

Note

POLYGAMY AS A RED HERRING IN THE SAME-SEX MARRIAGE DEBATE

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INTRODUCTION

Critics of same-sex marriage have argued that if same-sex marriage is legalized, then eventually polygamy and other currently prohibited sexual relationships, such as bestiality and incest, will be legalized as well. The polygamy issue received increased attention during the 1996 congressional hearings¹ on the Defense of Marriage Act.² Representative Bob Inglis of South Carolina asked, “If a person had an ‘insatiable desire’ to marry more than one wife . . . what argument did gay activists have to deny him a legal, polygamous marriage?”³ That same year, the Supreme Court decided *Romer v. Evans*,⁴ holding unconstitutional a Colorado state amendment that would have repealed existing city ordinances prohibiting

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1. Professor Hadley Arkes stated that:

[I]f marriage . . . could mean just anything the positive law proclaimed it to mean, then the positive law could define just about anything as a marriage. . . . [W]hy shouldn't it be possible to permit a mature woman, past child bearing, to marry her grown son? In fact, why would it not be possible to permit a man, much taken with himself, to marry himself? . . . [Although] I am not predicting that, if gay marriage were allowed, we would be engulfed by incest and polygamy[.] . . . [w]hat is being posed here is a question of principle: [w]hat is the ground on which the law would turn back these challenges?

Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. 97–102 (1996) (statement of Hadley Arkes, professor of jurisprudence and American institutions, Amherst College).

2. Pub. L. 104–199, 100 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

3. Andrew Sullivan, *Three's a Crowd*, THE NEW REPUBLIC, June 17, 1996, at 10 (attributing this remark to Representative Bob Inglis of South Carolina during hearings by the House Subcommittee on the Constitution).

4. 517 U.S. 620 (1996).

discrimination based on sexual orientation.⁵ A lengthy dissent in that case elaborated more fully on Representative Inglis' concern, noting that in spite of the Court's equal protection analysis of sexual-orientation-based discrimination, "the proposition that polygamy can be criminalized, and those engaging in that crime deprived of the vote, remains good law."⁶ To the dissenters, this proposition and the holding of *Romer* seemed irreconcilable: "Has the Court concluded that the perceived social harm of polygamy is a 'legitimate concern of government,' and the perceived social harm of homosexuality is not?"⁷

With the Supreme Court's recent revisitation of the constitutionality of laws regulating sexual behavior in *Lawrence v. Texas*,⁸ the polygamy issue has again been raised, this time by politicians, scholars, and pundits.⁹ As if to demonstrate that the polygamy references are not merely trivial excursions onto the "slippery slope," attorneys for Utah polygamists, appealing from convictions for bigamy, invoked the individual autonomy and right-to-privacy rationales of *Lawrence*.¹⁰ Attorneys for the convicted

5. *Id.* at 635–36.

6. *Id.* at 650 (Scalia, J., dissenting). Over a century earlier, in *Davis v. Beason*, 133 U.S. 333 (1890), the Court had upheld an Idaho statute denying the vote to practicing polygamists. Polygamists had challenged the constitutionality of the statute on free exercise grounds. *Id.* at 345 ("While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'"); see also *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878) (holding that criminal prohibition of polygamy is not unconstitutional).

7. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting). The *Davis* Court had based its holding largely on social science evidence that bigamy and polygamy "tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man. Few crimes are more pernicious to the best interests of society . . ." *Davis*, 133 U.S. at 341.

8. 539 U.S. 558 (2003).

9. See, e.g., Alan Cooperman, *Santorum Angers Gay Rights Groups*, WASH. POST, Apr. 22, 2003, at A4 ("If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything." (quoting Interview by Associated Press with Senator Rick Santorum, Pennsylvania (April 7, 2003))); George Will, *Preserving the States of Marriage*, NEWS & OBSERVER, Nov. 30, 2003, at A27; Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/2003_11_16_volokh_archive.html#106919249326450915 (Nov. 22, 2003, 12:34 EST) ("[C]oncerns that the Massachusetts homosexual marriage decision may lead to legalization of . . . even polygamous marriages seem . . . quite plausible.").

10. *State of Utah v. Green*, 99 P.3d 820 (Utah 2004); see also Pamela Manson, *Ban on Plural Marriage Questioned*, THE SALT LAKE TRIBUNE, Feb. 4, 2005, at A1 (reporting on oral argument of convicted bigamist Rodney Holm's appeal to the Utah Supreme Court).

polygamists contended “that the[] [appellants] have a liberty type of right in their relationship,”¹¹ and that “the state is not able to show” a sufficiently “compelling state interest” to warrant banning polygamy.¹² Brian Barnard, a Salt Lake City attorney who supported the polygamists’ appeal through the Utah Civil Rights & Liberties Foundation, echoed *Lawrence*’s dissent, referring to such arguments for legalization of polygamy as “another logical step” in the progression of the privacy rationale.¹³

Is there a legally defensible solution that allows same-sex marriage and traditional heterosexual unions while simultaneously restricting polygamy? Several proponents of same-sex marriage contend that there is and emphasize important differences between dyadic unions and polygamous arrangements.¹⁴ Others waver on the issue, suggesting that perhaps the marriage debate should not categorically exclude the polygamy issue or, alternately, that legalizing polygamy could itself prove to be a worthy objective.¹⁵

11. Pamela Manson, *Appeals Seek Polygamy Right; Green, Holm Challenge Convictions Based on Sodomy Ruling*, THE SALT LAKE TRIBUNE, Dec. 15, 2003, at C1 (attributing this comment to Rodney Parker, attorney for Rodney Holm).

12. *Id.* (attributing this comment to John Bucher, attorney for Tom Green).

13. *Id.* Mitchell Katine, a Houston attorney who represented the plaintiffs in *Lawrence*, pointed out the *Lawrence* Court’s focus on “whether there [i]s a rational basis, beyond moral disapproval, to ban [consensual behavior between adults]” and agreed that the decision could pave the way for future challenges to antipolygamy laws. *Id.*

14. See James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 560 (2002) (arguing that the Western companionate notion of romantic love “is by design *incompatible* with polygamy [because] ‘at its deepest level, [polygamy] was a fundamental protest against the careless individualism of romantic love’” and that “[i]f this point can be sustained, romantic love can mark the boundary between same-sex marriage and polygamy” (quoting E. J. GRAFF, WHAT IS MARRIAGE FOR? 174 (1999))); see also Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON 285, 287 (Andrew Sullivan ed., rev. ed. 2004) (“The purpose of secular marriage . . . is to bond as many people as possible into committed, stable relationships. . . . Polygamy radically undermines this goal because . . . [it leads to a situation in which] many low-status males end up unable to wed and dangerously restless.”). Rauch further asserts that “a society can sanction polygamy only . . . [by using] harsh measures to repress a[n] . . . underclass of spouseless men.” *Id.* at 287. Rauch concludes that “the one-partner-each rule stands at the very core of a liberal society, by making marriage a goal that everyone can aspire to. . . . [and that is therefore] fully in keeping with liberalism’s inclusive aspirations.” *Id.* However, according to Rauch, “[p]olygamy absolutely is not.” *Id.*

15. See David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 79-82 (1997) (arguing that “supporters of gay marriage are simply wrong to claim that gay peoples’ need for a union with another person of the same sex is more compelling than the needs of others who already have a spouse and who want to add a second or a third”). Chambers favors “a move to legalize plural marriages . . . unless they genuinely pose[] significant harms.” *Id.* at 82. However, as this Note will suggest, such assertions fail to recognize

This Note argues that the polygamy issue is not relevant to the debate over whether marriage should be redefined to include same-sex unions. By examining the assumptions informing the American understanding of the purpose of marriage, this Note demonstrates that dyadic partnerships—whether heterosexual or homosexual—serve a different normative purpose than polygamous relationships and that these different purposes are mutually exclusive. Recent case law not only confirms this fundamental difference but indicates a clear preference for dyadic relationships.

Part I of this Note sets forth an analytic framework for understanding the central arguments on each side of the cultural debate. Drawing on Judge Richard Posner's theory¹⁶ that societies configure their normative marital units to promote rational policy choices, Part I identifies three possible normative models of marriage: one purely procreative, another purely companionate, and a third, hybrid model that combines certain aspects of the other two. A society's decision to implement a particular normative model is a function of two variables: the relative degree of economic equality between genders and the presence or absence of an expectation of an emotional bond between partners. Historically, American culture has promoted a hybrid model in which aspects of the companionate ideal have been grafted onto an older, procreative norm.

Part II examines two recent cases¹⁷ through the lens of this analytic framework. This analysis suggests that courts are shifting away from a hybrid-model understanding of the purpose of marriage and toward a purely-companionate norm that subordinates procreative economics to the individual's liberty interest. Ultimately, Part II concludes that although same-sex marriage may be compatible with the evolving companionate norm, polygamy is fundamentally

the importance of distinguishing between the more abstract goals of society's democratic model—which depend on development of individuality and are therefore not furthered by polygamous arrangements—and the goals of an exclusively procreative-focused social model—which are concretely oriented toward economic survival and communitarian focus. Arguments failing to recognize this distinction, instead of attempting to answer the polygamy question, either imply that marriage serves little or no social purpose in Western culture and could therefore be abolished with few adverse consequences, or ignore the well-documented harms that are associated with the practice of polygamy.

