New Slants on the Slippery Slope: The Politics of Polygamy and Gay Family Rights in South Africa and the United States

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This article investigates the often cited and dismissed, but rarely examined, relationship between legalizing same-sex marriage and polygamy. Employing a comparative historical analysis of U.S. and South African jurisprudence, ideology, and cultural politics, we examine efforts to expand, restrict, and regulate the gender and number of legally recognized conjugal bonds. South African family jurisprudence grants legal recognition to both same-sex marriage and polygyny, while the United States prohibits and resists both. However, social and material conditions make it easier to practice family diversity in the U.S. than in South Africa. Our analysis of the very different histories of polygamy and same-sex marriage in the two societies suggests the centrality of racial politics to marriage regimes, yielding paradoxical narratives about the implications of legal same-sex marriage for the future of polygamy and sexual democracy. If there is a slippery marital slope, we argue, it does not tilt in a singular or expected direction.

Keywords: *family; homosexuality; law; marriage; race*

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Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and "polyamory" (group marriage).

—Stanley Kurtz[1]

Anyone else bored to tears with the "slippery slope" arguments against gay marriage? Since few opponents of homosexual unions are brave enough to admit that gay weddings just freak them out, they hide behind the claim that it's an inexorable slide from legalizing gay marriage to having sex with penguins outside JC Penney's.

—Dahlia Lithwick[2]

It's only a matter of time before the homosexual agenda in South Africa reaches an even more radical level, as it already has in the U.S.A., where certain groups are seeking to legalize pedophilia, polygamy, and polyandry.

—James Dobson[3]

TRAVERSING THE SLOPE

In the spring of 2008, two remarkable interventions in U.S. family life riveted the mainstream media and the blogosphere. On April 3, authorities raided the Yearning for Zion (YFZ) Ranch in Eldorado, Texas, in what they described as "the largest child-welfare operation in Texas history." The raid on the Fundamentalist Latter Day Saints (FLDS) compound founded by Warren Jeffs, the patriarchal leader of the polygamous sect who is serving a prison sentence for compelling a fourteen-year-old girl to marry her nineteen-year-old cousin, was the most dramatic, coercive state offensive against polygamy in more than fifty years. In an action the Texas Supreme Court later declared unjustified, the Lone Star State forcibly took protective custody over hundreds of children, removing them from their mothers and families, despite the absence of any specific complaints of abuse, neglect, or endangerment. Six weeks later, on May 15, 2008, the California Supreme Court issued an historic decision in favor of same-sex marriage. Strikingly, writing for the majority, Chief Justice Ronald George felt called upon to specify that the ruling "did not affect the Constitutional validity of the existing prohibitions against polygamy and the marriage of close relatives." This caution, like the jeremiad above by Hoover scholar Stanley Kurtz, joins warnings issued by Justice Scalia and other public figures after major judicial victories for gay rights.[4] The Eldorado raid and Chief Justice George's decision associating plural marriage with incest document the extremity of cultural antipathy to polygamy in the United States. Small wonder so many U.S. advocates for same-sex marriage work so hard to distance their cause from the slightest taint of association with it.[5]

Most gay-rights advocates and progressive intellectuals reflexively dismiss associations between polygamy and same-sex marriage as rhetorical ruses for

homophobia.[6] In doing so, they mistakenly overlook significant questions about the politics of marital diversity that produce these anxieties. Although some legal scholars address the genuine constitutional questions raised by slippery-slope discourse,[7] no sociologists have seriously engaged the relationship between movements to relax the gender and numerical restrictions on civil marriage. Curiously absent from discussions of marital change, moreover, is an acknowledgment that the coexistence of polygamy and same-sex marriage is no longer exclusively hypothetical. Now there is one nation in which both forms of marriage are legal—South Africa.

Post-apartheid South Africa boldly configured its transition to democracy as a laboratory for utopian efforts to promote social justice. Among the least examined of these is its vanguard agenda for family democracy. Not only is the 1996 Constitution of the Republic of South Africa (RSA) the first to ban discrimination on grounds of culture and sexual orientation; it also embraces pluralist definitions of marriage and family. These historic innovations compel courts, citizens, and diverse cultural communities to negotiate contradictions between protection for customary patriarchal prerogatives, on the one hand, and commitments to full gender and sexual equality, on the other. South Africa provides a unique heuristic opportunity, therefore, to scrutinize family debates in the United States from an alternative, and we believe salutary, slant.

Contemporary family politics in South Africa and the United States exhibit antipodal patterns of de jure and de facto support for family diversity generally, and for same-sex marriage and polygamy specifically. South Africa sets the gold standard for vanguard, pluralist family jurisprudence, including legal recognition for both same-sex marriage and polygyny. However, de facto conditions of inequality in South Africa are among the steepest in the world, and an entrenched culture of patriarchal heterosexual domination and virulent homophobia exact severe, sometimes deadly consequences against many who seek to exercise these rights.[8]

Directly inverse, the United States leads the world in de facto family diversity. National family history documents a cornucopia of experimentation, including polygamous and same-sex unions.[9] While the State forcibly drove polygyny underground more than a century ago, outlaw communities of fundamentalist Mormon, polygynous families, like the residents of YFZ, persist as open secrets in Utah, Arizona, and adjacent states, while gay and lesbian unions and parenting enjoy increasing national visibility and acceptance. Paradoxically, however, contemporary family jurisprudence in the United States vies for rearguard ideological status among advanced industrial societies, albeit with significant local inconsistencies, because the U.S. Constitution allocates family law to the states. While campaigns for same-sex marriage and couple rights tallied stunning victories in South Africa and Catholic Spain, as well as throughout Western Europe, in Canada and elsewhere, the U.S. government undertook substantial measures to reverse the trend at home, including

the Defense of Marriage Act, the Federal Healthy Marriages Initiative, and a proposed Federal Marriage Amendment to the Constitution. As of this writing, only three states have legalized same-sex marriage (and one of these laws is in jeopardy),[10] four states recognize civil unions, but forty-three states have adopted constitutional amendments or legislation to prohibit same-sex marriage.[11] Recently also, after a fifty-year hiatus, two U.S. states initiated criminal prosecutions for bigamy, and a third is rumored to be in the works for some residents of the YFZ compound.[12]

These striking national contrasts invite a serious assessment of the slippery-slope argument. On the face of it, of course, Justice Roberts and same-sex marriage proponents in the United States are correct that polygamy and same-sex marriage share little. Their ideologies, constituencies, and historic trajectories are nearly inverted. Historically, polygamy rests on pre-modern, patriarchal, religious principles, while gay marriage derives from late modern transformations of intimacy, propelled by egalitarian, secular impulses.[13] Nonetheless, these seemingly antagonistic kinship formations have come to share some surprising political affinities in the United States. First, both challenge the monolithic definition of monogamous heterosexual marriage that historians have shown to be central to the nation's republican identity.[14] Second, both expose massive gaps between mainstream sexual and familial ideology and widespread intimate practices in the United States. Third, uncomfortable histories of unacknowledged racial codings burden the politics of polygamy as well as same-sex marriage. Finally, the legal fate of both forms of intimacy may prove to be more entwined than either of their constituencies would wish.

Employing a comparative historical analysis of South African and U.S. family jurisprudence, ideology, and cultural politics, we examine relationships between legal and popular support for same-sex marriage and polygamy in the two nations. We investigate whether these divergent alternatives to monogamous, heterosexual marriage share significant social sources, affinities, or fates. Does relaxing gender restrictions on legal marriage necessitate, or at least facilitate, relaxing numerical constraints as well? To address these questions, we compare contrasting genealogies of de jure and de facto support for family diversity in the two societies.

In choosing to compare the United States and South Africa, we heed cautions against superficial comparisons.[15] We do not pretend that their family and social conditions bear much resemblance or that South African legal protections for family diversity could be meaningfully transplanted to the United States in any feasible way. Indeed, we can and at times more readily *will* make a case for their incommensurability. However, our analysis of the very different histories of polygamy and same-sex marriage in the two societies reveals the centrality of racial politics to marriage regimes in both nations. It likewise leads us to propose paradoxical narratives about the implications of legal same-sex marriage

for the future of polygamy in both nations. If there is a slippery marital slope, we argue, it does not tilt in a singular or expected direction. First, we show that, counter-intuitively, in South Africa, legal recognition for polygyny *preceded and facilitated* legal same-sex marriage, but the latter is likely to undermine the patriarchal practice of the former. In the U.S., in contrast, we demonstrate how criminalizing Mormon polygyny helped plow the trail to contemporary gay marriage demands, rather than the other way round. Nonetheless, as opponents of same-sex marriage claim, legalizing gay marriage can strengthen the case for decriminalizing polygamy, albeit only with significant differences from its current practice.

SOUTH AFRICA: VANGUARD FAMILY PLURALISM DE JURE

If one looks only at the black letter of the law, South Africa appears the most egalitarian society in the world. The Founding Provisions of the 1996 Constitution explicitly recognize past injustices and identify human dignity, equality, the advancement of human rights, as well as non-racialism and non-sexism as core values of the new Republic. The expansive equality clause of the Bill of Rights states, "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnicity or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[16] The Bill of Rights protects multiple dimensions of family life. Individuals enjoy explicit freedom to make decisions concerning reproduction,[17] and children acquire extensive rights, including a right to family or parental care. Yet the Constitution also embraces harmonizing diverse cultures and customary traditions. The Bill of Rights specifies that freedom of religion and opinion empower the state to recognize marriages "concluded under any tradition, or system of religious, personal or family law."[18]

On a practical level, apartheid-era law continues to govern until overturned by court challenges or new legislation, and both are developing rapidly. The South African Law Commission recommended a substantive, rather than a structural, definition of "family member" that "should entrench a non-traditional approach to family relations."[19] The South African Law Commission's *White Paper for Social Welfare* recognized that families take myriad forms: "The social, religious and cultural diversity of families are acknowledged as well as the effects of social change on the nature and structure of families."[20] The document defined family as "individuals who either by a contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing, and socialization for its members."[21] Welfare reform proposed a "follow the child" approach to defining parentage, rather than presuming that

married, biological parents will fill those roles. One impetus for this was to protect children in polygynous families.[22]

Lesbigay family rights. In the new Constitution's first decade, gay and lesbian South Africans garnered stunning new de jure rights and protections. Constitutional challenges consistently succeeded, overturning anti-sodomy laws and winning immigration equality, the right to jointly adopt children, and finally, same-sex marriage. The Court adopted a novel definition of sexual orientation based on erotic attraction[23] and rejected justifications that courts in the Global North use to deny family rights to gay men and lesbians.

The court's early sodomy decision defined protection for sexual orientation to include anyone who "might on a single occasion only be erotically attracted to members of their own sex" or who might choose a homosexual identity, as well as for bisexuals and transsexuals.[24] Justice Ackerman, writing for a unanimous court, ruled that because "gay men are a permanent minority in society, [who] have suffered from patterns of disadvantage," sodomy laws infringe on rights to equality, dignity, and privacy.[25] The commitment to human dignity responds to South Africa's apartheid legacy. By acknowledging "the value and worth of all individuals as members of society," the court underscored parallels between sodomy laws and miscegenation prohibitions.[26]

South African gay family jurisprudence challenges two popular misconceptions—the belief that homosexuality is primarily about sex and that lesbians and gays cannot procreate and thus have no need to partake in family. The court countered that, "from a legal and constitutional point of view, procreative potential is not a defining characteristic of conjugal relationships."[27] It rejected any connection between excluding same-sex couples from legal benefits and protecting the family lives of heterosexuals, finding gays and lesbians "capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from heterosexual spouses."[28] The Constitutional Court boldly insisted that Lesbian, Gay, Bisexual, and Transgender (LGBT) citizens deserve respect and support for their relationships whether they are queer by biology, by choice, for a day, or for a lifetime.

