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SODOMY AND POLYGAMY

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Response to: Adrienne Davis, Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality, 110 Colum. L. Rev. 1955 (2010).

INTRODUCTION

In her Article *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*,¹ Professor Adrienne Davis argues that the frequently invoked analogy between same-sex marriage and polygamy has been a red herring² in the debate about polygamy, distracting collective attention away from polygamy’s multiplicity, its “truly distinctive, and legally meaningful” feature.³ This analogy, Davis observes, has been made by polygamy’s strongest proponents as well as its strongest opponents.⁴ As a result of its ability to distract, Davis argues that the gay marriage analogy has caused scholars to neglect what Davis considers the more pressing questions about polygamy, namely “whether and how polygamy might be effectively recognized and regulated, i.e., licensed.”⁵ She answers these questions by proposing a regulatory model based on commercial partnership law for polygamous marriages.

I should disclose upfront that this Response does exactly what Davis warns against—namely, chasing the red herring that is the analogy between

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1. 110 Colum. L. Rev. 1955 (2010).

2. See, e.g., *id.* at 1958 (“This Article argues that the gay marriage analogy . . . is a red herring, a distraction from the real challenge polygamy raises for law . . .”).

3. See *id.* at 1957 (“[W]hile the gay analogy may make for splashy punditry and good television, it distracts us from what is truly distinctive, and legally meaningful, about polygamy—namely, its challenges to the regulatory assumptions inherent in the two-person marital model.”).

4. See *infra* note 13 and accompanying text (noting gay analogy has been invoked by both sides of polygamy debate).

5. Davis, *supra* note 1, at 1958.

same-sex marriage and polygamy.⁶ It uses Davis's examination of the same-sex marriage analogy to polygamy in order to examine why a better analogy—namely, that between sodomy and polygamy—has not been quite as frequently invoked. Davis did acknowledge that “[a]nalogies are powerful in the liberal legal arsenal,” and that “the gay [marriage] analogy is the battleground on which the cultural war over expanded recognition for alternative family structures is being fought,” so perhaps she will forgive this one relapse.⁷

After reconstructing Davis's argument in Part I, this Response argues in Part II that those in favor of legally recognizing polygamous marriage should analogize it to sodomy rather than same-sex marriage, for two possible reasons in addition to the reason that Davis proffered, namely that polygamy's multiplicity distinguishes it essentially from same-sex marriage. First, since the Supreme Court decided *Lawrence v. Texas*⁸ in 2003, the effort to lift sodomy bans has been much more successful than the effort to win legal recognition for same-sex marriages.⁹ Second, sodomy and polygamy share in common a history of criminalization which same-sex marriage does not, further weakening the analogy between same-sex marriage and polygamy.¹⁰ This Response then argues that an analogy to same-sex marriage, not sodomy, has survived despite the obvious differences between same-sex marriage and polygamy because of a resistance to discussing the specific sexual acts that go on between members of the same sex. It is these sexual acts, of course, that highlight the differences between same-sex and opposite-sex couples.

In Part III, this Response argues that, when fighting for rights on behalf of sexual minorities,¹¹ advocates should remember not only the ways in which these minorities are similar to the sexual majority but also the ways in which

6. A focus on the accuracy of analogies is not unique in legal scholarship and has even been done with respect to same-sex sodomy. See Ariela R. Dubler, From *McLaughlin v. Florida* to *Lawrence v. Texas*: Sexual Freedom and the Road to Marriage, 106 *Colum. L. Rev.* 1165, 1168–69 (2006) (arguing *Lawrence* was better analogized to *McLaughlin v. Florida*, 379 U.S. 184 (1964), which decriminalized “fornication” between members of different races, as opposed to *Loving v. Virginia*, 388 U.S. 1 (1967), which decriminalized marriage between members of different races).