16. See generally RICHARD A. POSNER, *SEX AND REASON* (1992).

17. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

antithetical to the principles informing the institutional purpose of marriage in American society and therefore unlikely to be legalized.

I. THREE NORMATIVE MODELS OF MARRIAGE

Before the debate about redefining marriage became such a prominent legal and social issue, Judge Richard Posner argued that society's choices in regulating this behavior are rational responses to environmental stimuli such as social and historical conditions.¹⁸ Several aspects of Posner's "economic theory of sexuality"¹⁹ are useful in analyzing the polygamy issue. First, Posner assumes that the best starting point for understanding social regulation of human sexuality is one of "moral indifference."²⁰ Although the libertarian-leaning standard of moral indifference should be distinguished from the "equal protection/injustice" arguments for expanding the definition of marriage, the two share the fundamental premise of individual autonomy as a normative starting point for determining the appropriate contours of social regulation of sexual behavior.²¹ Posner's libertarianism enshrines individual autonomy as a normative premise, considering "[g]overnment interference with adult consensual activities . . . unjustified unless it can be shown to be necessary for the protection of the liberty or property of other

18. Judge Posner's argument has been described as "an attempt . . . to prove the absolute universality of economic reasoning in human choice and behavior by showing the rationality of our presumably most irrational choices and behaviors: those driven by our sexual urges." Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L. J. 2413, 2414 (1993).

19. POSNER, *supra* note 16, at 3.

20. *Id.* at 85. Posner sees moral indifference—essentially moral neutrality—as an optimal starting point for understanding social regulation of sexual behavior because it focuses not on content but on the efficiency-based objective of satisfying as many sexual preferences as possible while minimizing their costs. *See id.* at 181 ("[A] laissez-faire approach to sex . . . [that] treat[s] sex as morally indifferent . . . limit[s] sexual freedom only to the extent required by economic or other utilitarian considerations."). As one critic has pointed out, despite admitting that his "assumption that efficiency should guide public policy is contestable," Posner neither critiques nor questions the normative value of the efficiency premise. West, *supra* note 18, at 2422–23 n.45 (quoting RICHARD A. POSNER, *SEX AND REASON* 214 (1992)). In keeping with his premise of moral indifference, Posner analogizes sexual preferences to ice cream flavors: while some people prefer chocolate ice cream, others prefer vanilla. POSNER, *supra* note 16, at 436. Sexual orientation is simply another manifestation of individual preference, not "something that is chosen, any more than one chooses to prefer vanilla to chocolate ice cream." *Id.*

21. *See* POSNER, *supra* note 16, at 3 (explaining that his economic theory should not be confused with "either libertine or modern liberal . . . theor[ies] of sexual regulation"); *cf.* West, *supra* note 18, at 2426 n.56 ("Posner goes to some lengths to distinguish his . . . argument from liberal arguments for sexual autonomy, which he regards as a species of 'moral' arguments.").

persons.”²² Posner further suggests that although societies may share similar policy goals²³ in regulating sexual behavior, two cultural variables—economic equality and the prevailing cultural norm regarding the purpose of marriage (companionate²⁴ or noncompanionate)—determine whether policies are heavily regulatory, or relatively permissive, of sexual behavior.²⁵

22. POSNER, *supra* note 16, at 3. In its focus on individual preference, the ice cream analogy at note 20, *supra*, reveals the pedigree of the “moral indifference” premise as another variant of the right-to-privacy-themed holdings of the *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), line of cases. See *Griswold*, 381 U.S. at 484 (finding a constitutional right to privacy in the “penumbra” of the Bill of Rights); *Eisenstadt*, 405 U.S. at 446-55 (using an equal protection rationale to extend the holding of *Griswold*). Although Posner’s analogy of ice cream preferences is rooted in the principle of individual autonomy, the broader social goal of economic efficiency remains the premise of his argument. POSNER, *supra* note 16, at 436. Written before *Lawrence* declared laws criminalizing private, consensual sexual transactions to be unconstitutional, commentators hailed Posner’s approach as offering a strong argument against antisodomy laws such as the one upheld in *Bowers v. Hardwick* 478 U.S. 186 (1986). See, e.g., West, *supra* note 18, at 2426 (“The economic approach to sexuality presents a strong argument, then, for the decriminalization of homosexual conduct.”).

23. One commentator suggests that the most central of these shared policy objectives is “the economically rational purpose of ensuring the well-being of children.” West, *supra* note 18, at 2451. Children are, of course, “an ‘externality’ of sex.” *Id.* As an externality, however, they play a dual economic role in society, being at once a drain on resources because of their inability to support themselves, and a potential asset because they ensure the preservation and continuation of the culture and population group. See POSNER, *supra* note 16, at 187 (referring to the “external effects of sexual activity on children” as “the most important to consider,” and identifying these effects as “first having to do with the welfare of children, [and] . . . second, with the size and quality of the population”). Posner apparently accepts preservation of the species as an appropriate normative goal because he argues that, in the absence of scarcity or other extenuating economic factors, “there is no strong economic argument for either pronatalist or antinatalist policies.” *Id.* at 196. For a detailed discussion of the economic centrality of the child’s role in the evolution of social structure, see generally ROBIN FOX, *KINSHIP AND MARRIAGE* (1967).

24. See POSNER, *supra* note 16, at 45 (defining “companionate” marriage as “marriage between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities”).

25. See *id.* at 177 (“Changes in women’s [economic] roles produce a movement to companionate marriage which in turn produces changes in sexual morality.”); see also *id.* at 184-85 (contrasting the low cost and consequent permissive regulation of “[a]dultery by the husband . . . in a noncompanionate marriage” with the higher costs and consequent “disapproval of male adultery”—leading to a more restrictive regulatory approach—in societies promoting the norm of “companionate marriage”). However, even when companionate marriage is the norm, Posner theorizes that a “social safety net” which “ensures the survival of children who have no father to support them” so reduces the costs of adultery that it “stimulates nonmarital sexual activity by men as well as by women.” *Id.* at 185. Therefore, Posner suggests that “laws against adultery [as well as] . . . laws against prostitution . . . be viewed as measures for the protection of children.” *Id.* at 186. Although his thesis requires postulating an economic

Taken as a whole, these principles suggest three normative models of marriage, each deriving a distinctive character according to the following variables: whether the normative purpose of marriage in that culture is companionate or noncompanionate, the degree to which children are economically dependent on the survival of the marital unit,²⁶ and the society's resultant regulatory approach to sexual behavior.²⁷ The underlying policy rationale for all three models' regulatory approaches remains the same, namely, society's interest in maximizing its own welfare.²⁸ However, societies in each model configure their regulatory approaches to accommodate varying degrees of economic inequality²⁹ or dependence³⁰ and to promote a

rationale for most regulation of sexual behavior, Posner recognizes that not "all sex laws can be explained on either efficiency or distributive grounds." *Id.* at 217.

26. This element takes into consideration both the economic dependence or independence of women and the State's relative generosity in making social welfare appropriations. *See id.* at 174 ("[I]f the woman's role is . . . enlarged to include . . . employment, then while . . . marriages . . . will be companionate, there will be fewer marriages; other forms of sexual relationship will no longer seem . . . so abnormal; and policies designed to foster . . . virginity and marital chastity for the sake of companionate marriage will lose . . . their point."); *id.* at 185–86 (discussing the regulatory and behavioral implications of "a generous social safety net [that] ensure[s] the survival of children who have no father to support them"); *id.* at 266 (attributing social policies that heavily regulate sexual behavior to the risk of "diminution in the resources invested in the child" that inheres in systems characterized by economic inequality between the sexes). Posner illustrates this aspect of his theory by comparing the sexual mores, rates of female employment, and social welfare systems of Sweden with those of the U.S. *Id.* at 175–80, 265–66.

27. Technically, this element would be part of the economic dependence analysis, but this Note identifies it separately in the interest of clarity. *See id.* at 157 (elaborating on the theory of the relationship between social regulatory policy and economic dependence on the marital unit).

28. *See id.* at 438 (conceding, as one limitation of an economic analysis, "that economics does not delimit the community whose welfare is to be maximized"). As discussed in note 23, *supra*, one of the most important aspects of this overall objective is society's interest in self-preservation, providing a fundamentally rational economic interest in providing for the survival of its next generation that encompasses more than a mere "state interest in ensuring the welfare of the child." West, *supra* note 18, at 2451. While the latter, on its face, would appear vulnerable to attack as a display of altruism on the part of the State, the former conforms to Posner's moral indifference libertarian premise. In the interest of clarity (and recognizing the risks of oversimplification), this Note will often use the child's economic well-being as a shorthand term for the more fundamental state interest in self-preservation.

29. Inequality refers to differences in market participation between women and men as well as to unequal regulation of sexual behavior due to gender. *See also supra* note 26 and accompanying text.

30. Dependence refers to the degree to which the child's economic well-being or survival hinges on the continuation of the marital unit. *See also supra* note 26 and accompanying text.

particular normative ideal (companionate or noncompanionate).³¹ Accordingly, regulation of extra- or non-marital sexual behavior is based on how much of a threat such behavior poses to the stability of the family, and by extension, the magnitude of third-party effects it may produce.³² This Note will distinguish among the three models by reference to the normative purpose of marriage that each promotes, namely, marriage-for-procreation-alone, marriage-for-companionship,³³ or marriage-for-procreation-plus-companionship. Because this last model combines various features of both the others, it will be referred to as the “hybrid model.”