This jurisprudence appears to embrace a capacious plurality of family forms and to reject religious justifications for discriminating against LGBT South Africans. Nonetheless, civil marriage remains the gold standard for relationship recognition. In the *Home Affairs case,* concerning immigration rights for same-sex partners, Justice Ackerman used marriage as a proxy for other rights. Under South African common law, marriage creates a "consortium omnis vitae."

> . . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. These embrace intangibles, such as loyalty and sympathetic care and affection, concern, as well as the more material needs of life, such as

physical care, financial support, the rendering of services in the running of the common household.[29]

The court, in another unanimous opinion, held that same-sex unions meet that legal standard and granted them equal immigration rights on this basis.

In December 2005, the Constitutional Court handed down its historic mandate that same-sex couples be granted full marriage rights by the following year's end. Holding the exclusion of LGBT citizens from civil benefits of marriage presumptively unconstitutional, Justice Albee Sachs confirmed that the Constitution protects both the status "sexual orientation" and the conduct of homosexual sex. It deemed gay and lesbian life partners as capable as heterosexual couples of expressing love, providing mutual support, adopting and (in the case of lesbians) bearing children, and building and enjoying "family" life. Acting on this directive, after heated debate, Parliament passed the Civil Union Act in November 2006. Negotiating a delicate compromise between gay activists and religious and cultural conservatives, Parliament reserved the Marriage Act for heterosexual couples, but granted same-sex couples the right to choose between marriage or civil union under the Civil Union Act[30] (though they did include a clause allowing religious and civil officials to "opt out" of conducting ceremonies for same sex couples on moral grounds). A controversial portion of the bill, which would have made domestic partnership status available to both same- and different-sex couples, failed during fraught deliberations.[31]

Customary law and polygyny. Constitutional equality protection for sexual orientation sits in uneasy tension with language designed to respect customary family practices, particularly those involving polygyny.[32] The Bill of Rights specifies a distinct right to culture, and the post-apartheid "harmonization" agenda sought to recognize customary marriages while reforming them to protect women.[33] The Constitution established a Commission for Gender Equality to assist courts and legislatures to improve the status of women. These provisions create a thorny paradox, because many customary practices express profoundly patriarchal values. Courts continually struggle to reconcile patriarchal customs with sex-equality principles.[34]

The 1998 Recognition of Customary Marriages Act (RCMA) is the watershed legislation in this area. It aims to ensure the consent of parties (particularly women) and to inject state regulation into customary marriages, defined as "negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa."[35] The RCMA offers limited recognition under civil law to plural customary marriages and decrees that women in these marriages have full "status and capacity" to possess and dispose of property, enter into contracts, and litigate grievances.[36] The RCMA represents an uneasy compromise between feminist activists who sought to outlaw polygyny and traditional leaders who continue to register dissent about

the subjection of traditional practices to new gender equality principles.[37] Although some scholars consider the RCMA an attempt to "replace a patriarchal view of marriage with a partnership view,"[38] it subjects rights to plural marriage and to gender equality to limitations. To guard the exclusively monogamous character of civil marriage, it forbids parties in a civil marriage from entering further customary marriages. To promote gender equality, it declares all customary unions after its enactment in community of property but introduces deferential standards for mediating property disputes that arise from pre-existing plural marriages.[39]

Few customary marriages are registered with the state, however, and husbands often die intestate. Despite awareness that excluding women from intestate succession violates sex equality, on more than one occasion the Court intimates that the patriarchal legacy of much customary law derives from benign sexual difference, no more offensive than sex-specific bathroom facilities.[40] Some more progressive case law does allow women to occupy traditionally male roles. In *Mabena v. Letsaolo,* the validity of the marriage hinged on whether mothers could negotiate *lobola,* a traditionally male undertaking.[41] The judge held the marriage to be valid, despite customary law's failure to contemplate independent female households. In 2004, the Constitutional Court struck down the rule of male primogeniture, holding that this fundamental element of African customary law infringed unconstitutionally on the rights of women.[42]

Strikingly, the RCMA explicitly excludes recognition to marriages "concluded in accordance with Hindu, Muslim or other religious rites." In fact, the post-apartheid regime has not yet successfully negotiated a law to recognize Muslim marriages among its substantial Indian and South Asian minorities, largely due to issues concerning their potentially polygynous nature.[43] Apart from accommodating indigenous African marital traditions, the post-apartheid state resists support for plural marriage. For most of the twentieth century, South African civil law refused to recognize even monogamous Muslim marriages due to their "potential" for polygamy,[44] leaving Muslim wives unprotected from exploitation or abandonment. A 1997 case, *Ryland v. Edros,* was the first to reverse this trend by granting a Muslim wife maintenance payments after a unilateral divorce by her husband.[45] Several ensuing cases awarded damages and support to Muslim widows and divorcees in de facto monogamous unions,[46] leaving open the question of whether civil courts will adjudicate disputes arising from polygynous Muslim marriages.

Finally, the Court refuses to intervene in heterosexual cohabitation cases. In *Volks NO v. Robinson,* the Court denied the intestate succession claim of a woman who lived with her (monogamous, heterosexual) partner of sixteen years, holding that the Marriage Act does not contemplate nonmarital heterosexual life partnerships, because to do so risks infringing on the rights of individuals to control their own property by electing not to enter marital relationships.[47] The

Court acknowledges the danger its judgment poses for poor, illiterate women who are easily exploited by male partners who refuse to marry them but concludes that a liberal interpretation of marriage law is insufficient protection. Instead, it argues, their protection should be addressed through "empowerment" and social policy.[48]

Despite the new Constitution's commitment to respect traditional customary law, civil law is the dominant system for adjudicating disputes. Legal scholar Marius Pieterse charges that the dual legal regimes represent a proxy for the legal status of the racial groups they most often represent (dominant civil law for whites and subordinate customary law for blacks).[49] Unless couples agree explicitly to apply customary law, courts look to "lifestyle" to determine which legal system should apply. Parties who appear to have a "western" orientation receive civil law; parties with an "African orientation" receive customary law.[50] This determination starkly distinguishes the type of relief courts can grant, and as Pieterse argues, racialized class underscores it. African cultural customs predominate in poor, black, rural areas, and courts have imposed customary law on poor blacks, without any indication that they preferred such law. Finally, official customary law lags behind living customary culture, but courts generally treat it as static and monolithic. Ironically, customary law might prove less attuned than civil law to evolving cultural patterns and therefore less equipped to serve its purpose to act as a living, breathing codification of cultural practice.

Unequal Family Prospects De Facto

Post-apartheid South Africa has promulgated the most egalitarian gender, sex, and family jurisprudence ever attempted, but these de jure rights lie beyond the reach of the vast majority of its citizens. Poignantly, the RSA remains among the most unequal societies in the world, and the gap between rich and poor has actually worsened since the fall of apartheid.[51] The new regime had the historical misfortune to assume power in the 1990s during the unlucky conjuncture of global developments that doomed the new government's ambitious, redistributive development goals and mocked its egalitarian family principles.

First, the demise of the Soviet Union enabled neoliberal global capitalism to impose stringent market constraints on economic development strategies. Second, gold forfeited its status as the standard of the international financial system, causing its price to plummet with devastating effects on South African gold mining, a crucial employment area for uneducated blacks.[52] Worse, by the 1990s, the global AIDS epidemic was taking its severest toll on the peoples of sub-Saharan Africa. In consequence, sustaining any sort of family life constitutes a formidable challenge for masses of South Africans. Few among the black racial majority possess the wherewithal to access their new constitutional rights.

Despite dramatic transformations in political representation,[53] inequality remains deeply racialized and gendered in South Africa.[54] Southern Africa suffers the world's highest HIV infection rates, and these expose harsh race and gender disparities. By 2005, UN AIDS placed the HIV prevalence rate among South African adults between 16.8 percent and 20 percent,[55] which represented 10 percent of the world's reported cases.[56] The vast majority of South African AIDS victims are black, and women suffer almost twice the infection rates as men.[57] AIDS orphaned more than 1 million, primarily black, South African children by 2003,[58] and experts predicted steady increases in all of these dismal statistics.[59] Contemporary family patterns are decidedly diverse and often innovative, but grim necessity rather than individual choice or newly garnered rights motivates most of the family changes under way. Declining marriage rates index race. In 2001, 54 percent of black African women ages fifteen years and older had never married, compared with 44 percent of colored women, 31 percent of Indian/Asian women, and 25 percent of white women.[60] However, unwed teen pregnancy had "become virtually institutionalized" among black rural South Africans, due to male sexual abuse rather than female agency.[61] The severe double standard of a coercive patriarchal sexual culture also underwrote the disproportionate AIDS burden that black women suffer.[62]

Apartheid exacerbated male dominance in South Africa, and black women suffered its heaviest abuses. Severe poverty and unemployment in the African "homelands" compelled men to migrate to mines and cities in search of work, leaving behind a sex-ratio imbalance that magnified women's economic dependence and constrained their marital options. Yet lengthy absences from their wives, families, and villages expanded men's sexual freedom and access to multiple partners, including male youth, whom many workers in the single-sex mining communities took as their "boy wives."[63] Women faced great pressure to enter polygynous marriages if they were to marry at all for the crucial, if meager, supplies of housing and co-workers it might provide.[64]

Several scholars maintain that the racialized employment, residence, and marriage policies under apartheid deepened and distorted customary patriarchal marriage practices.[65] Historically, polygynous marriages had been relatively rare, but the Transkei Marriage Act of 1978 entrenched polygyny in that region. The first Foreign Minister of Transkei rationalized that "the African is by nature a polygynist."[66] Xhosa men interviewed in an Eastern Cape township in that period justified their philandering in these terms. Gouws argues that colonial authorities and African male elders colluded in codifying a rigid form of "defensive customary law" out of gender and family practices that had been fluid and less detrimental to women.[67] Likewise, scholars have documented occasional practices of same-sex polygamy in traditional African cultures,[68] but insufficient cultural memory of these survived the apartheid era to prompt the Law Commission to entertain including homosexual polygamy among the customary practices protected by the RCMA.[69]

Contemporary South African gender, family, and sexuality bear the weighty imprint of its violent colonial history as well as its legacy of patriarchal family arrangements. The vast majority of rapes go unreported, but in 1996 the RSA held unenviable first place for rate of reported rapes among eighty-nine Interpol states.[70] Field research conducted in Soweto and surrounding townships between 1997 and 2000 found that 59 percent of women considered a sexually violent man to be more powerful, 32 percent of male youth did not consider it violence if a man forces a woman he knows to have sex, and almost as many of the female youth agreed.[71] Survey data in the early 1990s reported that 62 percent of women in KwaZulu-Natal believed that their male partners had a right to multiple sexual partners, 49 percent did not believe that women had a right to refuse sex with their partners, and 51 percent stated that asking their partners to use condoms would anger them and risk provoking desertion or violence.[72] Masses of African women as well as men supported polygynist Jacob Zuma, the current ANC presidential heir-apparent when in 2006 he was acquitted of raping a much younger woman whom he knew to be HIV positive.[73] De facto gender and family relations in South Africa bear scant resemblance to the lofty intentions of the equality clause. Nor has the new regime undertaken significant initiatives to reduce the chasm between formal rights and formidable realities.[74]

Nonetheless, material conditions, women's resistance, and perhaps symbolic effects of the legal principles seem to be taking a collective toll on the incidence and character of customary and polygynous marriages. Between 1996 and 2001, the percentage of South Africans classified by the Census in customary marriages declined from 12 percent to 10.2 percent.[75] The vast majority of these citizens were black, of course, but the 2001 census also classified 36,775 whites in customary marriages and 1,366 whites in polygamous ones. (The 1996 census did not include a separate category for polygamous marriages.) Likely, most of the unconventional white South Africans in these "customary" and polygamous marriages are women whose presence alone renders such marriages anything but customary. In an emergent form of interracial polygyny, elite black African men convert long-term mistresses of diverse races into plural or sequential wives. Jeri Ngomane, an ANC provincial treasurer and executive mayor of Swazi royal descent, is among the most prominent of this new breed of polygynists. He travels to governmental meetings with his black and white wives jointly on proud display.[76] South Africa's sexual double standard undergirds a continuum of contemporary practices that blur the line between philandering, open marriage, and polygyny.

