishes.⁷²

The addition of a new spouse to a marriage may have the effect of reducing the share of emotional support, care and nurturing, financial support, and marital property available to the first spouse and his or her children. Even if the new spouse brings additional financial resources to the marriage, if the parties to the marriage are heterosexual and the marriage involves one man and multiple wives, the husband will be dividing his time and attention among his wives. The state's interest in marriage as an institution that provides for the mutual support of spouses could thus be undermined by multiple-party marriage.

CONCLUSION

Polygamy, unlike same-sex marriage, strikes at the monogamous character of Western countries and undermines gender equality. While we believe that polygamy should not be a crime, the state is justified in excluding from civil marriage a fringe practice at odds with the country's cultural norms, values, and rights.

Despite the arguably diminished legal significance of marriage, the state still has and should reaffirm its interest in marriage. The relativistic notions that the shape of marriage should be left to individual choice without reference to state interest and that "socially undesirable marriages . . . take place for many, many reasons and we cannot and do not attempt to legislate to prevent those marriages" should be abandoned.⁷³ We oppose the opening up of civil marriage to multiple parties because to do so would compromise the state's interest in providing an optimal environment for the rearing of children and in supporting freely chosen, committed, stable relationships of equality that provide for the mutual support of the parties.

⁷² BAILEY & KAUFMAN, *supra* note 3; MUKHOPADHYAY ET AL., *supra* note 65.

⁷³ 2 PARL. DEB., Sen. 1749 (Dec. 18, 1985) (Can.).