A. *The Procreative Model*

The procreation-only model of marriage has seen more widespread use than the other two, appearing from ancient times³⁴ to

31. Although Posner devotes considerable attention to a comparative discussion of various forms of regulating sexual behavior, the three most salient forms of such regulation are policies discouraging nonmarital sex, restrictions on marrying, and policies relating to divorce. See, e.g., POSNER, *supra* note 16, at 244–45 (“[F]or the idea of marriage as the only legitimate channel for sexual activity to have substance . . . [requires placing certain] restrictions on freedom of contract.”). In predominately procreative societies, in which the primary impact of divorce is on the woman’s economic security, methods of regulating nonmarital sex may be as simple as using customs like brideprice or dower to enforce marital duties or ensure the wife’s economic security in case of divorce. *Id.* at 265 & n.53. Companionate and hybrid societies, however, must contend with what Posner identifies as the “complex implications” of the companionate ideal “for the rules of divorce.” *Id.* at 245. Although both companionate and noncompanionate societies may seek to discourage or ban divorce on the theory that this will “protect[] the [economically dependent] woman against abandonment,” in cultures endorsing the companionate ideal, the pressures for a policy allowing divorce are so strong that a policy prohibiting divorce becomes untenable. *Id.* at 247.

32. *Id.* at 183–89; cf. Lawrence v. Texas, 539 U.S. 558, 567 (2003) (identifying as appropriate “attempts by the State, or a court, to define the meaning of [a consensual adult sexual relationship] . . . or to set its boundaries. . . [in the case of] injury to a person”). According to Posner, “[t]he external effects of sexual activity on children are probably the most important to consider.” POSNER, *supra* note 16, at 187.

33. Posner discusses only two ideals of marriage—companionate and noncompanionate. Based largely on this distinction, this Note identifies three normative models, each consisting of a companionate/noncompanionate feature and an economic dependence/independence feature. The procreation-only model is noncompanionate, and one spouse is economically dependent on the other. The companionship-only model views marriage as a friendship between equals, and spouses are generally economically independent of one another. See POSNER, *supra* note 16, at 161 (citing Sweden as exhibiting greater “educational and occupational parity between men and women. . . than in any other country”). In the hybrid model discussed in this Note, spouses also carry an expectation of mutual friendship, but one spouse is economically dependent on the other.

34. For Posner, ancient Greek society offers a primary example of a procreation-focused, noncompanionate ideal of marriage. *Id.* at 38–45. Posner’s characterization of the marriages of

parts of modern Africa, Asia,³⁵ and the Americas.³⁶ This model takes both matriarchal³⁷ and patriarchal³⁸ forms but is most commonly characterized by economic inequality between the sexes, relative dependence of women on men for economic survival, and sequestration³⁹ of women. Spouses in this model do not generally look to one another for companionship or friendship.⁴⁰ Rather, the

ancient Greeks presumably refers chiefly to Athenian culture, in which “[w]omen were considered markedly inferior to men in intellect and character” and were subject to the “firmly entrenched double standard that enjoined on them but not on men premarital virginity and marital fidelity.” *Id.* at 39. Ancient Greek culture was so overtly “misogynistic” that “[e]ven the woman’s role in reproduction was disparaged.” *Id.*

35. For information about modern practices of polygamy in Africa and Asia, see generally <http://www.polygamyinfo.com>.

36. In North America, the procreation-only model lies at the heart of the institution of plural marriage or polygamy, which, although illegal, is still practiced among a few small groups of Latter-day Saints fundamentalists in isolated parts of Utah and Arizona. See generally John Dougherty, *Special Report, Polygamy in Arizona*, NEW TIMES, available at http://www.phoenixnewtimes.com/special_reports/polygamy/; *Special Report, Prosecuting Polygamy*, at <http://www.azcentral.com/specials/special45/> (last visited Apr. 16, 2005). Although polygamy was practiced by early Mormons, the Mormon Church officially rejected the practice in 1890. In most of the United States today, Mormon marriages are monogamous and follow the hybrid model in a manner generally indistinguishable from those of non-Mormon Americans. IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 2-4 (1996).. As the fundamentalists interviewed in one study revealed, although the rationales offered to justify U.S. fundamentalist polygamy are purely procreative, the larger society’s endorsement of the hybrid-companionate model exerts an unavoidable influence on the expectations of polygamous family members. These families acknowledge that this tension contributes to the considerable stress and anxiety experienced by the adult participants in the plural family, especially by female members. *Id.* at 146-53, 163-72, 437-39.

37. See POSNER, *supra* note 16, at 259 (alluding to a matriarchal type of procreative-only “society in which women did all the work, and men’s only role was . . . inseminat[ion],” and suggesting this as one of the only instances of de facto polygamy in which its negative effects toward women would be mitigated).

38. See, e.g., ALTMAN & GINAT, *supra* note 36, at 2-3 (noting the patriarchal origins of nineteenth-century polygamy in the United States, characterized by “strict gender roles with women assuming . . . domestic and child-rearing responsibilities, and the subordination of women to male patriarchal leadership”).

39. Sequestration does not refer only to separate living quarters, but to the separate social roles of each gender, with women being generally confined to the home, and men being the primary actors vis-à-vis the outside world. See also ALTMAN & GINAT, *supra* note 36, at 218 (“[Latter-day Saints] fundamentalists have long linked women’s roles to the home, leaving men to deal with the outside world . . .”). Posner notes, however, that “sequestration is inconsistent with companionability.” POSNER, *supra* note 16, at 160. Companionability in the marriage relationship is discussed in Part I.B, *infra*.

40. See, e.g., POSNER, *supra* note 16, at 45 (contrasting the characteristics of companionate marriage with “the occasional copulation that was the principal contact between spouses” in ancient Greek marriages); ALTMAN & GINAT, *supra* note 36, at 146-53, 163-72, 437-39 (citing case studies of contemporary polygamous families and reporting that, despite the best intentions of participants, an expectation of romantic love between the husband and each wife appears to

purpose of marriage is seen as promoting procreation and ensuring the survival of the next generation, who will perpetuate cultural practices and social norms.⁴¹

Cultures following the procreative model tend to promote gender-based double standards,⁴² holding women to strict standards of chastity⁴³ but allowing men to take additional wives or concubines.⁴⁴ The relationship between spouses in ancient Greece was characteristic of procreative cultures in that, “[a]part from the duty of economic support, a husband’s legal obligation to his wife was limited to having sexual intercourse with her a few times a month.”⁴⁵ Concubinage, a feature of many procreative-only societies, is de facto polygamy. In addition, in societies in which women’s primary economic value is limited to breeding and child-rearing functions, procreative-model cultures may officially endorse polygyny⁴⁶ as a way

be functionally incompatible with a polygamous arrangement, with the result that wives often experience emotional insecurity, doubt, and jealousy, which in turn places the husband under considerable strain).

41. For example, Altman and Ginat attest to the procreative emphasis of the normative basis for encouraging polygamy among nineteenth-century Mormons and twentieth-century fundamentalists, namely, the religious belief “that certain men should ‘multiply and populate the earth.’” ALTMAN & GINAT, *supra* note 36, at 42 (quoting *Genesis* 9:7).

42. A complaint penned by the great medieval Cordoban philosopher Averoes illustrates the extremes of gender inequality and economic dependence that are possible in the procreative-only model:

If male and female natures are the same . . . , it is obvious that a woman should do the same things as a man in that society. . . . However, in our societies, the abilities of women are unknown because they are only used for procreation . . . [and] are bound to serve their husbands. . . . [T]his renders their other possible activities useless. . . . [and they become] a[n economic] burden for men.

IBN RUSHD AVEROES, EXPOSICIÓN DE LA “REPÚBLICA” DE PLATÓN 57–59 (trans. and ann. by Miguel Cruz Hernández, Technos, 1987) (quoted in María Jesús Viguera Molins, “A Borrowed Space: Andalusí and Maghribi Women in Chronicles” in WRITING THE FEMININE: WOMEN IN ARAB SOURCES 165, 169–70 (Manuel Marín & Randi Deguilhem eds., 2002)).

43. See POSNER, *supra* note 16, at 40 (stating that the standards of “premarital chastity” and “marital fidelity” meant that women in ancient Greece were often “confined to the home except for religious and other special occasions”).

44. *Id.* at 40–41. Concubinage is purely an economic exchange of financial support in return for sex. Such a relationship is understood to “creat[e] no legal obligations on the part of the man toward either the woman or any children born of the union” and is subject to termination at any time by either party. *Id.* at 41.

45. *Id.* at 40. Athenian norms also prevented the husband from “installing another woman in [the] house [where his wife lived]. Beyond that he was free to seek sexual pleasure anywhere he pleased except with another citizen’s wife or daughter.” *Id.*

46. Technically, “polygamy” means “multiple marriages,” and includes arrangements in which one man has several wives (“polygyny”) or one woman has several husbands (“polyandry”). BLACK’S LAW DICTIONARY 1180 (7th ed. 1999). However, because the term

to ensure economic support for women and their offspring.⁴⁷ Accordingly, if the social purpose of marriage as a civil institution rests predominantly on procreative and child-rearing-focused policy goals, as opponents of same-sex marriage argue, then the status and benefits of marriage may justifiably be denied to members of same-sex unions. By the same logic, however, the institution may justifiably be expanded to include polygamous marriages as a particularly efficient means of promoting and achieving the procreative policy objective.