The racialized character of customary marriage law is its "most embarrassing" feature[77] and challenges the Constitution's commitment to non-racialism. Unsurprisingly, therefore, it did not take long for a white South African to object to black men's racial monopoly on legitimate polygyny. What is surprising, however, is the gender of the first protester. Christina Landman, a University of

Pretoria theology professor and member of the conservative Dutch Reformed Church, brands lack of access to polygamy a form of "clear discrimination" against the white minority.[78] More recently two white Christian couples filed suit for the right to practice polygamy as part of their customary Old Testament religion.[79] Arguably, black South African gays and lesbians have a stronger Constitutional basis to press for access to polygamy than do white heterosexuals. White Christian South African marriage traditions have been monogamous for centuries, but during the colonial period, patriarchal African leaders may have suppressed evidence of same-sex polygamy within some traditional black South African cultures.[80] Black lesbians and gays could seek access to polygamy not only under the equality clause but also as a customary practice. They have not done so, nor does an appeal of this sort appear likely.

Instead, securing access to the most basic of their unambiguous de jure rights remains a formidable challenge for most non-white South African gays, lesbians, and trans-people. As sociologist Jacklyn Cock summarizes, "homophobia is intense and widespread in post-apartheid South Africa."[81] Virulent homophobia entwines with brutal patriarchal sexual ideology in contemporary black South African culture. Gangs of youth engage in extensive gay bashing, including "curative" rape of lesbians and occasional homicides, with little fear of prosecution. Zanele Muholi, co-founder of the Forum for the Empowerment of Women (FEW), a support network for black gay women, recorded fifty cases of black lesbians raped in townships because of their sexual orientation.[82] The director of the Triangle Project, the principal LGBT advocacy and social service organization in Cape Town, argues that adopting clothing and behavior typical of a "butch lesbian" or "effeminate male" arouses such violence more than sexual orientation does: "Lesbians who mimic men are seen to be challenging male superiority. Rape and violence against lesbians is common . . . the men who perpetrate such crimes see rape as curative and as an attempt to show women their place in society."[83] "The fact that we have one of the most advanced constitutions," Muholi points out, "has had little impact on mind-sets in townships. Members of our community are celebrating the Constitution, but it is very different in the society."[84] In July of 2007 alone, three separate murders of black lesbians provoked the Joint Working Group (an alliance of LGBT activist organizations across the country) to develop the "070707 Campaign," making antiviolence work on behalf of black lesbians their priority issue.[85]

A survey of 2,163 individuals from all races and regions conducted in 1995, just before the new Constitution was adopted, found that 44 percent were opposed to including equal rights for gays in the Constitution, 64 percent opposed equal partner rights for same-sex couples, and 68 percent opposed allowing gays the right to adopt children.[86] Though the Court has now granted these rights, the government has undertaken few initiatives to change such social views. A Human Sciences Research Council survey of 5,000 South

Africans over the age of sixteen conducted in 2005 found entrenched disapproval of homosexuality. More than three-quarters of those surveyed claimed that sexual relations between adults of the same gender are "always wrong."[87]

Some public figures share the popular prejudice that homosexuality is un-African and, like Mugabe in Zimbabwe, actively exploit homophobia for political purposes. For example, Winnie Mandela appealed to homophobia during her trial for kidnap and assault, and her supporters waved banners outside the court announcing, "Homosex is not in black culture."[88] Conservative political and religious groups staged vigorous protests during the parliamentary debate on same-sex marriage in November 2006 to demand revising the Constitution itself to prohibit same-sex marriage rights.[89] Likewise, Trewhela makes a plausible argument that President Mbeki's tragic capitulation to AIDS "denialism" was rooted in an Africanist genre of homophobia.[90] Not only does this anti-colonial discourse deny black gays and lesbians their de jure family rights, but also denialism threatens the survival of most families among South Africa's black racial majority.

UNITED STATES: REARGUARD FAMILY PLURALISM DE JURE

Compared to South Africa, the history of gender, sex, and family equality jurisprudence in the United States is long and conflicted. Where South African law embraces diversity, U.S. law features a singular emphasis on heterosexual, monogamous, civil marriage. Courts proclaim its naturalness to justify suppressing other marital and family forms, particularly plural and same-sex marriage. Heterosexual civil marriage evolved over the last century, however, from racist patriarchal principles to gender and race neutrality. Feminist struggles gradually divested marriage law of male prerogatives, and civil-rights struggles overturned anti-miscegenation laws. Nonetheless, family rights remain splintered along lines of racialized class and geography, and only two state courts have legalized same-sex marriage.[91] To further complicate matters, family law is largely state law and, as such, inconsistent and shifting across state lines. Consequently, federal and state courts and legislatures struggle, often incompatibly, to reconcile the changing realities of American family life with a body of law that is increasingly unable to address them.

U.S. equality jurisprudence is rooted in the same desire to protect "discrete and insular minorities" that infuses South African law, but the U.S. Constitution grants protection to far fewer identity categories. The strict judicial scrutiny applied to race and national origin does not extend to gender or sexual orientation, and minority status itself (or even evidence of discrimination) does not activate equality protections. In the last half-century, successful feminist campaigns divested marriage law of male domination, but gender equality never became a Constitutional mandate. The proposed Equal Rights Amendment was

defeated in 1982, and a vigorous backlash continues to roll back earlier feminist gains in reproductive rights and welfare provision.[92] Gender-equality initiatives never dislodged the heterosexual and monogamous presumptions of the marriage system, nor its gatekeeper position for legally recognized relationships. The Supreme Court has found a fundamental right to monogamous heterosexual marriage, but not to family life more generally.

The Due Process Clause of the Fourteenth Amendment does offer small protections to some family relationships. The Constitution grants individuals, within the right to privacy, freedom of personal choice in matters of marriage and family life. Substantive due process guarantees the right to procreate and assures a biogenetic parent numerous rights. Family jurisprudence buttresses marital relationships that involve childrearing, presuming legitimacy to married co-parents, even in the face of evidence that one parent lacks biogenetic ties to the child. However, state courts battle fiercely over the boundaries of parentage law, particularly when a non-biogenetic parent wishes to activate rights.[93] Courts increasingly navigate paradoxes between the growing prevalence of non-marital and non-biogenetic parenting at the same time that new DNA testing can determine genetic parentage with unprecedented accuracy.[94] LGBT parents find their rights deeply implicated in these struggles.

Finally, two neoliberal trends toward privatization exacerbate the already unequal access to family rights by class. On the one hand, retrenchment policies shift responsibility for the poor from the state onto families and other private actors.[95] On the other hand, courts have been creating a veritable menu of relationship options for the wealthy.[96] Both trends splinter American family law along racialized class lines in ways surprisingly similar to that of South Africa. Over the past three decades, economic and regulatory components of legal marriage declined, individuals gained freedom to use private law to vary the terms of marriage, and distinct sex-equality jurisprudence granted women autonomy as free-contracting individuals.[97] However, courts increasingly enforce a contract model of "choose-your-own" family law for wealthy (especially male) individuals. All of this places an onerous financial burden on same-sex couples, who are increasingly turning to private law to protect their relationships.[98] At the same time, poor, mostly minority women suffer increased state regulation and fewer options. Many social policies attempt to control their sexuality and fertility, and in the last few years, the federal government actively began to promote heterosexual marriage as a cure-all for social ills. President Bush's Federal Healthy Marriages Initiative pledged $1.5 billion in 2004 to specific programs that aim to promote heterosexual marriage, in part, as a remedy to poverty.[99]

Lesbigay family rights. In contrast with South Africa, U.S. family law displays a checkered pattern of gay family rights gains and losses. Because states hold jurisdiction over most family law, gays and lesbians cope with an

incoherent, contradictory set of laws, particularly if they relocate across state lines.

Lesbigay family law emerged in the 1970s when a burgeoning gay-rights movement ushered a generation of people out of the closet. The first wave of case law focused on custody issues, as newly out lesbian and gay parents attempted to retain relationships with their children after divorce. Although these pioneers sustained categorically discriminatory defeats, gradually courts began to award visitation or custody to gay parents, but they often imposed restrictions on cohabitation, conduct, or the mere presence of a same-sex romantic partner in the home. During the 1980s, the "immorality" rationale for per se discrimination against gay parents began to wane. Currently, states and courts differ widely in use of a "best-interests-of-the-child" standard or versions of the "nexus rule" (the burden of establishing a nexus between the sexual orientation of the parent and the best interests of the child). Alabama and Florida apply "moral fitness" standards that function much like per se bans on lesbigay parental rights.

At present, only Florida explicitly prohibits gay individuals from adopting children, but several states use indirect measures like cohabitation prohibitions to the same end.[100] Same-sex co-parents generally must apply for second-parent adoptions to secure a legal relationship to their children. However, state laws on second-parent and co-adoption also differ vastly, and law has yet to catch up with the science of assisted reproductive technology (ART). The bedrock principle of legal parentage, "the presumption of legitimacy" (the assumption that a woman's husband is the natural and legal father of any child she bears in wedlock), does not apply to same-sex couples who cannot marry.[101]

The AIDS epidemic heightened the urgency of securing rights for gay male couples, and initiatives for partner rights gained momentum in the mid-eighties. However, lesbigay case law and partner initiatives merely chip away at U.S. law's inability to recognize diverse structures of intimacy and care. Little wonder that so much political energy has come to focus on marriage law, which seems to provide a quick fix for legal problems that lesbigay relationships face. *Lawrence v. Texas,* the 2003 Supreme Court decision invalidating same-sex sodomy laws, a watershed event in contemporary U.S. gay-rights jurisprudence, inflamed cultural and legal combat over same-sex marriage. Even though the court expressly limits the holding to non-interference in the private realm of sexual intimacy, Justice Scalia's dissent charged that it paved a "slippery slope" to legal gay marriage, bigamy, bestiality, and the end of all laws based on moral choices.[102] Though gay advocates scoffed at the idea that *Lawrence* would lead to any broadside changes in family law, as it turned out, Scalia was partly right. Soon thereafter, the favorable 2004 state Supreme Court ruling in *Goodridge* made Massachusetts the first state to legalize same-sex marriage. A proposed Federal Marriage Amendment to enshrine the heterosexuality of marriage into

the Constitution failed to pass in 2006. In May 2008, the California Supreme Court struck down that state's ban on same-sex marriage, ruling it offensive to the equality clause in the state constitution.[103] That decision provoked an immediate backlash campaign to amend the Constitution to prohibit same-sex marriage. Passage of Proposition 8 in November 2008 placed the future of same-sex marriage in California once again back in the jurisdiction of the state's Supreme Court.

With few exceptions, U.S. jurisprudence places little value on sexual self-determination. South Africa's commitment to equality across sexual orientation categories enshrines a legal penumbra that protects equal parenting and partner rights for LGBT individuals. The United States is still squabbling over whether gays can parent or sustain intimate relationships, and whether the law should recognize those relationships. Courts alternately deploy or reject analogies to racial equality jurisprudence in gay family-rights cases. Unlike in South Africa, most U.S. courts fail to find the history of discrimination against LGBT Americans grounds for extending protections. Conflicted family law jurisprudence among individual states maintains drastically different standards for relationship recognition and parent status, and LGBT families find themselves awash in a confusing morass of law.

Suppression of Mormon polygamy. A national commitment to a distinctly white, Western, Christian regime of monogamous, heterosexual marriage undergirds family jurisprudence in the United States. Though the two stories are rarely read in tandem, the history of marriage inequality is inextricably bound up with the legal suppression of Mormon polygamy.[104] A racialized rhetoric of morality and of the naturalness of heterosexual monogamy infuses both plural and gay-marriage jurisprudence.