B. The Companionate Model

Companionate marriages display aspirational qualities such as “mutual respect and affection” and “close and continuous association in child rearing, household management, and other activities, rather than . . . the occasional copulation that [is] the principal contact between spouses in the [prototypical procreation-only model].”⁴⁸ At the same time, however, marriage partners must also contend with the probability of disappointed expectations of friendship or fidelity. These unrealized expectations threaten the longevity of the marital relationship,⁴⁹ contributing to higher divorce rates and lower birth rates than in cultures endorsing a procreation-only norm.⁵⁰ In the purely-companionate model, either marriage partner is equally

“polygamy” is commonly used as a synonym for “polygyny,” this Note adopts the technically incorrect usage as well.

47. The rise of Mormon polygamy in the nineteenth century can be traced to the need to provide economic security and support for the early Mormon pioneer women whose husbands had died. ALTMAN & GINAT, *supra* note 36, at 39. In fundamentalist and non-Western/non-Mormon polygamous societies alike, the economic burden traditionally carried by the sole male participant in the polygynous plural family can be considerable. For this reason, “monogamous marriages are more frequent than plural marriages” even in societies that do permit polygamy and “plural marriages usually involve older, wealthier, or high-status men.” *Id.* at 40.

48. POSNER, *supra* note 16, at 45.

49. See *id.* at 247 (“[A]n ideal of marriages that are based on affection creates pressure for the safety valve of divorce when affection between the spouses fades. . . . [C]ompanionate marriage creates so much pressure for divorce as to eventually make a policy of no divorce untenable.”).

50. Posner points to the Scandinavian countries as an example of the correlation between the companionate ideal, on the one hand, and high divorce rates and low birth rates, on the other. See *id.* at 58 (observing that although “[t]he divorce rate is high in the Scandinavian countries and the birth rate low, . . . these are phenomena typical of developed countries today”).

capable of providing economic support for offspring.⁵¹ Any inherent instability therefore poses little threat to the State's economic interests in ensuring the welfare of offspring.⁵² When neither the children nor the adult partners are economically dependent on the continued existence of the marital unit, it becomes unnecessary for a society to strictly prohibit "deviant"⁵³ sexual behavior.⁵⁴ Accordingly, purely-companionate societies tend to regulate "deviant" behavior to a minimal extent.⁵⁵

The companionate ideal of marriage is a legacy of a "preoccupation with individualism" that began to dominate Western European thought in the High Middle Ages and culminated in the explosive philosophic revolution of nineteenth-century Romanticism.⁵⁶ Marriage as a means of individual fulfillment is conceptually rooted in the Romantic movement's emphasis on heroic

51. See *id.* at 195–96 (discussing the effects of changes in women's employment opportunities outside the home).

52. See *id.* at 191 (contrasting the effects of divorce on children in Sweden with those in the United States). Posner cites research "attribut[ing] the bad effects of divorce on children to the reduced economic and social resources available to the children of divorced parents, [and] implying that in a society such as Sweden, in which divorce does not reduce the mother's income substantially, those effects will be small." *Id.* at 191 n.19 (citing Verna M. Keith & Barbara Finlay, *The Impact of Parental Divorce on Children's Educational Attainment, Marital Timing, and Likelihood of Divorce*, 50 J. MARRIAGE & THE FAMILY 797, 807 (1988)).

53. Posner defines "deviant" sexual behavior as that which is not "procreative-protective," including within this category "masturbation, homosexuality, voyeurism, exhibitionism, seduction of young children, and fetishism." *Id.* at 98.

54. See *id.* at 174 (suggesting that as "the woman's role is further enlarged to include market employment, then while such marriages as there are will be companionate, there will be fewer marriages; [and] other forms of sexual relationship will no longer seem quite so abnormal"). As an example of a more lenient regulatory approach, Posner points to the policies of the modern Scandinavian cultures which fall within a predominately companionate model of marriage characterized by adherence to the "companionate" ideal and relative economic independence of both partners. *Id.* at 161–73.

55. *Id.* at 162; see also *id.* at 56 (discussing examples of rising "[s]ocial tolerance for noncoercive deviant sexual acts" in twentieth-century Western Europe). According to Posner, ancient Athenian culture also manifested a more lenient regulatory approach to nonmarital sexual behavior. *Id.* at 38–45. For purposes of the discussion in this Note, ancient Athenian society is categorized as adhering to a procreation-only model of marriage, which is characterized by economic inequality and rejection of the "companionate" ideal.

56. Jacqueline Murray, *Individualism and Consensual Marriage: Some Evidence from Medieval England*, in *WOMEN, MARRIAGE, AND FAMILY IN MEDIEVAL CHRISTENDOM* 121, 126 (Rousseau et al. eds., 1998); see also William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1436 (1993) ("Companionate unions are most similar to those that are typically valorized by most modern Western perspectives.").

individualism.⁵⁷ Under this ideal, State institutionalization of marriage serves as a socially stabilizing influence⁵⁸ by recognizing and affirming the spouses' commitment to one another. According to the German Romantic philosopher Georg W. F. Hegel,⁵⁹ whereas procreation is “[n]either essential to marriage [n]or its chief end,” the individual's interest in self-fulfillment⁶⁰ through companionship is pivotal to properly understanding the role that marriage plays in the modern state.⁶¹ The primary social function of marriage⁶² is “its capacity to

57. See generally Joseph Campbell, *THE HERO WITH A THOUSAND FACES* (2d ed. 1972). The modern understanding of the heroic archetype reinterprets the hero's quest as the pursuit of individually oriented—not communitarian—goals, such as the individual's private struggle for self-definition. The work of the German Romantic composer Richard Wagner represents an extreme example of the Romantic obsession with the individual's Heroic Quest for identity and self-actualization.

58. As discussed at *supra* note 49, instability is an inherent weakness of both companionate models of marriage.

59. See Maura Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1523–32 (1997) (delineating the Hegelian perspective on the role of marriage in the modern state) (citing GEORG W. F. HEGEL, *PHILOSOPHY OF RIGHT* ¶ 164, at 113. (T.M. Knox trans., Oxford Univ. Press 1952) (1821)).

60. Self-fulfillment arguments take many forms and are often invoked by proponents of same-sex marriage. For example, one commentator has summarized the core of the cultural debate about the normative purpose of marriage by recognizing that, although “[c]hildren are not a trivial reason for marriage, they . . . cannot be the only reason.” Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, NEW REPUBLIC, May 6, 1996, at 18, 22. Aside from this procreative objective, however, two additional purposes of heterosexual marriage “give society a compelling interest” in expanding the definition of marriage to include same-sex couples. *Id.* at 23. These additional purposes—“domesticating men” and “[mutual] caregiv[ing]”—are clearly companionate notions, with the former, especially, being oriented toward (male) self-actualization. *Id.* at 22. Rauch argues that because “[m]arriage is the *only* institution that . . . serves these purposes,” the fact that privileging same-sex unions would serve even “[t]wo out of three” of these purposes “is more than enough to give society a compelling interest” in legitimizing same-sex unions. *Id.* at 23. See generally Eskridge, *supra* note 56.

61. Strassberg, *supra* note 59, at 1531 (citing Hegel, *supra* note 59, ¶ 164, at 113). Strassberg notes the similarity between Hegel's view of marriage and that expressed in *Turner v. Safley*, 482 U.S. 78, 95–96 (1987). The *Turner* Court “recognized that the incarceration of one of the partners [in a marriage] eliminated the . . . procreative facets of marriage without destroying what Hegel would describe as marriage's ‘ethical character.’” This “ethical character” embodies “important attributes of marriage. . . . [such as] emotional support and [expression of] public commitment.” Strassberg, *supra* note 59, at 1559.

62. The other purpose of marriage in Hegel's view of society is also individual in nature, emphasizing the “capacity [of marriage] to produce individuals who are self-conscious moral agents.” Strassberg, *supra* note 59, at 1557. Compare Hegel, *supra* note 59, ¶ 167, at 115 (“Marriage, and especially monogamy, is one of the absolute principles on which the ethical life of a community depends. Hence marriage comes to be recorded as one of the moments in the founding of states by gods or heroes.”) and *id.*, ¶ 264, at 163 (“in the family and civil society they . . . find their substantive self-consciousness in social institutions”) with *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“[C]ivil marriage enhances the ‘welfare of the

provide . . . otherwise isolated individuals with a sense that they can be unified with others in a way that preserves their individuality.”⁶³ Romantic love is the mechanism for achieving this function.⁶⁴ Hegel’s understanding of the function of sexual behavior in society is thus consistent with a purely-companionate model of marriage. If sensuality and any sexual behavior flowing from it are mere forms of self-expression,⁶⁵ a relationship characterized by romantic love will enable individual participants to achieve further self-fulfillment through self-expression.

In contrast to the procreative model, therefore, sexual behavior in a companionate model of marriage has a social significance entirely unrelated to a procreative objective. Similarly, whereas an emotional relationship between partners is irrelevant in the procreative model,⁶⁶ the impetus for companionate marriage is the partners’ emotional and psychological attraction to one another.⁶⁷ This emotional component is also largely responsible for the inherent instability of relationships characterized by romantic love,⁶⁸ thereby creating the need for a stabilizing counterforce such as the civil institution of marriage.⁶⁹ Thus, in a purely-companionate model, marriage serves not only as an impetus for further self-individuation, but also as a socially unifying force, “break[ing] down barriers between individuals and creat[ing] bonds of partnership and communal purpose.”⁷⁰ The normative stability that marriage fosters through legal and social recognition of partners’ commitment to one another counterbalances the inherent instability of relationships based on romantic love.

community’ . . . [and] is a ‘social institution of the highest importance.’ Civil marriage . . . encourage[s] stable relationships over transient ones.” (citation omitted)).

63. Strassberg, *supra* note 59, at 1557.

64. *Id.* at 1607. Acknowledging the sexism in Hegel’s work, Strassberg speculates that “Hegel likely was ambivalent about romantic love as a basis of marriage because he recognized that romantic love would necessarily individuate women to such an extent that the sacrifice of women to male individuality would then result in a sacrifice of male individuality as well.” *Id.* Strassberg’s speculation is based in part on Hegel’s argument that “an arranged marriage is ethically superior to a marriage motivated by love.” *Id.* at 1607 n.593.

65. See *id.* at 1609 n.603 (noting that the purpose of modern relationships is “mutual discovery” and emotional “self-disclosure” (quoting ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 119–22 (1990))).

66. See generally *supra* Part I.A.

67. See generally *supra* notes 60–63 and accompanying text.

68. See *supra* note 49 and accompanying text.

69. See *supra* notes 49–50 and accompanying text (referring to high divorce rates in cultures that subscribe to the two models of marriage characterized by a companionate feature).

70. Strassberg, *supra* note 59, at 1610.

Marriage's role as a normatively stabilizing counterforce offers a logical basis for distinguishing between dyadic partnerships and polygamous arrangements and demonstrating that a normative model of marriage can include same-sex couples while excluding polygamous arrangements.⁷¹ The exclusion of polygamy is a necessary result of the individualist values of the companionate ideal and of two important differences between the procreative and companionate models. First, in contrast to the more elastic procreative model, marriages in the companionate model can only accommodate two partners. Second, because companionate-model spouses are economically independent of each other, the offspring's economic well-being⁷² does not depend on continued existence of the marital unit. If there is no procreative ideal for marriage to protect, the importance of regulating nonprocreative sexual behavior fades.⁷³ Requiring that both genders be represented within the marital unit is one example of a procreatively focused policy that loses its purpose when the procreation-protective rationale is removed. In the absence of that rationale, the only normative requirements for marriage become equality⁷⁴ and the existence of an emotional bond, such as romantic love,⁷⁵ between the partners.⁷⁶ By contrast, the procreative

71. Posner points to a pattern of "polygamy, de jure or de facto, in a society of noncompanionate marriage; [and] monogamy in a society of companionate marriage." POSNER, *supra* note 16, at 259. It is worth noting, however, that in light of the high rate of divorce in companionate-model societies, monogamy in this model may actually be serial monogamy instead of the traditional notion of a partnership for life.

72. See *supra* note 23 and accompanying text. Because the offspring's economic well-being is crucial to furthering society's interest in continued self-preservation, it plays a pivotal role in the overarching economic goal of maximizing the welfare of the community as a whole.

73. See *infra* Part I.C (linking heavy regulation of nonprocreative sexual behavior in the hybrid model to the offspring's economic dependency on the marital unit remaining intact); see also *supra* note 49 (discussing the regulation of divorce).

74. For purposes of this discussion, "equality" includes the notion of economic independence of each participant. See POSNER, *supra* note 16, at 45 (defining "companionate marriage" as a marriage between approximate equals).

75. When marriage becomes a companionate arrangement as opposed to a procreative/economic arrangement, the emotional bond between partners functions as a precursor to mutuality and consent. See Murray, *supra* note 56, at 126 (discussing the connection between early notions of consent and the modern notion that "freedom to marry . . . is one of the tests by which to measure a society's respect for individual freedom of choice in general." (citing John F. Benton, *Individualism and Conformity in Medieval Western Europe*, in INDIVIDUALISM AND CONFORMITY IN CLASSICAL ISLAM 145, 155-56 (Amin Banai and Speros Vryonis eds., 1977))).

76. Any attempt to qualitatively distinguish the emotional relationships enjoyed by same-sex couples from those of heterosexual couples would be hopelessly subjective. Persons of either orientation would be incapable of temporarily altering their own sexual orientation enough to

ideal requires that both genders be represented within each marital unit, but the partners need not experience an emotional bond to fulfill the purpose of marriage.⁷⁷

Just as any male-female relationship is by definition capable of furthering a procreative purpose, any dyadic relationship characterized by self-expressive sensuality and a companionate bond is capable of furthering self-individuation. If a heterosexual dyadic relationship—whether procreative or nonprocreative—fulfills this function, then so would a nonprocreative, dyadic same-sex relationship. Conversely, just as the procreative model is inherently stable, regardless of the number of participants in the marital unit,⁷⁸ the companionate model's inherent instability does not depend on the participants' gender. Finally, whereas polygamous relationships are easily accommodated within the purely-procreative model,⁷⁹ in the purely-companionate model, polygamy is necessarily excluded due to the individualist expectations on which companionate relationships are based. The practice of polygamy is fundamentally incompatible with the companionate model of marriage⁸⁰ because it negates the values and objectives of individualism and self-fulfillment that this model seeks to promote.⁸¹

meaningfully compare the two emotional experiences of romantic love. In either type of relationship, the word of the respective couples themselves would be the only proof that any particular type of mutual emotional bond exists.

77. See *supra* notes 39–41 and accompanying text (discussing the irrelevance of emotional ties between partners in the procreative model and noting the stress caused in procreation-only enclaves by the influence of companionate expectations from the dominant culture outside the enclave).

78. This is true as long as its members do not also expect the marital relationship to be the source of individual fulfillment. See ALTMAN & GINAT, *supra* note 36, at 146–53, 163–72, 437–39 (reporting the elusiveness of actual companionate relationships between the husband and each wife in polygynous American families and the resulting stress to the family as a whole).

79. As this Note argues in Part I.A, *supra*, under a purely-procreative, non-companionate model of marriage, it is irrational to include dyadic same-sex partnerships—which are only tenuously related to procreation—in the definition of marriage while refusing to sanction polygamous arrangements, because the latter are more efficient than dyadic heterosexual partnerships at fulfilling procreative policy objectives.

80. See POSNER, *supra* note 16, at 6, 259 (stating that de jure or de facto polygamy will be found in those societies that promote a noncompanionate ideal of marriage, whereas monogamy will be found in societies with companionate marriage); see also *id.* at 253–60 (exploring the practice of polygamy from an economic perspective). With respect to the three-model framework of this Note's analysis, therefore, polygamy is incompatible with both the hybrid and the companionship-only models, because these both adhere to a companionate ideal of marriage. See *infra* Part II.C (discussing the hybrid model of marriage).

81. Early American proponents of polygamy viewed it as an antidote to the rising tide of social liberalism emphasizing "greater freedom of choice of marital partners, women's rights,

C. *The Hybrid Model*

Procreation-plus-companionship is the model that many Western cultures purport to follow.⁸² The remainder of this Note refers to this model as the “hybrid model” because it combines the normative ideal of marriage as a procreation-oriented economic arrangement⁸³ with the companionate expectation that partners will foster and maintain a friendship of “approximate equals.”⁸⁴ Like a purely-companionate model, this hybrid model only accommodates two people.⁸⁵

The hybrid model retains some features of the purely-procreative model but rejects primarily communitarian values in favor of individualist notions ranging from consent to self-actualization. In this regard, it resembles the purely-companionate model.⁸⁶ As early as

easier divorces, . . . and . . . [generally enhanced] individual rights.” ALTMAN & GINAT, *supra* note 36, at 2. The mutual exclusivity of polygamy and the companionate ideal flows from the necessarily dyadic contours of the companionate relationship. *See id.* at 146–53, 164–72, 437–39 (noting that, in Mormon fundamentalist polygamous families, despite attempts to ensure equal treatment of each dyadic relationship (i.e., the two-party relationship between the husband and each wife), actual companionate relationships prove elusive).

82. The hybrid model is somewhat similar to what Posner labels “stage two” in his chronicle of the “evolution of sexual morality” in that it has historically included Western nations from medieval times through the twentieth century. *See POSNER, supra* note 16, at 45–54. Posner identifies England as a “pioneer” in this model of marriage and points to the medieval Roman Catholic Church as nominally encouraging at least the normative concept, if not its actual practice. *See id.* at 156–57 (“England was the pioneer in companionate marriage, although it did not invent the practice. . . [which also] received the encouragement of the Church.”).

83. *See id.* at 250 (describing the “extreme economic peril” of the divorced woman “in a society in which women’s principal asset is their fertility”).

84. *Id.* at 45.