Mormon polygamy represents an anomaly in Western family history, because Euro-American Christian and Jewish communities abandoned the Old Testament practice of polygyny centuries ago. Western marriage systems have been exclusively and intolerantly monogamous ever since. The conviction that polygamy is un-American is fundamental to national cultural identity. Racism permeates the discourse justifying the harsh measures the U.S. government has taken to eradicate Mormon plural marriage since the practice surfaced in the mid-nineteenth century.

Between 1854 and 1887, Congress passed a series of acts to criminalize bigamy and disenfranchise the Mormon Church and its followers. Practicing plural marriage, historian Nancy Cott suggests, made these white Christians "metaphorically nonwhite" in their opponents' eyes.[105] In 1856, the new Republican Party pledged to extinguish the "twin relics of barbarism," polygamy and slavery. Likewise, in his historic 1878 Reynolds decision finding bigamy a criminal "offense against society," U.S. Supreme Court Chief Justice

Waite denied Mormon polygamy constitutional protection as an exercise of freedom of religion and associated it with "barbaric African and Asiatic practices" that were "odious to the northern and western nations of Europe."[106] Even liberal Supreme Court Justice William Douglas reprised this rhetoric in 1946 when he upheld the conviction of a Mormon polygynous husband under the Mann Act (prohibiting prostitution): "The organization of a community for the spread and practice of polygamy is, in measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."[107]

A paternalist genre of feminist ideology interlaces with this racially tinged rationale for criminalizing polygamy as un-American. Since the nineteenth century, critics have associated polygamy with male power and sexual promiscuity and portrayed it as antithetical to women's interests. A prominent nineteenth-century anti-polygamy crusader, the Reverend John W. Mears, condemned Mormon plural marriage as "the manifest degradation of woman"[108] and influenced Justice Waite to portray the practice not only as "patriarchal" but as barbaric as well.[109] Congress funded a home in the nineteenth century to shelter women escaping polygynous marriages.[110] Although few Mormon women sought refuge, the government prosecuted and imprisoned polygynous men, culminating in the infamous Short Creek raid on FLDS communities in 1953 to rescue women and children from the polygynous families the raids disrupted.[111]

Today, plural marriage remains illegal in all fifty states. State bigamy offenses range from misdemeanors carrying small monetary fines to felonies mandating imprisonment.[112] Some statutes also forbid a person from cohabiting with a person other than his or her spouse, as well as "aiding and abetting" bigamy by marrying someone one knows to be married to another party. Despite the ubiquity of these laws, prosecutions rarely occurred until recently.[113] Since the *Lawrence v. Texas* decision, just as Scalia predicted, there is revived interest in the constitutionality of anti-polygamy legislation.[114] The following year, Brian Barnard, a civil-rights attorney, filed suit to overturn Utah's ban on polygamy on behalf of a married couple wishing to enter into a plural marriage with another woman.[115] On May 16, 2006, the Utah Supreme Court upheld the conviction of William Holm for bigamy and sexual conduct with a minor, ruling that *Lawrence* did not expand the fundamental liberty interest in marriage to encompass plural marriage.[116] Chief Justice Christine Durham issued a strong dissent against the bigamy conviction. She pointed to the hypocrisy of confining *Lawrence* to specific sexual acts and argued that the Court impermissibly codified in law "mere moral disapproval of an excluded group."[117]

The predominance of heterosexual, monogamous marriage in U.S. family law is a winner's history. However, this singular model increasingly collides with the reality of family diversity and growing pressure for a broader menu of legal relationship recognition.

Vanguard Family Diversity De Facto

The United States is the richest, most powerful nation in the world but clearly lags in legal recognition for family diversity generally, and for gay family rights and polygamy in particular. When it comes to the lived experience of family diversity, however, the United States has few peers. No society has generated more extensive grassroots movements to transform intimacy than the United States. While family innovations in South Africa reflect largely top-down initiatives on sexual, gender, and children's rights or survival strategies in the face of AIDS and extreme poverty, a great deal of family experimentation in the United States erupted from the bottom up.[118] The United States represents the global vanguard of personal identity politics. From the 1960s through the 1990s, the sexual revolution, the counterculture, the women's movements, and LGBT movements inspired masses to radically transform personal life. Youth rebelled against sexual repression, hypocrisy, and bourgeois propriety; feminists assailed male sexual privilege and coercion, as well as "the feminine mystique" of domesticity;[119] lesbigays rejected "compulsory heterosexuality."[120] Free market developments in contraception and reproductive technology also unhinged the links between sex, love, marriage, procreation, and parenting.

Despite radical changes in timing, meaning, sequence, stability, and substance, marriage remains far more popular in the United States than in South Africa or most European nations or, to be precise, far more prevalent among whites. For in the United States, as in South Africa, the history of marriage is deeply racialized. Slaves were denied the legal right to marry outright, and the Supreme Court did not overturn bans on interracial marriage until 1967.[121] Now that de jure rights to marriage are racially neutral, however, de facto marital status still starkly indexes racialized class privilege in the United States, as in South Africa. Whites are twice as likely as blacks to marry.[122] In the United States, unlike in South Africa, marriage also remains a preserve of explicit sexual privilege. A vigorous backlash against gay rights continues to score victories to encode an exclusively heterosexual definition of marriage in state constitutions and federal statutes. Most recently, in the November 2008 election, voters supported such bans in Florida and Colorado as well as Prop 8 in California. Efforts to restrict gay adoption, fertility services, and parental custody rights have been less successful, but Arizona voters passed an indirect ban on gay adoption or foster parenting in November 2008, and few states grant lesbian and gay parents rights equal to heterosexuals'.

Nonetheless, lesbigay couples and parents have achieved far greater social acceptance in the United States than the reactionary legal landscape implies, certainly greater than in South Africa. In the United States, gay and lesbian couples and their children are almost literally "everywhere," as the slogan boasts. The 2000 Census recorded 1.2 million individuals residing in households headed

by same-sex couples in 99 percent of U.S. counties. One in four of these households included children, and 12 to 15 percent of the couples were biracial.[123] Because the Census records relationships only among those who co-reside, these data undercount and provide misleadingly static portraits of de facto lesbian and gay family formations. They miss the creative panoply of intimacy and kinship arrangements that anthropologist Kath Weston termed "families we choose."[124] The United States remains the global epicenter of social initiatives for planned lesbian and gay parenting, including commercial sperm banks, assisted reproduction centers, and adoption agencies and lawyers devoted to serving them. Gay community groups, national organizations, the Internet and the private sector sponsor "maybe baby" groups, parent support groups, play groups, camps, social events, and vacations for their children and families.[125]

However, in the United States, as in South Africa, educated, white lesbians and gays disproportionately promote and profit from campaigns for same-sex marriage and gay family rights, as gays of color repeatedly complain.[126] Gays and lesbians of color in the United States are much more organized than in South Africa, with race-specific advocacy organizations, social networks, and institutions, such as the National Black Lesbian and Gay Leadership Organization, LLEGO (a Latino gay organization), the Gay Asian-Pacific Alliance, as well as the primarily black gay Unity Fellowship Church, a national black gay party circuit, and Encuentro (an HIV and substance-abuse prevention program for Latino gay and bisexual men). These groups rarely mobilize for same-sex marriage or gay family rights. In the United States, as in Africa, many people of color consider gay to be an immoral white identity, alien to their cultures.[127] Moreover, national survey data report stronger opposition to same-sex marriage among blacks than whites.[128] Gay family rights can seem a white bourgeois agenda to the less-privileged constituencies addressed by gay activists of color.[129]

Nonetheless, only a comatose resident of the United States can avoid encountering ubiquitous, increasingly positive, multiracial images of gay familial relationships. Whether projected onto the silver or the electronic screen, broadcast on airwaves or into earphones, plastered on billboards or magazine racks, advertised in classified pages, or celebrated in wedding announcements in the *New York Times,* images of gay family life now saturate U.S. popular culture. To be sure, serious hostility, harassment, rape, violence, and even homicide against gays also persist, sometimes directly in response to such exposure. And, of course, rightwing forces have successfully mobilized vigorous backlash sentiment against the specter of same-sex marriage to pass the Defense of Marriage Act and the rash of "baby DOMAs," including the recent Proposition 8 in California. Still, gays and lesbians have achieved major gains in public acceptance. Popular opposition to gay relationships is certainly less widespread in the United States than in South Africa and seems to be waning at a rapid pace. National Opinion Research Center poll data show an 18 percent decrease in the

percentage of Americans who believe that "homosexual relations are always wrong," from 73 percent in 1973 to 55 percent in 2002.[130] A 2006 national Gallup Poll found 58 percent of adults opposed to "extending marriage to include same-sex couples" and 39 percent in favor.[131] More significant, younger cohorts consistently express majority support for same-sex marriage and gay rights generally, suggesting favorable long-term prospects.[132]

"Such a day of social acceptance will never come for polygamists," a prominent law professor predicted in 2004. "It is unlikely that any network is going to air *The Polygamist Eye* for the *Monogamist Guy* or add a polygamist twist to *Everyone Loves Raymond*."[133] National antipathy to polygamy in the United States is so robust that few would have challenged Turley's prophecy at the time. Indeed, 92 percent of Americans surveyed in a 2005 Gallup Poll viewed polygamy as "morally unacceptable."[134] Remarkably, however, less than a year after this survey, U.S. cable TV channel HBO debuted just such a series. *Big Love* sympathetically portrays a Mormon husband and his three wives navigating the emotional, sexual, and social complexities of their closeted polygamous family life in suburban Utah.

Because polygamy is illegal in the United States, unlike in South Africa, the practice has been driven underground where it survives in fundamentalist Mormon outlaw communities clustered around the border of Utah and Arizona. Scholars estimate a population of between 11,000 and 50,000 members of Mormon offshoots like the FLDS, the splinter group of the Latter Day Saints, which rejected as heresy the church's 1890 pragmatic decision to repudiate polygamy.[135] A smaller number of non-Mormon, self-described "Christian polygamists" also believe that the Old Testament mandates patriarchal polygyny ("The Principle"). In addition, a newer network of non-Mormon Christians advocates a radical system of plural marriage that might pass muster under the South African equality clause. The organization called Liberated Christians distinguishes its sex-egalitarian ideology of voluntary polygamy from patriarchal, biblical versions of Christian polygyny. Putting a religious spin on the secular New Age, free-love ideology of polyamory, Liberated Christians interpret the New Testament to provide support for plural husbands as well as plural wives.[136] Similarly, Unitarian Universalists for Polyamory Awareness (UUPA) promotes "the philosophy and practice of loving or relating intimately to more than one other person at a time with honesty and integrity."[137] UUPA advocates for "any form of family structure, whether monogamous or multi-partner, which is characterized by free and responsible choice, mutual consent of all involved, and sincere adherence to personal philosophical values."[138] Unlike the FLDS, polyamorists do not inhabit separatist communities and may not even cohabit with more than one mate. They are less likely to attract prosecution under anti-bigamy statutes.

Negative political repercussions from the Short Creek raids dampened the government's appetite for prosecuting polygynists.[139] After the 1953 raid, a half-century passed before the state again took legal action. By driving polygyny underground, however, the United States enabled patriarchal sexual abuses to proliferate unregulated. Dictatorial, self-proclaimed prophets, like convicted former FBI fugitive Warren Jeffs, likely the model for the sinister prophet portrayed in *Big Love,* have been able to rule renegade communities with impunity. Former wives and children who flee these sects populate most anti-polygamy groups, like *Tapestry Against Polygamy,* which publicizes abuses and the hypocrisy of officials who fail to prosecute polygynists. Perhaps this contributed to the FBI's decision to include FLDS leader Jeffs along with Osama bin Laden on its 2006 list of Ten Most Wanted Fugitives and to the recent events in Texas.