85. As discussed in Part I.B, *supra*, polygamy is incompatible with the individualist values of the companionate ideal.

86. *See POSNER, supra* note 16, at 157 (attributing the origins of the notions of companionship and mutuality in marriage to the Bible and the Greco-Roman tradition, but noting that the importance of these ideals increased during the Enlightenment). Ultimately, these seminal notions blossom into the full-blown concept of individual self-actualization promoted by the Romantic philosophers. For discussion of Hegel’s version of this concept, see *supra* notes 61–63 and accompanying text. *See also* Murray, *supra* note 56, at 124–26 (tracing the medieval development of the notion of consent as essential to forming the marital bond). As Murray further points out, because “[t]he freedom to marry is part of the process by which the individual gains independence from external control,” the rise of the “consensual theory of marriage . . . reflect[s] the preoccupation with individualism that [begins to] dominate [Western European thought in] the twelfth[] century” and later becomes a seminal impetus for the modern notion of “individual freedom of choice in general.” *Id.* at 126–27. Consensual marriage has become so enshrined as a norm in modern U.S. society that the Supreme Court has declared freedom to marry a fundamental constitutional right.

Loving v. Virginia,⁸⁷ the Supreme Court recognized the dual function of marriage in U.S. culture.⁸⁸ On one hand, the Court called marriage “fundamental to [American society’s] very existence and survival,” clearly referring to the traditional procreative purpose.⁸⁹ On the other hand, it identified “the freedom to marry . . . [as] one of the vital personal rights essential to the orderly pursuit of happiness,” referring to the companionate ideal of marriage as a means of achieving individual fulfillment.⁹⁰

However, the hybrid model’s economic function permits it to be readily distinguished from the companionate model. Although this difference may be somewhat obscured by the companionate aspect of the hybrid model, the latter’s normative purpose as a procreation-oriented, economic arrangement becomes unmistakable in the context of divorce. In societies endorsing the hybrid model, the unstable nature of companionate marriage⁹¹ directly threatens the

87. 388 U.S. 1 (1967).

88. Posner suggests that the United States has traditionally adhered to a normative model of marriage characterized by endorsement of the “companionate” ideal. POSNER, *supra* note 16, at 157 (“[T]he culture that most celebrates companionate marriage, in succession to England, is the United States.”). However, the United States places far greater emphasis on traditional sexual morality than other developed countries that endorse companionate marriage. This greater emphasis is evidenced by the fact that “the United States criminalizes more sexual conduct than other developed countries do and punishes the sexual conduct that it criminalizes in common with those countries more severely, relative to the punishment of nonsex crimes.” *Id.* at 78. After contrasting Swedish sexual regulatory policy with that of the United States, Posner concludes that this “traditional sexual morality is founded on women’s dependence upon men.” *Id.* at 180. Women in such situations “need[] the protection of men in order to have children[,] and when careers not involving children [a]re closed to them.” *Id.* Accordingly, in light of the fact that economic equality has not historically been a feature of marital relationships in the United States, the emphasis on traditional morality indicates that the United States adheres to the hybrid model of normative marriage rather than a purely -companionate model. As American women’s wage-earning capacity gains parity with that of men, Posner’s theory would predict that U.S. culture will undergo a corresponding shift from the hybrid model toward a purely -companionate norm. As he says:

[A]s [women’s] dependence [upon men] lessens, the traditional morality weakens. The function of that morality is to protect the male’s interest in warranted confidence that his children really are his biological issue. Women will cooperate in securing that interest only if they are compensated for doing so. . . . [but] [w]omen need and receive less male protection as their childbearing role diminishes and their market opportunities grow.”

Id.

89. *Id.* at 12.

90. *Id.*

91. See *supra* notes 49–50 and accompanying text. Although this instability is an inherent feature of both models featuring a companionate ideal, it only poses such a socially significant threat in the hybrid model.

offspring's economic well-being,⁹² thereby undermining the state's interest in self-preservation. Similarly, while uncertain paternity would pose little threat to offspring in purely-companionate societies, in which spouses are typically both market participants and therefore economically independent,⁹³ "considerations of secure paternity" remain an important policy focus in hybrid cultures.⁹⁴ This difference between the hybrid and the purely-companionate models accounts for their contrasting regulatory approaches to policing sexual behavior. Whereas the purely-companionate model takes a permissive approach to regulating extra- and non-arital sexual behaviors, the hybrid model regulates these heavily.⁹⁵ Hybrid-model societies sanction sexual behavior according to narrow parameters and strictly prohibit "deviant" behaviors,⁹⁶ including prostitution, adultery, fornication, and bigamy. Underlying these prohibitions is a policy of insulating the marital unit from destabilizing influences.⁹⁷ Accordingly, the current uproar over proposed change to the legal definition of marriage can be analyzed as resulting, at least in part, from the heavily regulatory approach the United States has historically implemented to shore up its hybrid model of marriage.

Analyzing the arguments for and against redefining marriage in light of these three models reveals that the polygamy argument is an

92. See *supra* note 82 and accompanying text.

93. *Id.* at 174 & n.72. Posner points to statistics showing that "[a]lmost three-fourths of Swedish women are employed outside the home, compared to fewer than 60 percent of American women" *Id.* at 174. Further, women in Sweden are paid "90 percent of the average male wage, a third higher than in the United States." *Id.* These statistics further confirm that the United States is a hybrid model culture, whereas Sweden falls closer to the purely-companionate model.

94. See *id.* at 173-74 ("If the woman's . . . role is . . . that of child rearer and husband's companion, as well as breeder, . . . considerations of secure paternity are foremost."); see also *id.* at 95 ("If a father's support . . . [is] vital to the survival of his children to reproductive age, a man will have a powerful incentive to . . . watch [his wives] like a hawk to make sure they are bearing his children, lest he waste costly protective efforts perpetuating another man's genes."). The importance of secure paternity is a direct consequence of economic inequality between spouses. If women are economically dependent on men, the child of uncertain paternity will have no guarantee of economic support; therefore, the child will either fail to thrive (threatening the culture's interest in self-preservation) or become an economic burden to the State.

95. See, e.g., *id.* at 72, 161-67 (describing aspects of Scandinavian regulatory policies of sexual behavior that starkly contrast with those of the United States).

96. *Id.* at 158.

97. See POSNER, *supra* note 16, at 158 ("A husband's adultery becomes . . . offensive, because it undermines love and trust and reduces the amount of time that he spends with his wife, which are elements of companionate but not of noncompanionate marriage.").

unhelpful diversion in the same-sex marriage debate, a byproduct of the tension and confusion generated by the hybrid model of marriage American culture has historically endorsed. In keeping with this model, the normative conception of the purpose of marriage in American society has been characterized by competing factors: on the one hand, the historic fact of economic inequality between (predominantly heterosexual) spouses along with a traditional focus on procreation and economic stability, and, on the other hand, a growing emphasis on companionship and individual fulfillment.⁹⁸ As Sections A and B point out, in societies that do not promote such competing objectives, nonprocreative or nonmarital sexual behaviors pose little threat to the State's interest in the economic well-being of the child. Accordingly, in such cultures, the State has less incentive to regulate individual sexual behavior. By contrast, in a hybrid culture, the State maintains an important economic interest in policing sexual behavior.⁹⁹ This is due to the hybrid model's unique structure, which combines the instability that inheres in the companionate ideal¹⁰⁰ with the relative inequality between spouses that causes offspring to be economically dependent on the continued existence of the marital unit.¹⁰¹

The competing features of the normative American ideal, in which marriage has both procreative/economic and companionate purposes, provide each side of the same-sex marriage debate with a valid premise on which to base its position. Opponents of same-sex marriage assert the procreative/economic feature in support of their argument,¹⁰² whereas proponents focus almost exclusively on the

98. See *supra* Part I.B (exploring the origins and ideals of the companionate notion of marriage).

99. See *supra* note 94 and accompanying text.

100. See *supra* note 49 and accompanying text. The high divorce rate in societies that promote the companionate ideal attests to the inherent instability of models characterized by this feature. See POSNER, *supra* note 16, at 247. The ironic disconnect between this fact and the companionate ideal's normative assumption of "a mutual understanding of lasting commitment" between partners is worth noting. William Eskridge, *Beyond Lesbian and Gay Families We Choose*, in *SEX, PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE* 277, 286 (David M. Estlund & Martha C. Nussbaum eds., 1996).

101. See *supra* note 94 and accompanying text.

102. See, e.g., *supra* note 9; see also *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 97-102 (1996) (statement of Hadley Arkes, professor of jurisprudence and American institutions, Amherst College, suggesting that extending the definition of marriage to include same-sex unions would "set[] off many other kinds of changes . . . [as a result of which society would inevitably] move away from the sense that there is something portentous about the generation of new life");

companionate and individual fulfillment aspects of the cultural norm.¹⁰³ Each argument, although entirely logical as a deduction from its starting premise, fails to recognize the hybrid nature of the model of marriage American culture has historically endorsed. Consequently, these conflicting, selective views of the normative purpose of hybrid-model marriage inevitably generate disagreement about whether the definition of marriage can be expanded without destroying the purpose of the institution. Part II will explore whether recent case law provides any guidance in resolving this issue.

II. RECENT TRENDS IN LEGAL REASONING REFLECT MODIFICATION OF THE HYBRID MODEL

Although the answer to the polygamy issue is clear in either the purely-procreative or purely-companionate models, American society's understanding of the function of marriage has historically emphasized both procreative economics and romantic companionship, while featuring the weaknesses of both other models. These competing factors have given rise to the debate over whether expanding the definition of marriage to include same-sex couples could also lead to the legalization of polygamy.

However, two recent cases indicate that despite having long defined marriage in terms of the hybrid model, American culture is currently undergoing a normative shift in its understanding of the purpose of marriage as a civil institution. While the procreative and economic functions are diminishing, greater emphasis is being placed on the companionate ideal as a means of achieving further individuation and self-fulfillment. In effect, American society's historically hybrid model of marriage is being transformed into a predominantly companionate model.