Currently, political conflicts over polygamy and same-sex marriage intermingle in the culture wars over "family values," although these are unlikely, mutually suspicious, political bedfellows. Both forms of marriage signify promiscuity to conservative opponents.[140] In the 1946 *Cleveland* decision, even liberal Justice Douglas called polygamous households "a notorious example of promiscuity."[141] Similarly, in direct contrast with queer critics who view the demand for gay marriage as a conservative bid to assimilate into a suspect regime of bourgeois propriety,[142] conservatives fear that gay marriage will subvert that regime. Kurtz, for example, warns that, "Up to now, with all the changes in marriage, the one thing we've been sure of is that marriage means monogamy. Gay marriage will break that connection. It will do this by itself, and by leading to polygamy and polyamory. What lies beyond gay marriage is no marriage at all."[143] Kurtz believes that sympathetic treatment of polygamy on *Big Love,* a program conceived and produced by a gay male couple, as he unfailingly underscores, will undermine cultural taboos and foster support for pluralist definitions of marriage and family that South African law embraces but U.S. law and Kurtz oppose.[144] "At the heart of the show," Kurtz worries, is the claim "that, so long as people love each other, family structure doesn't matter."[145]

He has grounds for this fear. Although fictional and parodic, the well-researched TV series has revived national conversation about polygamy in the United States. Pro-polygamists enthuse that "the topic of polygamy thereby exploded in the public marketplace."[146] Contributors to national media, websites, and blogs now deliberate the pros and cons of polygamy,[147] and libertarians, like *New York Times* columnist John Tierney, mock the cultural hypocrisy of laws that criminalize it: "Polygamy isn't necessarily worse than the current American alternative: serial monogamy."[148] While sympathetic to its subject, *Big Love* refrains from glamorizing the lot of a polygynous husband or his wives. It also exposes practices of incest, sexual abuse, and patriarchal exploitation within fundamentalist polygamist communities. Nonetheless, the program

does draw connections between discrimination against same-sex and plural marriage. Real-life fundamentalist Mormon proponents of polygyny echo this view and credit the program with reporting "around the world" their conviction that "polygamy rights is the next civil rights battle."[149] In August 2006, Principle Voices organized a pro-polygamy rally in Salt Lake City at which youth from polygynous families sounded like children of gay parents when they spoke of the pain they suffer concealing their parents' non-normative marriages.[150]

Recently a few mainstream voices have dared to call for decriminalizing polygamy. One of these, David Zolman, is a Republican former Utah state representative who also advocates issuing a state apology for the raids on Short Creek.[151] Utah Supreme Court Chief Justice Christine Durham's dissenting opinion in the 2006 Holms case noted the state's inconsistency in upholding his conviction for bigamy while it does not prosecute cohabitants.[152] Libertarians note the hypocrisy of anti-bigamy laws in the context of legal cohabitation and men who procreate with more than one woman. As one observed, "Green is not being punished for having children with several different women. He is being punished for sticking around."[153] However, Utah House Speaker Marty Stephens warns that tampering with anti-polygamy laws could "open up a Pandora's Box." This Pandora reverses the conventional slippery-slope argument: "If we are going to argue people ought to be able to marry who they want and have plural marriage, how different is that from saying you ought to allow homosexual marriages?"[154] Vicky Prunty, Director of Tapestry Against Polygamy, labels Latter Day Saints leaders who protest gay marriage "shamefully hypocritical" for failing to mobilize against polygamy. "Let there be no mistake: Passing a marriage amendment to stop gay marriages or any other form of marriage including polygamy is putting false hopes in a bogus amendment. Polygamy has been illegal for decades while some of the strongest proponents of the [heterosexual] marriage amendment are our nation's gravest enablers of polygamy."[155]

Finally, in stark contrast with South Africa, the primary constituencies of polygamy and polyamory in the United States are white. Despite its "metaphorically nonwhite" history, fundamentalist Mormon doctrine is white supremacist, portraying blacks as tainted descendants of Cain and Ham (a doctrine the Latter Day Saints did not repudiate until 1978). FLDS patriarch Jeffs warned followers against interracial relationships and contended that blacks "are low in their habits, wild and seemingly deprived of nearly all the blessings of the intelligence that is generally bestowed upon mankind."[156] Likewise, while proponents of same-sex marriage in both countries claim racially diverse constituencies, gay critics underscore the implicit whiteness of the gay marriage project itself. Kenyon Farrow argues that proponents of gay marriage employ the same family values rhetoric and skewed social science methodology that for decades served to stigmatize black families in the United States by positioning the heterosexual,

dyadic, marital union as the sole socially and psychologically healthy model for contemporary family life. Instead of reaching toward a model of family that might both secure protection and acceptance for all conjugal and care relationships, Farrow says, the gay-marriage fight places blacks in the crosshairs of an ideological battle between white conservatives and white gays and lesbians.[157] His critique proved prescient in the wake of the historic 2008 presidential election, when media reports linking the high turnout of African American voters to the passage of an anti–gay marriage ballot measure in California sparked debates about both black homophobia and gay racism.[158] The complex racial terrain of marital politics in both nations invites serious reflection.

DIFFERENT SLOPES FOR DIFFERENT FOLKS

Comparing de jure and de facto responses to same-sex and plural marriage in these two societies offers new perspectives on whether legitimating the former alternative to heterosexual monogamy leads inexorably toward legalizing the latter. The (too) simple verdict is no, "not guilty, as charged." No predestined link and no unidirectional gradient govern relationships between these two forms of marriage in South Africa, the United States, or elsewhere. Their intersecting trails are unpredictable, alternately slippery, and pocked with moguls.

Chronologically, polygamy long predated gay marriage in South Africa and the United States. Thus, one might more credibly claim a slope tilting from plural to same-sex marriage than the other way round. However, few would or, in our view, *should* make this claim. Historically, polygyny was a pre-modern, patriarchal institution in which kin-based, economic, and procreative priorities govern marital practices. Same-sex marriage, in contrast, expresses a late modern egalitarian conjugal ideal pursued by individuals questing for the emotional and erotic rewards of what Giddens terms "the pure relationship."[159] That is why few could have envisioned that same-sex couples would win legal marriage rights in underdeveloped South Africa long before they are likely to do so in the United States.

South Africa, as we have seen, has a history of racially based marital pluralism. Polygyny and monogamy co-existed under apartheid, but the former, governed by customary law for black Africans only, served to mark their racial inferiority to whites. The post-apartheid regime instituted a fundamental value shift from state-mandated, patriarchal racism to the Constitutional equality principle. Surprisingly, however, marital pluralism remains racially based. Lesbigay family rights were rapidly legalized under the equality clause, but anti-colonial South African homophobia makes it more difficult for black gays and lesbians to exercise them. In contrast, polygynous marriage is legally available almost exclusively to black South Africans.

Nonetheless, the 1998 RCMA represents an attempt to regulate rather than to endorse polygyny. It aims to subject polygyny to the equality clause with which it is fundamentally incompatible. The equality principle made legal same-sex marriage inevitable in South Africa, which in turn reinforces the post-modern trajectory that de-genders the meanings and practices of marriage. The de jure marital slope in South Africa slid swiftly from the equality principle to legal same-sex marriage and then more haltingly to either eroding polygamy or divesting it of patriarchal and racial principles. However, absent substantial interventions into popular support for homophobia and male domination, prospects for realizing egalitarian family ideals promised by the Bill of Rights seem distant and dim.

Historical relationships between plural and same-sex marriage in the United States are nearly the reverse of those in South Africa, and opposite to the slippery-slope argument against gay marriage. Neither plural marriage nor a pluralist definition of marriage ever enjoyed legal status in the United States. Rather, historians have demonstrated that "the deployment of monogamous [heterosexual] conjugal norms" furthered "the imperial consolidation of the nation-state."[160] Demands for plural marriage preceded campaigns for same-sex marriage in the United States, while rationales for criminalizing polygamy supplied ideological foundations for the campaign for gay marriage. In fact, the conservative Christian pro-polygamy movement argues that "Anti-Polygamy is the Real 'Slippery Slope,'"[161] because it abandoned biblical teachings, abrogated religious freedom, and allowed government to define marriage. Thereby, the state attained the power to legalize same-sex marriage when and if it chooses.

We agree that anti-polygamy forces in the United States fueled an ideology that lists toward same-sex marriage, but our reasoning is secular. Manifest destiny, racism, and monogamy intermingled in the nineteenth century as the nation constructed its monolithic marital regime. Expectations that an individual should freely wed a beloved soul-mate gradually supplanted pre-modern marital principles.[162] Feminist critiques of polygyny buttressed ethnocentric convictions that monogamy evinces national and racial superiority. This modern "transformation of intimacy"[163] established ideological grounds for same-sex marriage. Once the marital ideal becomes a freely chosen loving partnership, the state loses rational grounds for dictating the genders of the partners.

De jure responses in South Africa and the United States to postmodern family diversity could scarcely be more antithetical. Vanguard South African law embraces it; reactionary U.S. jurisprudence resists it. South Africa struggles to respect incompatible values among diverse family cultures; the United States seeks to impose monolithic values on all families. De facto support for family diversity in the two nations also contrasts sharply, but with reverse valences. Here the United States occupies pioneer terrain, and South Africa lies closer to the rear. Despite legal and political constraints, U.S. material and cultural conditions allow a hundred species of family to blossom. Despite legal

encouragement, South African material and cultural calamities place all but the hardiest, best-cultivated families at risk of withering on the vine.

These contrasts as well as three features common to family politics in both societies are instructive. First, marital projects and family forms are deeply racialized. Civil monogamous (heterosexual) marriage has been disproportionately available to whites in both nations, at some times de jure, at all times de facto. Both nations only recently decriminalized interracial marriage, and whites have been the primary advocates and beneficiaries of gay family rights. Second, gender equality principles conflict with traditional family values in both nations. Finally, although South Africa recognizes multiple types of families, both societies still favor marital over non-marital status.

South African gays did not gain family rights through grassroots activism, but largely by constitutional and judicial fiat. Pivotal gay male anti-apartheid activists in and outside South Africa as well as international human-rights groups in anti-apartheid alliances influenced the momentous inclusion of sex orientation in the equality clause.[164] Therefore, de jure gains for gay rights are symbolically potent but fragile and largely inaccessible to the masses. Substantial cross-racial efforts are needed to counter homophobic, anti-colonial discourses that portray gay as an alien, white Western deformation.

Despite the grassroots, mass-mobilized character of gay activism in the United States, its principal agents and beneficiaries also are white. The single-issue, bourgeois character of the drive for same-sex marriage alienates many members of subordinate racial and ethnic groups, opening opportunities for white religious conservatives to exploit homophobia for political purposes, as Winnie Mandela did in South Africa, and as the campaign for Prop 8 did in California. Many African Americans bitterly reject analogies between U.S. struggles for racial and sexual justice generally and for interracial and gay-marriage rights.[165]

Similarly, despite stark demographic contrasts, plural marriage remains racialized in both nations. South African polygyny enjoys at least temporary legal protection as a customary practice among members of the formerly disenfranchised black majority. Conversely, Mormon polygynists in the United States deviated starkly from customary practice among the white Christian majority. Polygyny defied the racist, imperial, but anti-patriarchal family ideology that criminalized it. Contemporary advocates for plural unions in the United States, likewise, are mainly white, and some are overtly racist.[166] South Africa and the United States demonstrate how entrenched race and class inequities thwart the promise of gender and sexual equality. Despite the South African Constitutional mandate of equality, civil marriage remains disproportionately white and customary marriage almost exclusively black African, with women in the most vulnerable positions. U.S. law resists supporting family forms beyond the heterosexual, monogamous marital ideal, thereby withholding legal protection from the majority of American families. Wealthy Americans can contract their

relations of care, but poor (mostly minority) Americans, disproportionately women, find their options constricted.