This Part explores two cases that recognized this broad-based cultural shift. In *Lawrence v. Texas*,¹⁰⁴ the Supreme Court invoked companionate values, especially individual interest, to overturn a state law criminalizing private, noncommercial, consensual sexual activity between same-sex couples. In *Goodridge v. Department of*

Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON, 285, 287 (Andrew Sullivan ed., rev. ed. 2004) (asserting that the "committed, stable relationships" resulting from marriage "provide the best environment for raising children").

103. For examples of such an argument, see *supra* note 60.

104. 539 U.S. 558 (2003).

Public Health,¹⁰⁵ the Massachusetts Supreme Judicial Court, recognizing that the *Lawrence* opinion had chosen to steer clear of the issue altogether, considered the state constitutionality, under Massachusetts law, of extending the civil institution of marriage to include same-sex unions. The holding in *Goodridge*, as in *Lawrence*, hinged on a view of the purpose and nature of marriage entirely consistent with the companionate model. However, *Goodridge* extended the principles announced in *Lawrence*, rejecting the hybrid model's dual-purpose view of civil marriage and fully adopting the companionate model. Together, these two cases signal a growing recognition of the current cultural trend away from the hybrid model and toward the companionate model.

A. *Lawrence v. Texas*

Lawrence is the Supreme Court's most recent pronouncement on the relative importance of the individual's interest in autonomy compared to the procreative interest. In *Lawrence*, the Court revisited the constitutionality of state antisodomy laws, overruling *Bowers v. Hardwick*¹⁰⁶ and upholding the right of same-sex adults to engage in consensual sexual activity.¹⁰⁷

The *Lawrence* opinion noted that antisodomy laws did not originally discriminate on the basis of gender but were directed at nonprocreative sexual behavior in general.¹⁰⁸ This observation implied recognition of the tension between the procreative and companionate ideals in the American culture's hybrid model, in which the State traditionally had a significant regulatory interest¹⁰⁹ in discouraging both nonmarital and nonprocreative sexual conduct.¹¹⁰

105. 798 N.E.2d 941 (Mass. 2003).

106. 478 U.S. 186 (1986).

107. *Lawrence*, 539 U.S. at 578; see *id.* at 571-72 ("[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."). In dicta, the *Lawrence* Court chided the *Bowers* Court, suggesting that "[t]his emerging recognition should have been apparent when *Bowers* was decided." *Id.* at 572.

108. See *id.* at 568 ("[E]arly American sodomy laws were not directed at homosexuals as such but . . . sought to prohibit non-procreative sexual activity more generally.").

109. As discussed in Part I.C, *supra*, the regulatory interest arose because of the State's need to ensure the economic well-being of both partners and any offspring (which the State encouraged) in light of the inherent instability of the "companionate" side of the hybrid model.

110. Cf. Strassberg, *supra* note 59, at 1608-09 (attributing "the explosion of Romantic literature, music, and art" in nineteenth-century Europe to the self-expressive quality of these

However, as the dissent in *Lawrence* noted, if one assumes a viewpoint of moral indifference,¹¹¹ not even a policy of encouraging procreation justifies drawing the boundaries of the institution of marriage so narrowly as to exclude same-sex couples.¹¹²

In crafting its analysis, the *Lawrence* Court chose not to invalidate the statute on equal protection grounds.¹¹³ Instead, the Court aligned its holding with other cases valuing individual autonomy as “a form of ‘liberty’ protected by the Due Process Clause.”¹¹⁴ Justice Kennedy began by invoking the broader political role that the individual interest plays in preserving the ideals of democracy, reasoning that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression.”¹¹⁵ As if underscoring the normative weight due the individual interest in these matters, the Court cited examples of other common law countries that had recently reaffirmed individual autonomy as an important norm.¹¹⁶ By going outside its own jurisprudence to support

personal experiences, and suggesting that this Romantic artistic “explosion . . . can [also] be seen as expression in the service of radical individuation”).

111. The majority expressly assumed such a viewpoint. See *Lawrence*, 539 U.S. at 559 (“[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court’s obligation is to define the liberty of all, not to mandate its own moral code.”).

112. See *id.* at 605 (Scalia, J., dissenting) (“[Apart from moral concerns,] what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” (quoting *id.* at 567) (citations omitted)). Although the *Lawrence* dissent protested that “[s]tates continue to prosecute all sorts of crime by adults ‘in matters pertaining to sex’ [including] prostitution, adult incest, adultery, obscenity, and child pornography[.]” the legitimate State interest in such prosecutions, from a viewpoint of moral indifference, would be the socially undesirable externalities and third-party effects of such conduct. *Id.* at 598.

113. See *Lawrence*, 539 U.S. at 575 (majority opinion) (“Were we to hold the statute invalid under . . . [e]qual [p]rotection[,] some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex participants.”).

114. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting), quoted in *Lawrence*, 539 U.S. at 578. *Lawrence* further reasoned that because “[e]quality of treatment and the due process right . . . are linked in important respects, . . . a decision on the latter point advances both interests.” *Lawrence*, 539 U.S. at 575.

115. *Lawrence*, 539 U.S. at 562.

116. See *id.* at 576 (“Other nations, too, have taken action consistent with an affirmation of the protected right of . . . homosexual adults to engage in intimate, consensual conduct . . . [and have accepted] the right petitioners seek in this case . . . as an integral part of human freedom . . .”). The Court pointed to decisions by the European Court of Human Rights as support for this assertion. *Id.* (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988)).

its rationale, the Court emphasized both the appropriateness and importance of extending the ideal of individual liberty in matters of personal choice to its fullest degree.¹¹⁷

Lawrence also acknowledged that the holding and rationale of *Bowers* were directly contrary to other substantive due process cases.¹¹⁸ This contradiction is not surprising in light of the confusion generated by the American culture's hybrid ideal, which has historically emphasized both procreative and companionate values. In dicta, however, the Court suggested that the companionate aspect of the hybrid ideal may be gaining strength in American society as a whole. *Lawrence* pointed to "an emerging awareness that liberty gives substantial protection to adult[s]. . . in deciding how to conduct their private lives in matters pertaining to sex."¹¹⁹ The Court explicitly identified this "emerging awareness" with the values promoted by a companionate model.¹²⁰ These observations implicitly recognized two cultural phenomena: first, the competing normative ideals in American culture; and second, an ongoing reevaluation process. In the course of this reevaluation, the Court suggested, the normative focus in regulating sexual behavior has been shifting away from safeguarding procreative economics and toward enshrining the individual interest.¹²¹ Accordingly, because the notion of marriage as a means of furthering individual fulfillment comports as readily with same-sex marriage as it does with heterosexual marriage, expanding civil marriage to include same-sex couples would be consistent with this increasing emphasis on companionate-model values. At the same time, however, expanding the definition of marriage to include same-

117. Cf. Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 203–06 (2003) (discussing the current legal debate on the appropriateness of using comparative law in constitutional interpretation, and noting that several federal appellate judges and Supreme Court justices support the use of comparative law by American courts "to aid in their own deliberative process" (citing William Rehnquist, *Constitutional Courts—Comparative Remarks*, Address in Commemoration of the Fortieth Anniversary of the German Basic Law (1989), in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE*, A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchoff & Donald P. Kommers eds., 1993))).

118. See *Lawrence*, 539 U.S. at 577 ("*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.>").

119. *Id.* at 572.

120. See *id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.>").

121. Although *Lawrence* focuses on the due process right to personal autonomy in private matters, individual interest is the logical premise underlying this right.

sex couples would be unlikely to lead to legalization of polygamy because polygamy is based on values that are antithetical to the companionate ideals driving the reevaluation process.

B. *Goodridge v. Department of Public Health*

Beyond merely endorsing companionate values, as *Lawrence* had, *Goodridge* expressly rejected the hybrid model's juxtaposition of a procreative-protective purpose for marriage alongside its companionate aspect. Instead, the Supreme Judicial Court of Massachusetts based its approach on an entirely companionate purpose. The issue in *Goodridge* was whether Massachusetts could continue to exclude same-sex couples from "the protections, benefits, and obligations conferred by civil marriage."¹²² After a lengthy analysis, the court concluded that such an exclusion was inconsistent with the Massachusetts Constitution.¹²³ More importantly, Massachusetts had "failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples."¹²⁴

The majority's analysis in *Goodridge* relied in large part on *Lawrence* to resolve an issue that *Lawrence* had not explicitly addressed: whether there was a legitimate state purpose for excluding same-sex couples from marriage.¹²⁵ The court began by identifying the companionate purpose of marriage in modern society: "[w]hile it is . . . true that many . . . married couples have children together . . . , it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."¹²⁶ Having resolved the hybrid problem by subordinating the traditional procreative interest to the

122. 798 N.E.2d at 948.

123. See *id.* ("The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.").

124. *Id.*

125. *Id.* at 953. By framing the question this way, even while recognizing that the long-established definition of marriage exclusively denoted one type of dyadic, heterosexual partnership, the Massachusetts Supreme Judicial Court engaged in the same reevaluation process indirectly condoned in *Lawrence*, in which the majority and the dissent agreed that "later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U. S. at 579; *id.* at 603 (Scalia, J., dissenting).

126. *Goodridge*, 798 N.E.2d at 961; see *id.* at 954 ("Civil marriage is at once a deeply personal commitment to another human being and a . . . celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."); *id.* at 968 ("[T]he basic premises of individual liberty and equality under law [are] protected by the Massachusetts Constitution").

companionate ideal,¹²⁷ the court made the logical move of rejecting the procreative rationale advanced by Massachusetts, holding this rationale an unsatisfactory basis for refusing to define marriage to include same-sex couples.¹²⁸ By framing the issue in terms of redefinition, *Goodridge* affirmed the role of marriage in society¹²⁹ but more closely aligned it with “evolving constitutional standards.”¹³⁰

127. The Dutch legislature took a similar approach to resolving the conflict between procreative and companionate values that has plagued hybrid-model cultures: it passed an enactment that expanded civil marriage to include same-sex couples. See “Wet openstelling huwelijk” (Stb. 2001, nr 9 (11 januari 2001) amending Book 1 of the Civil Code, becoming law on April 1, 2001), www.eerstekamer.nl/9324000/1/j9vvgh5ihkk7kof/vfsgbl20fnzb/f=x.pdf (Kees Waaldijk’s unofficial English translation is available at <http://athena.leidenuniv.nl/rechten/meijers/index.php3?c=86>). Like the rationales used in *Goodridge*, *Lawrence*, and *Halpern v. Toronto*, [2003] 172 O.A.C. 276, the rationale of the Dutch legislature focused almost exclusively on the individual interest in companionship and self-fulfillment. By further extending full adoption rights to same-sex couples, the legislature demonstrated that the procreative aspect of hybrid marriage could be served in a companionate model.

Exploring how this dramatic conceptual shift gathered such momentum in the Western world is beyond the scope of this Note, although increases in women’s social and economic equality likely have played a significant role by making women less dependent on marriage for economic security, and therefore more accepting of the individuation-oriented companionate aspect of marriage. As explained in Part I.B, *supra*, once this individuation/companionate purpose of marriage is fully embraced, the biological differences between men and women that play such an important role in the traditional procreative purpose lose their significance almost entirely, except as a means of distinguishing one individual’s personal sexual preference from that of another.

128. *Goodridge*, 798 N.E.2d at 968 (citing “[t]he absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare”). Although the *Goodridge* court acknowledged that limiting marriage to heterosexual couples conceivably served a permissible state purpose in the past, it insisted that this was no longer the case. See *id.* at 961 n.23:

It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in ‘the modern age,’ ‘heterosexual intercourse, procreation, and child care are not necessarily conjoined.’

(quoting *id.* at 995–96 (Cordy, J., dissenting)).

129. See *id.* at 964 (“Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’” (quoting *id.* at 995 (Cordy, J., dissenting))).

130. *Id.* at 969.

Having justified its decision, the *Goodridge* court next searched for a foundation on which to build its new definition. Here, *Goodridge* followed the example of *Lawrence* in seeking guidance outside its own jurisprudence.¹³¹ The Massachusetts court reasoned that “this remedy . . . is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards.”¹³² Although the court had rejected the procreative interest when considering whether to redefine marriage,¹³³ the *Goodridge* court now chose one aspect of that interest to help determine the contours of the modified definition: third-party effects on children.¹³⁴ By accepting these third-party effects as a rational basis for state regulation of marriage and as an incentive to include same-sex partnerships within the newly expanded definition of marriage, the court demonstrated that the controversy generated by the hybrid model could be resolved by subordinating the procreative aspect to the companionate aspect.¹³⁵

Accordingly, the *Goodridge* rationale provides a useful foundation for addressing the issue of polygamy. On its face, *Goodridge* might appear to confirm the notion that extending the benefits and protections of marriage to same-sex unions also justifies

131. The case cited by both courts, *Halpern v. Toronto*, [2003] 172 O.A.C. 276, justified expanding the definition of marriage by analogizing to the evolution of banking practices beginning in the mid-nineteenth century. The *Halpern* court reasoned that although “certain credit activities did not fall within the scope of . . . [the statute] because ‘banking’ at the time of Confederation did not include these activities. . . . the term ‘banking’ is not confined to the extent and kind of business actually carried on by banks in Canada in 1867.” *Id.* at ¶ 44. *Halpern* similarly held that the term “marriage” did not “have a constitutionally fixed meaning . . . [but] rather, like the term ‘banking’ . . . and the phrase ‘criminal law’ . . . the term ‘marriage’ . . . has the constitutional flexibility necessary to meet changing realities of . . . society.” *Id.* at ¶ 46.

132. *Goodridge*, 798 N.E.2d at 969.

133. See *supra* notes 128–29; see also *Goodridge*, 798 N.E.2d at 961 (rejecting the argument that a “state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation”).

134. *Goodridge*, 798 N.E.2d at 968 (“[The] justifications for the civil marriage restriction [offered by the State] are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children.”). In its acceptance of third-party effects as a rational basis for state regulation of marriage and as a reason to include same-sex partnerships within the newly expanded definition of marriage, *Goodridge* is consistent with Posner’s “moral indifference” standard. See *supra* note 20 (discussing the role this moral indifference standard plays in Posner’s economic theory).

135. On the other hand, to subordinate the companionate aspect to the procreative aspect would effectively eliminate the companionate principle altogether; the procreative-economic interest, in its fullest capacity, carries implications of self-effacement, subordination, and dependence, as opposed to self-fulfillment in an (ideal) companionate-based relationship of equals. See *supra* Part I.A (discussing examples of such dependence in the procreative model).

legalizing polygamy.¹³⁶ However, upon closer examination, the fallacy of this assertion comes to light. The “third-party effects” of polygamous relationships on both women and children distinguish polygamy from same-sex marriage.¹³⁷ Those who speculate about the desirability of plural marriages ignore these third-party effects, which are not found in same-sex partnerships.¹³⁸ Moreover, polygamous relationships have historically exalted the procreative purpose of marriage.¹³⁹ In light of the high value modern U.S. culture places on individual autonomy and equality, the cornerstones of the companionate ideal of marriage, it is unlikely that polygamy could be legalized under the same individuality-focused rationale of *Lawrence* or *Goodridge* because polygamy tends to be premised on dependence, inequality, and even subordination.

136. Such an assertion could be based on *Goodridge*'s periodic use of language derived from equal protection jurisprudence, even though the holding is not premised on the constitutional principle of equal protection alone.

137. See Child Protection Project at <http://www.childpro.org> (last visited Nov. 1, 2005) (reporting on child abuse within religious institutions, especially those that endorse polygamy); see also John Dougherty, *Polygamists Probed*, PHOENIX NEW TIMES, May 1, 2003, at 11, available at <http://www.phoenixnewtimes.com/issues/2003-05-01/news/news.html>; *Special Report: Prosecuting Polygamy*, at <http://www.azcentral.com/specials/special45/> (last visited Apr. 16, 2005) (reporting the efforts of Arizona and Utah authorities to combat institutionalized domestic violence and child abuse in polygamous communities); cf. Utah Attorney General's Office & Arizona Attorney General's Office, *The Primer—Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities*, at http://attorneygeneral.utah.gov/polygamy/The_Primer.pdf (last updated July 2005) (providing “basic information about various polygamous communities that will assist human services professionals, law enforcement officers and others in helping victims from these communities”).

138. See American Academy of Pediatrics, *Technical Report: Co-Parent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (Feb. 2002) (citing “evidence gathered during several decades using diverse samples and methodologies. . . [as] demonstrating that there is no systematic difference between gay and nongay parents. . . [nor] any risk to children as a result of growing up in a family with 1 or more gay parents.”); American Psychological Association, *Lesbian and Gay Parenting: A Resource for Psychologists* (1995), at <http://www.apa.org/pi/parent.html> (“Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence . . . suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.”).

139. Polygamy may promote procreation to the point that it threatens the well-being of the children thus produced. See generally The Center for Public Education and Information on Polygamy, at <http://www.polygamyinfo.com> (last updated Aug. 23, 2005).

CONCLUSION

For almost two centuries, Western culture has promoted two competing ideals of the purpose of marriage, one based on procreative, communitarian values, and the other based on companionship and individual fulfillment. This combination of ideals has produced policies that heavily regulate individual sexual behavior according to a narrow normative definition of "marriage." In response to the assertion that expanding civil marriage to include same-sex partnerships will ultimately lead to state-sanctioned polygamy, this Note has argued that this is unlikely because polygamy is based on values that are antithetical to the ideals driving this redefinition.

Polygamous relationships can be distinguished from dyadic heterosexual and same-sex relationships on the basis of underlying values and ideals. Whereas polygamy is rooted in an economic-dependency model of marriage, same-sex marriage is based on the more recently developed ideal of marriage as a means of furthering individual fulfillment. Although Western culture has historically embraced aspects of both these models, the normative ideal of marriage is presently undergoing a metamorphosis driven by recent changes in the relative economic equality of men and women. As a result, the normative weight accorded the companionate purpose of hybrid marriage in the West has increased and the procreative-economic purpose has diminished. In the U.S., this progression toward, and growing acceptance of, the purely-companionate model is reflected in the rationales of recent cases that invoke companionate-model values of individuality and mutuality in human relationships. In light of such evidence signaling the move away from the hybrid model and toward a companionate ideal, expanding civil marriage to include same-sex couples is unlikely to lead to legalization of polygamy.