Finally, despite contrasting policies, marriage still enjoys hegemonic status in both societies. The U.S. version is extreme. Federal policies actively promote heterosexual monogamy and discriminate against anyone who is not heterosexual or married. Although the South African Bill of Rights endorses family diversity, unmarried heterosexual couples have not yet won recognition. Forms of legally recognized marriages multiply, but "marriage is the gatekeeper for recognition."[167] Even openly gay High Court Justice Edwin Cameron affirms: "marriage *and the capacity to get married* remain central to our self-definition as human beings."[168]

Thus far we have argued that efforts to suppress polygyny in both societies helped to propel the case for gay marriage and that legal gay marriage, in turn, does more to undermine than to legitimate polygyny. This seems to reverse the slippery-slope argument. However, though our closing argument supports the verdict that gay marriage is not guilty as charged, the defense cannot rest at this point. We do not judge the case so weak that it should be dismissed *prima facie.* If suppressing polygyny performed historic spade work toward legitimating same-sex unions, legalizing gay marriage now could weaken grounds for ruling egalitarian forms of plural marriage out of court. We do not share the view of pro-polygamy.com that their cause is "the next great civil rights issue." Yet we believe that were there a constituency seeking plural marriages open to consenting adults *of any gender,* it could plausibly appeal to the same love-based ideology of marriage that serves plaintiffs for same-sex marriage.[169] There are very few such advocates, however, and we do not expect their ranks to increase much in post-industrial democracies.

Most pre-modern marriage systems included polygamy, but its prevalence declines, as recent South African data indicate, along with the economic, cultural, and kinship systems whose purposes it served. Post-modern conditions of intimacy provide few incentives and post-industrial economies scant support for this challenging kinship structure. Were plural marriages legal in the United States, only a small minority of citizens would likely choose to enter them. As *New York Times* columnist John Tierney observed after viewing *Big Love:*

> After watching the husband on the show struggle to pay for three households and watching his three wives struggle for his attention, the question that comes to mind is not how to keep polygamy illegal. The question is why we bother to ban something that takes so much work these days.[170]

Although current prospects for decriminalizing plural unions in the United States seem bleak, perhaps small advocacy groups ultimately will achieve some success. Perhaps they will persuade courts, legislatures, and the populace that a

democracy has no more cause to dictate the number of spouses its citizens may wed than it does their religion, their race, or their gender. The South African model suggests potential benefits from such an outcome, even for those who oppose plural marriage. By criminalizing the practice, the United States drove Mormon polygyny underground, enabling sexual and other abuses to flourish unmonitored. "If you outlaw polygamy," one astute commentator observes, "only outlaws will have polygamy."[171] Far wiser to pursue the South African strategy of legally recognizing polygamy in order to regulate abuses and subject its practice to a gender-equality standard. Counter-intuitively, moreover, legalizing plural marriages could lead to fewer rather than more of them. Were age-of-consent laws strictly enforced and women genuinely free to consent to enter polygynous marriages, we doubt that hordes would clamor to do so. That is the wager the South African Law Commission made. Although feminists and the Rural Women's Association sought to ban the practice outright, the commission compromised with patriarchal tribal authorities by recognizing customary marriages while subordinating them to the equality clause.[172]

Christian polygynists in the United States correctly distinguish their agenda from polyamory, which subscribes to modern, gender-neutral, egalitarian values. Polyamory, literally many loves, *not* many spouses, moreover, is less an alternative form of marriage than an alternative to marriage at all. Sequential de facto polyamory is already the norm in contemporary American society, and dishonest forms can claim a long, if dishonorable, pedigree. Since multiple, open, concurrent, amorous commitments are likely to remain at best a marginal preference, we do not believe that courts need to expend energy guarding against demands for their recognition. It would take us considerably beyond our already-lengthy closing argument to enter the contemporary debate on disestablishment of marriage to which such an alternative points.[173]

The fate of legal gay or plural marriage or of any state-sponsored marriage will hinge not on abstract logic but on complex social forces and political alliances painstakingly forged or foolishly foresworn. Our comparative analysis reveals the vexed racialized histories that undergird marital regimes in both nations. Intersecting ideologies of racial and religious purity helped generate the modern marital model that both regimes favor. Until groups struggling for racial, sexual, and economic rights collaborate on campaigns for family diversity, few innovations will achieve both de jure and de facto success. The politics of family change is no sleigh ride down a slippery slope.

NOTES

1. Stanley Kurtz, "Beyond Gay Marriage: The Road to Polyamory," *Weekly Standard* 8, no. 45 (August 4–11, 2003).

2. Dahlia Lithwick, "Slippery Slop: The Maddening 'Slippery Slope' Argument against Gay Marriage," *Slate* (May 19, 2004), http://www.slate.com/id/2100824/ (accessed December 4, 2008).

3. James Dobson, "An Open Letter to South Africans on Same-sex Marriage," *Christians for Truth* (2005), http://www.cft.org.za/articles/dobson_gay_marriage_sa.htm (accessed December 4, 2008).

4. See, e.g., William Bennett, "Bookworld: Live Discussion with William Bennett," *Washington Post* (June 9, 2006); Katherine Kersten, "Once Same-sex Marriage Is OK, Polygamy's Next," *Star Tribune, Minneapolis-St. Paul, MN* (April 6, 2006); New York Times Editorial Staff, "Senator Santorum Sounds Off," *New York Times* (April 22, 2003); *Lawrence v. Texas,* 123 S.Ct. 2472 (Scalia, J. dissenting).

5. Immediately after the California decision, for example, an article in the gay publication *Washington Blade* featured reassurances from numerous experts "that the California Supreme Court ruling has nothing to do with polygamy." Joey Diguglelmo, "Will Gay Marriage Lead to Legalized Polygamy? Legal Experts Respond to Arguments of Conservative Activists," *Washington Blade* (June 6, 2008).

6. Andrew Sullivan, "Idiocy of the Week," *Salon* (April 22 2003), http://dir.salon.com/story/opinion/sullivan/2003/04/22/santorum/index.html (accessed December 4, 2008).

7. Joseph Bozzuti, "The Constitutionality of Polygamy Prohibitions after *Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?" *The Catholic Lawyer* 43 (2004): 409–42; David L. Chambers, "Polygamy and Same-sex Marriage," *Hofstra Law Review* 26 (1997): 53–83; David D. Meyer, "Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood," *American Journal of Comparative Law* 54 (2006): 125; Maura L. Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-sex Marriage," *North Carolina Law Review* 75 (1997): 1501–1624; Eugene Volokh, "Same-sex Marriage and Slippery Slopes," *Hofstra Law Review* 34 (2006): 1–40.

8. Fikele Vilakazi, "Lobbying for Same-sex Marriage: An Activist's Reflections," in Melanie Judge, Anthony Manion, and Shaun de Waal, eds., *To Have and to Hold: The Making of Same-sex Marriage in South Africa* (Johannesburg: Fanele, 2008), 87–96.

9. Amy Agigian, *Baby Steps: How Lesbian Alternative Insemination Is Changing the World* (Boston, MA: Wesleyan University Press, 2004); Laura Benkov, *Reinventing the Family: The Emerging Story of Lesbian and Gay Parents* (New York: Random House, 1995); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2001); Rosabeth Moss Kanter, *Commitment and Community: Communes and Utopias in Sociological Perspective* (Cambridge, MA: Harvard University Press, 1972); Kath Weston, *Families We Choose* (New York: Columbia University Press, 1997[1991]).

10. The California Supreme Court ruled on May 15, 2008, that same-sex couples have the right to marry under California law. California voters passed Proposition 8, barring recognition of same-sex marriages, on November 4, 2008. The constitutionality of that ballot measure is currently being appealed, and it remains unclear if marriages conducted prior to its passage will remain valid.

11. The Heritage Foundation, "Marriage in the Fifty States," http://www.heritage.org/Research/Family/Marriage50/ (accessed December 4, 2008); National Conference of State Legislatures, "Same Sex Marriages, Civil Unions and Domestic Partnerships" (2008), http://www.ncsl.org/programs/cyf/samesex.htm/ (accessed December 4, 2008).

12. Associated Press, "Fate of Polygamy Sect Unclear as Leader Held," *USA Today* (August 29, 2006); Associated Press, "Tom Green To Be Paroled in August '07" (August 28, 2004); Ben Winslow, "Texas Attorney General Hints at Bigamy Prosecutions," *Deseret News* (April 17, 2008).

13. Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, CA: Stanford University Press, 1993).

14. Stephanie Coontz, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage* (London: Penguin Books, 2005); Cott, *Public Vows;* Sarah Barringer, *The Mormon Question//Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002).

15. Gay W. Seidman, "Is South Africa Different? Sociological Comparisons and Theoretical Contributions from the Land of apartheid," *Annual Review of Sociology* 25 (1999): 419–40.

16. *Constitution of the Republic of South Africa,* chap. 2, sec. 9(3).

17. *Constitution of the Republic of South Africa,* chap. 2, sec. 12(2)(a).

18. *Id.*

19. Brigitte Clark, "Families and Domestic Partnerships," *South African Law Journal* 119 (2002): 634–49, note 48.

20. South African Law Commission, *White Paper for Social Welfare* (1997), http://www.welfare.gov.za/Documents/1997/wp.htm (accessed December 4, 2008).

21. *Id.,* Glossary.

22. Shireen Hassim, "Turning Gender Rights into Entitlements: Women and Welfare Provision in Postapartheid South Africa," *Social Research* 72 (2005): 621–46.

23. Edwin Cameron, "Sexual Orientation and the Constitution: A Test Case for Human Rights," *South African Legal Journal* 110 (1993): 450–72, also cited in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others,* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) ("*Sodomy Case*").

24. *Sodomy Case*, para. 20–21.

25. *Id.*

26. *Id.*

27. *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others,* 2000 (2) SA 1 (CC), para 50.

28. *Id.,* para. 56.

29. *Peter v. the Minister of Law and Order,* 1990 (4) SA 6 (E) at 9G, cited in *the Sodomy Case,* para 46.

30. Pierre De Vos, "A Judicial Revolution? The Court-Led Achievement of Same-sex Marriage in South Africa," *Utrecht Law Review* 4, no. 2 (2008): 161–74.

31. Sharon LaFraniere, "South African Parliament Approves Same-sex Marriage," *New York Times* (November 15, 2006).

32. *Minister of Home Affairs and Another v. Fourie and Another,* 2004 (6) SA 121 (CC), note 80; David L. Chambers, "Civilizing the Natives: Marriage in Post apartheid South Africa," *Daedalus* 129, no. 4 (2000): 101–24; Amanda Gouws, "The Politics of State Structures Citizenship and the National Machinery for Women in South Africa," *Feminist Africa* 3 (2004): 1–15.

33. Michael W. Yarbrough, "We Thee Wed: Marriage Law, Culture, and Subjectivity in Post-apartheid South Africa," Comparative Research Workshop, Yale University (2005).

34. Chambers, "Civilizing the Natives"; Gouws, "The Politics of State Structures Citizenship."

35. Chambers, "Civilizing the Natives," 113; Penelope E. Andrews, "'Big Love'? The Recognition of Customary Marriages in South Africa," *Washington and Lee Law Review* 64 (2007): 1483.

36. *Recognition of Customary Marriages Act* (RCMA): sec. 6.

37. Interviews with Melanie Judge, Beth Goldblatt, Chief Kutama, Likhapha Mbatha, 2007; Andrews, "'Big Love'?"; Graeme Reid, "How to Be a 'Real' Gay: Emerging Gay Spaces in Small-town South Africa," Ph.D. dissertation, University of Amsterdam

(2007); Graeme Reid, "'This Thing' and 'That Idea': Traditionalist Responses to Homosexuality and Same-sex Marriage," in Judge et al., *To Have and To Hold* (Johannesburg: Fanele, 2008), 73–86.

38. Chambers, "Civilizing the Natives," 114.

39. RCMA, sec. 7(vii)(a) and (b).

40. *Mabena v. Letsaolo,* 1998 (2) SA 1068 T.

41. *Id.*

42. *Bhe and Others v. The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v. President of the Republic of South Africa* (2004) Case CCT 49-03.

43. Interviews with Likhapha Mbatha, David Bilchitz, Beth Goldblatt, Pierre de Vos, 2007.

44. Julia Sloth-Nielson and Belinda Von Heerden, "The Constitutional Family: Developments in South African Family Law Jurisprudence Under the 1996 Constitution," *International Journal of Law, Policy and the Family* 17, no. 2 (2003): 121–46, 139.

45. *Ryland v. Edros,* 1997(2) SA 690 (CC).

46. See *Arnold and Another v. Multilateral Motor Vehicle Accidents Fund*, Supreme Court of Appeal, Case No. 444/98, September 29, 1999 (unreported).

47. *Volks NO v. Robinson,* 2005 (5) BCLR 446 (CC); 2005 (SACLR LEXIS 3), 21/02.2005.

48. *Id.*

49. Marius Pieterse, "It's a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Nonracialism," *South African Journal of Human Rights* 17 (2001): 364–91, 372.

50. *Id.,* 375

51. Catherine Albertyn, "Contesting Democracy, HIV/AIDS and the Achievement of Gender Equality in South Africa," *Feminist Studies* 29 (2003): 595–615.

52. Gay W. Seidman, "Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State," *Gender & Society* 13 (1999): 287–307.

53. Hassim, "Turning Gender Rights into Entitlements"; Seidman, "Gendered Citizenship."

54. Hassim, "Turning Gender Rights into Entitlements"; Seidman, "Gendered Citizenship"; Sloth-Nielson and Von Heerden, "The Constitutional Family." For example, only 21.4 percent of black women and 35 percent of black men were employed in 2001 compared with 52.8 percent of white women and 70.4 percent of white men. (RSA Primary Census Data, 2001, Table 2.29:52)

55. UNAIDS, "2006 Report on the Global AIDS Epidemic," *Annex Country Profiles* (2006), 455; Statistics South Africa, "Census 2001, Census in Brief" (2003), http://www.polity.org.za/pdf/Census2001_brief.pdf (accessed December 4, 2008).

56. Anne Outwater, Naeema Abrahams, and Jacqelyn C. Campbell, "Women in South Africa Intentional Violence and HIV/AIDS," *Journal of Black Studies* 35, no. 4 (2005): 135–54, 137.

57. O. Shisana, T. Rehle, L. C. Simbayl, et al. *South African National HIV Prevalence, HIV Incidence, Behavior and Communication Survey* (Cape Town: HSRC Press, 2005), 38.

58. UNICEF, "South Africa Statistics," http://www.unicef.org/infobycountry/southafrica_statistics.html (accessed December 4, 2008).

59. Jacklyn Cock, "Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution," *Women's Studies International Forum* 26 (2002): 35–45.

60. RSA Primary Census Data, 2001.

61. Michel Garenne et al., "Understanding Marital and Premarital Fertility in Rural South Africa," *Journal of Southern African Studies* 27 (2001): 277–90, 279.

62. For example, due to male desires for friction during heterosexual intercourse, some South African women apply drying agents to their vaginas, causing tears and bleeding that increase their risk of HIV (A. Baleta, "Concern Voiced over 'Dry Sex' Practices in South Africa," *Lancet* 352 [1998]: 1292.) Patriarchal sexual coercion and multiple partners are widespread, and many women are too subordinate to challenge men's refusal to use condoms. (See Outwater et al., "Women in South Africa," note 107).

63. Marc Epprecht, *Hungochani: The Story of a Dissident Sexuality in Southern Africa* (London: McGill-Queen's University Press, 2004).

64. Connie M. Anderson, "The Persistence of Polygyny as an Adaptive Response to Poverty and Oppression in apartheid South Africa," *Cross Cultural Research* 34, no. 2 (2000): 99–112.

65. Gouws, "The Politics of State Structures Citizenship"; Likhapha Mbatha, "Reforming the Customary Law of Succession," *South African Journal of Human Rights* 18 (2002): 259–86; Pieterse, "It's a 'Black Thing'"; Virginia Van der Vliet, "Traditional Husbands, Modern Wives? Constructing Marriages in a South African Township," in Andrew D. Speigel and Patrick A. McAllister, eds., *Tradition and Transition in Southern Africa* (New Brunswick and London: Transaction Press, 1991).

66. S. Koyana, in Van der Vliet, "Traditional Husbands, Modern Wives?" 231.

67. Mbatha, "Reforming the Customary Law of Succession"; Pieterse, "It's a 'Black Thing.'"

68. Epprecht, *Hungochani.*

69. Van der Vliet, "Traditional Husbands, Modern Wives?"; Elsje Bonthuys, "The Civil Union Act: More of the Same," in Judge et al., *To Have and To Hold* (Johannesburg: Fanele, 2008), 171–81.

70. Outwater et al., "Women in South Africa," 140; IRIN, "Murder of Young Lesbian Sparks Homophobia Concerns," *Mail & Guardian* (February 21, 2006).

71. Outwater et al., "Women in South Africa," 140; IRIN, "Murder of Young Lesbian."

72. Outwater et al., "Women in South Africa," 142.

73. IRIN, "Murder of Young Lesbian." Zuma acknowledged both the unprotected sex and his knowledge that she was HIV positive but argued that she invited his advances and that he would have been culturally remiss to deny her sex.

74. Interviews with Melanie Judge and Wendy Isaak, 2007.

75. RSA Census 2001, Tables 6.2 and 6.4.

76. Aurelia Dyanti, "Two Wives Better than One for Some South Africa Men" *The Star* (2003), http://www.polygamyinfo.com/intnalmedia%20plyg%20192star.htm (accessed December 4, 2008).

77. A. Costa, quoted in Pieterse, "It's a 'Black Thing,'" 364.

78. Christina Landman, "Polygamy Beats Divorce, Afrikaner Academic Says," *Victoria Times-Colonist* (January 16, 1999), A8. Landman maintained that Afrikaans culture makes it difficult for women (all presumptively heterosexual) to function without a husband and that "there are just too few men in the world" available. She advises divorced white women to "select a married man and go and negotiate with his wife to become part of the family." Indeed, "timesharing awaits us, ladies," she advised, "and that at a time Viagra was sent for men."

79. *Robertson et al v. Minister of Home Affairs,* 2007.

80. Pieterse, "It's a 'Black Thing.'"

81. Cock, "Engendering Gay and Lesbian Rights," 40–41.

82. IRIN, "Murder of Young Lesbian."

83. IRIN, "Murder of Young Lesbian." Ironically, some scholars indicate that butch/femme is a dominant practice among blacks and coloreds in South Africa; Cock, "Engendering Gay and Lesbian Rights," 43.

84. *Ibid.*

85. Human Rights Watch, "South Africa: Lesbians Targeted for Murder; A Climate of Violent Homophobia Mars South Africa's Celebration of Women's Day" (August 9, 2007), http://hrw.org/english/docs/2007/08/08/safric16617.htm (accessed December 4, 2008); Interviews with David Bilchitz and Pierre de Vos.

86. Cock, "Engendering Gay and Lesbian Rights," 39.

87. Afrol News, "South Africans Disapprove of Homosexuals, Abortion" (October 21, 2004) http://www.afrol.com/articles/14605 (accessed December 4, 2008).

88. Winnie Mandela justified kidnapping four youths in Soweto in 1988 (one of whom was murdered) because of the alleged homosexuality of the priest with whom they were staying. Paul Trewhela, "Mbeki and AIDS in Africa: A Comment" *New York Review of Books* 47, no. 16 (2000); see also Rachel Holmes, "'White Rapists Made Coloureds (and Homosexuals)': The Winnie Mandela Trial and the Politics of Race and Sexuality," in Mark Gevisser and Edwin Cameron, eds., *Defiant Desires: Gay and Lesbian Lives in South Africa* (New York: Routledge, 1995), 284–94.

89. Wynbdham Hartley, "MP's Dig in Their Heels against Same-sex Unions," *Johannesburg Business Day* (September 14, 2006); Reid, "How to Be a 'Real' Gay"; Reid, "'This Thing' and 'That Idea.'"

90. Trewhela (2000) claims that Mbeki "endorses an Africanist myth of a pure and primal Africa contaminated by a sinful West." Scholars debate the role of homosexuality and homophobia in African cultures and whether the West imposed either. (See e.g., Yarbrough, "We Thee Wed"; Neville Hoad, "Tradition, Modernity and Human Rights: An Interrogation of Contemporary Gay and Lesbian Rights Claims in Southern African Nationalist Discourses," *Development Update Quarterly Journal of the South African National NGO Coalition and INTERFUND* 2, no. 32 (1998); Epprecht, *Hungochani.*)

91. *Goodridge v. Department of Health*, 798 N.E.2d. 941 (Mass., 2003).

92. Evelyn Nieves, "S.D. Abortion Bill Takes Aim at Roe," *Washington Post* (February 23, 2006), A01.

93. Michael G. Myers, "Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?" *Houston Law Review* (2006): 1451–86.

94. *Id.*

95. Shiela B. Kamerman and Alfred J. Kahn, *Privatization and the Welfare State* (Princeton, NJ: Princeton University Press, 1989); Christopher Pierson and Francis G. Castles, *The Welfare State Reader* (Malden, MA: Blackwell Publishing, 2000).

96. Jana Singer, "The Privatization of Family Law," *Wisconsin Law Review* (1992): 1443–1567.

97. *Id.*

98. Katherine E. Hull, "The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-sex Marriage," *Law & Social Inquiry* 28 (2003): 629–57.

99. Robert Pear and David D. Kirkpatrick, "Bush Plans $1.5 Billion Drive for Promotion of Marriage," *New York Times* (January 14, 2004), A1; see also http://www.healthymarriageinfo.org/.

100. See e.g. Utah Child Welfare Law § 78-30-9(3)(a).

101. Susan F. Appleton, "Presuming Women: Resisting the Assumption of Legitimacy in the Same-sex Couples Era," *Boston University Law Review* 86 (2006): 227–97.

102. *Lawrence v. Texas,* 2490.

103. *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008). *Loving v. Virginia*, 388 U.S. 1 (1937).

104. For exceptions, see Chambers, "Civilizing the Natives" and Katherine Franke, "Becoming a Citizen: Reconstruction Era Regulation of African American Marriages," *Yale Journal of Law and the Humanities* 11 (1999): 251–309.

105. Cott, *Public Vows.*

106. Myers, "Polygamist Eye for the Monogamist Guy"; see also Martha M. Ertman, "The Story of Reynolds v. United States: Federal 'Hell Hounds' Punishing Mormon Treason," in Carol Sanger, ed., *Family Law Stories 51* (Eagan, MN: Thomson Reuters/ West, 2007).

107. Chambers, "Civilizing the Natives," 68.

108. Carol Weisbrod and Pamela Sheingorn, "Reynolds v. United States: Nineteenth Century Forms of Marriage and the Status of Women," *Connecticut Law Review* 10 (1978): 828, note 6.

109. Bruce Burgett, "On the Mormon Question: Race, Sex and Polygamy in the 1850s and the 1990s," *American Quarterly* 57 (2005): 75–102; Joan S. Iversen, *The Antipolygamy Controversy in U.S. Women's Movements, 1880–1925: A Debate on the American Home* (New York: Garland Publishing, 1997).

110. Chambers, "Civilizing the Natives," 66.

111. Iversen, *The Antipolygamy Controversy.*

112. Bigamy is a misdemeanor in thirteen states. For examples of felon statutes, see the bigamy statutes of: Massachusetts, M.G.L. c272 §15, "Polygamy"; New York, N.Y.G.L §255.10 "unlawfully purporting a marriage" (a misdemeanor) and N.Y.G.L. §255.15 "Bigamy" (a felony); Utah, UT.G.L. §76-7-101 "Bigamy" (a third-degree felony).

113. Strassberg, "Distinctions of Form or Substance."

114. The 2001 Tom Green case sparked national interest. Green, a self-proclaimed Mormon polygamist, was the only individual prosecuted for bigamy by Utah between 1953 and 2003. (*State v. Green,* 99 P.3 820 [Utah 2004]). Green was released from prison in August 2007 after serving six years of his five year–to–life sentence. CNN, "Utah Polygamist Released on Parole after Serving Six Years" (2007), http://www.cnn.com/2007/US/08/07/polygamist.ap/index.html (accessed December 4, 2008).

115. Alexandria Sage, "Utah Polygamy Ban Challenged," *CBS News* (January 27, 2004), http://www.cbsnews.com/stories/2004/01/27/national/main596268.shtml (retrieved December 4, 2008).

116. *State v. Holm,* 2006 UT 31.

117. *Id.,* 184.

118. See Judith Stacey, *Brave New Families: Stories of Domestic Upheaval in Late-Twentieth-Century America* (New York: Basic Books, 1990); Judith Stacey, *In the Name of the Family: Rethinking Family Values in a Postmodern Age* (New York: Beacon Press, 1996); Weston, *Families We Choose.*

119. Betty Friedan, *The Feminine Mystique* (New York: W.W. Norton, 1997[1963]).

120. Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence," *Signs: A Journal of Culture and Society* 5 (1983): 631–60.

121. *Loving v. Virginia,* 388 U.S. 1 (1967).

122. In 2001, 41.9 percent of black women and 43 percent of black men over the age of fifteen had never married, compared with 20.7 percent of white nonhispanic women and 27.4 percent of white non-Hispanic men; the comparable rates for Asians and Hispanics were 33.4 percent Asian men, 40 percent Hispanic men, 25.3 percent Asian women, 29.7 percent Hispanic women. U.S. Bureau of the Census, "Marital History for

People 15 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2001" (February 1, 2005), http://www.census.gov/population/socdemo/marital-hist/p70-97/tab01-hispanic.xls (accessed December 4, 2008).

123. A 2006 survey reported 21 percent of lesbians and 5 percent of gay men currently have a child living at home; two-thirds of lesbians said they plan to have a child in the next three years! One-third of male couples plan to raise kids. Beth Shapiro, "Gay Families Growing," *365Gay.com* (April 25, 2006), http://365.vom/Newscon06/04/042506family.htm (accessed December 4, 2008).

124. Weston, *Families We Choose.*

125. See e.g. Agigian, *Baby Steps;* Marie Mohler and Lacy Frazer, *A Donor Insemination Guide: Written by and for Lesbian Women* (New York: Harrington Park Press, 2002); Judith Stacey, "Gay Parenthood and the Decline of Paternity as We Knew It," *Sexualities* 9 (2006): 27–55; Maureen Sullivan, *The Family of Woman: Lesbian Mothers, Their Children, and the Undoing of Gender* (Berkeley: University of California Press, 2004).

126. Kenyon Farrow, "Is Gay Marriage Anti-black?" *Chickenbones: A Literary Journal* (2004), http://www.nathanielturner.com/isgaymarriageantiblack.htm (accessed December 4, 2008).

127. Kevin Boykin, *One More River to Cross: Black and Gay in America* (New York: Anchor Books, 1996); Matthew Mosk, "Gay Unions Fracture MD.'s Black Caucus; Civil Rights Pull as Strong as Church's," *Washington Post* (January 28, 2006), A01.

128. Stacey M. Brumbaugh, Laura A. Sanchez, Steven L. Nock, and James D. Wright, "Attitudes toward Gay Marriage in States Undergoing Marriage Law Transformation," *Journal of Marriage and Family* 70 (2008): 345–59.

129. "Beyond Same-sex Marriage: A New Strategic Vision for All Our Families and Relationships" (2006), http://www.beyondmarriage.org/ (accessed December 4, 2008); Farrow, "Is Gay Marriage Anti-black?"

130. Cited in Eugene Volkh, "Changing Attitudes about Homosexuality" (2005), http://www.volokh.com/posts/1124468214.shtml (retrieved December 4, 2008).

131. Religioustolerance.org; "Single U.S. Public Opinion Polls: Same-Sex Marriages and Civil Unions," (2006), http://www.volokh.com/posts/1124468214.shtml (retrieved December 4, 2008).

132. A 2004 CBS/NYT poll found that 56 percent of 18- to 29-year-olds supported gay marriage vs. 25 percent of 45- to 64-year-olds (Michaele M. Melendez, "Young Americans More Likely to Support Gay Marriage, Polls Suggest," *Newhouse News Service* [March 11, 2004]: 1); a 2006 California poll found 54 percent of respondents aged 18 to 29 support gay marriage vs. 29 percent of respondents age 65+ (Field Poll, 2006); an August 3, 2006, Pew report found 73 percent of respondents aged 65 and older opposed gay marriage, but 53 percent of adults under 30 support it. Paul Taylor, "Wedge Issues on the Ballot: Can State Initiatives on Gay Marriage, Minimum Wage Affect Candidate Races?" *Pew Research Center* (July 26, 2006); Jeni Loftus, "America's Liberalization in Attitudes toward Homosexuality, 1973 to 1998," *American Sociological Review* 66 (2001): 762–82.

133. Jonathan Turley, "Polygamy Laws Expose Our Hypocrisy," *USA Today* (October 4, 2004).

134. Joseph Carroll, "Society's Moral Boundaries Expand Somewhat This Year," *Gallop Poll* (May 16, 2005), http://www.gallup.com (accessed December 4, 2008).

135. Chambers, "Civilizing the Natives"; Wade Goodwyn, Howard Berkes, and Amy Walters, "Warren Jeffs and the FLDS," *NPR* (May 3, 2005), http://www.npr.org/templates/story/story.php?storyId=4629320 (accessed December 4, 2008).

136. Liberated Christians, "Multiple Intimate Relationships: A Summary of Liberated Christians' Views" (1999), http://www.libchrist.com/bible/polygamy.html (accessed December 4, 2008).

137. Unitarian Universalists for Polyamory Awareness, "Mission" (July 11, 2008) http://www.uupa.org/index#mission (accessed December 4, 2008).

138. *Id.*

139. Chambers, "Civilizing the Natives," 70–71.

140. e.g. Kurtz, "Beyond Gay Marriage"; and Stanley Kurtz, "Big Love from the Set," *National Review Online* (2006), http://www.nationalreview.com/kurtz/kurtz200603130805 .asp (accessed December 4, 2008).

141. Chambers, "Civilizing the Natives," 69; Iversen, *The Antipolygamy Controversy.*

142. "Beyond Same-sex Marriage"; Lisa Duggan, "Holy Matrimony," *The Nation* (March 15, 2004); Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999).

143. Kurtz, "Beyond Gay Marriage."

144. Kersten, "Once Same-sex Marriage Is OK, Polygamy's Next."

145. Kurtz, "Big Love from the Set."

146. Tapestry Against Polygamy, "By 3rd Anniversary of 'Lawrence'—Polygamy Rights Accelerating" (June 26, 2006), http://www.pro-polygamy.com/articles.php?news=0044 (accessed December 4, 2008).

147. *Big Love* instantly inspired an iconic *New Yorker* magazine cover (June 19, 2006) featuring an upbeat "just-married" groom and his three beaming brides waving from their honeymoon, get-away convertible sedan. On the HBO website for the program (http://www.hbo.com/biglove/), *Big Love* actors offer thoughtful reflections on polygyny's trade-offs between autonomy and collectivity, jealousy, and support. See Principle Voices, "FAQs about Mormon Polygamy," http://principlevoices.org/faq (visited March 12, 2009).

148. John Tierney, "Who's Afraid of Polygamy?" *New York Times* (March 11, 2006).

149. See http://www.pro-polygamy.com; quotes a sound-bite from Mark Henkel of TruthBearer.org and proposes "the solution to end the so-called 'same sex marriage' debate once and for all: true limited government by getting government out of defining and 'abominating' marriage altogether."

150. Jennifer Dobner, "Teens Defend Polygamy at Salt Lake Rally," *ABC News* (August 19, 2006), http://abcnews.go.com/US/wireStory?id=2333693 (accessed December 4, 2008).

151. Religioustolerance.org, "The LDS Restorationist Movement, Including the Mormon Churches", http://www.religioustolerance.org/lds_poly2.htm (accessed December 4, 2008).

152. Elizabeth Neff and Pamela Manson, "Court Rejects Polygamy Defense," *Salt Lake Tribune* (May 17, 2006).

153. Jacob Sullum, "Attacking Pluralism, *reasononline*, May 29, 2001 www.reason.com/news/show/35731.html; see also Turley, "Polygamy Laws Expose Our Hypocrisy."

154. http://www.polygamyinfo.com.

155. Tapestry Against Polygamy, "Tapestry Against Polygamy Calls Elder Russell M. Nelson 'Serial Polygamist,' Denounces Hypocrisy," (June 7, 2006), http://www.affirmation.org/news/2006_76.shtml (accessed December 4, 2008).

156. Pamela Manson, "FLDS Added to List of Hate Groups," *Salt Lake Tribune* (April 21, 2005).

157. Farrow, "Is Gay Marriage Anti-black?"

158. Well-known gay writer Andrew Sullivan garnered much criticism by gay rights activists for a blog post in which he decreed, "no ethnic community as homophobic in America as African-Americans." Andrew Sullivan, "Young Evangelicals and Gay Couples," *The Daily Dish* (September 30, 2008), http://andrewsullivan.theatlantic.com/the_daily_dish/2008/09/young-evangelic.html (accessed December 4, 2008). This statement prompted a host of responses, like this one: Ta-Nihisi Coates, "Andrew on Black Homophobia," *The Atlantic* (October 1, 2008), http://ta-nehisicoates.theatlantic.com/archives/2008/10/andrew_on_black_homophobia.php (accessed December 4, 2008).

159. Giddens, *The Transformation of Intimacy.*

160. Burgett, "On the Mormon Question," 77.

161. See http://www.pro-polygamy.com.

162. Andrew J. Cherlin, "The Deinstitutionalization of American Marriage," *Journal of Marriage and the Family* 66 (2004): 848–61; Coontz, *Marriage, a History;* Cott, *Public Vows.*

163. Giddens, *The Transformation of Intimacy.*

164. Cameron, "Sexual Orientation and the Constitution"; Cock, "Engendering Gay and Lesbian Rights."

165. "Beyond Same-sex Marriage"; Burgett, "On the Mormon Question," 95–98; Farrow, "Is Gay Marriage Anti-black?"

166. Recently, however, a few African-American women have suggested the appeal of polygyny to African-American women who face a glaring shortage of marriageable men. See Barbara Bradley Hagerty, "Philly's Black Muslims Increasingly Turn to Polygamy," *NPR* (June 2, 2008), (http://www.npr.org/templates/story/story.php?storyId=90886407&sc=emaf (accessed December 4, 2008).

167. Yarbrough, "We Thee Wed," 4.

168. *Id.,* 7.

169. One legal scholar, Elizabeth Emens, makes precisely this argument. Elizabeth Emens, "Monogamy's Law: Compulsory Monogamy and Polyamorous Existence," *NYU Review of Law and Social Change* 29 (2004).

170. Tierney, "Who's Afraid of Polygamy?"

171. Knute Berger, "Racing Down the Slippery Slope," *Seattle Weekly* (June 23, 2004).

172. Van der Vliet, "Traditional Husbands, Modern Wives?"

173. For further discussion of these arguments, see Duggan, "Holy Matrimony"; Strassberg, "Distinctions of Form or Substance."

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