7. Davis, *supra* note 1, at 1986.

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

9. See discussion *infra* Part II.A.1 (reviewing limited success of fight for same-sex marriage).

10. See discussion *infra* Part II.A.2 (noting same-sex marriage has not been criminalized historically).

11. A note on terminology: In this Response, I use the term “sexual minorities” to refer to all those whose sexual preference or gender identity cause them to fall within the minority of the population. I include polygamists in this group. When I use the initialism “LGBT,” I do so to refer only to lesbians, gay, bisexual and transgender people. And when I use the term “gay,” I do so in order to refer to gay and lesbian people, but not to bisexual or transgender people. I have discussed the need to be explicit about naming groups within the broader category of sexual minorities in other work. See, e.g., Elizabeth M. Glazer, Naming's Necessity, 19 *Tul. J.L. & Sexuality* 166, 167 (2010) (urging scholars who write about law as it relates to sexual orientation and gender identity to consider words they use to refer to their constituent group); Elizabeth M. Glazer, Sexual Reorientation, 100 *Geo. L.J.* (forthcoming 2012) (manuscript at 7), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690590 (on file with the *Columbia Law Review*) (“[T]he act of naming is an important step toward making visible those distinctions that even those who perceive them cannot express adequately before those distinctions are named.”).

they are different.¹² This Part draws on the history of the LGBT rights movement to argue that the movement's strategy—which has been to demonstrate how its constituents are just like everybody else—deviates from its purpose, which has been and should be to protect difference. Favoring an analogy to same-sex marriage as opposed to sodomy is but one example of the salience of similarity as opposed to difference in the LGBT rights movement. A better LGBT rights movement, this Response ultimately argues, is one that protects difference—a movement that is unafraid of sodomy and unafraid of incorporating polygamists into its constituency.

I. THE ANALOGY AS DISTRACTION: PROFESSOR DAVIS'S ARGUMENT

Davis argues that the analogy between same-sex marriage and polygamy has distracted attention from polygamy's serial multiplicity, which, according to Davis, is polygamy's distinctive feature. In light of this distinctive feature, Davis proposes a model based on commercial partnership law to regulate polygamy.

A. *Two Same-Sex Marriage Analogies*

Davis argues that the analogy between polygamy and same-sex marriage has had a distracting effect on the debate about the legal recognition of plural marriages.¹³ Davis observes astutely that this analogy has been invoked by both sides of the polygamy debate, perhaps increasing its ability to distract the attention of all of those participating in a debate as opposed to only those on one side.

Polygamy's opponents have invoked the "slippery slope argument"—"the claim that gay marriage will lead to polygamy, polyamory, and ultimately to the replacement of marriage itself by an infinitely flexible partnership system."¹⁴ Those who have invoked the analogy in order to make the slippery slope argument "share[] the fear that recognizing gay marriage will lead all sexual minorities to make similar claims."¹⁵ Polygamy's proponents have also invoked the analogy to same-sex marriage. They have invoked the "alternative

12. Cf. Leo Bersani, Foucault, Freud, Fantasy, and Power, 2 *Gay & Lesbian Q.* 11, 11–12 (1995) (explaining Foucault's warning against interpretation of gay sex by reference to heteronormative metaphors). Professor Bersani notes:

There may be something to say about gays holding hands after . . . erotic play. Don't . . . read *their* tenderness as the exhausted aftermath of cock-sucking that would 'really' be a disguised incorporation of the mother's breast. . . . [W]ith no fantasies to fantasize about, the silenced interpreter becomes the intolerant homophobe.

Id.

13. See Davis, *supra* note 1, at 1957 ("Curiously, this gay analogy is popular among both supporters and detractors of expanded recognition for alternative family structures.").

14. *Id.* at 1981 (quoting Stanley Kurtz, *Big Love*, from the Set, Nat'l Rev. Online (Mar. 13, 2006, 8:05 AM), <http://old.nationalreview.com/kurtz/kurtz.asp> (on file with the *Columbia Law Review*)). For an example of an academic iteration of the slippery slope argument against polygamy, see George W. Dent, Jr., The Defense of Traditional Marriage, 15 *J.L. & Pol.* 581, 628–31 (1999) ("Consider . . . a man who marries two wives . . . then immigrates to America, where he must abandon the second wife. . . . [T]his result seems harsh and pointless . . . [.] Making exceptions is tricky, though, and pushes the law onto a slippery slope.").

15. Davis, *supra* note 1, at 1983.

lifestyles” argument, that both polygamy and same-sex marriage are “equally legitimate ‘alternative’ lifestyles that should be tolerated and given legal recognition.”¹⁶

In arguing that the analogy has had a distracting effect on the polygamy debate, Davis usefully examines the same-sex marriage analogy itself. She observes that the same-sex marriage analogy invoked by either side of the polygamy debate can be traced back to the Supreme Court’s ruling in *Lawrence*, which was not a same-sex marriage decision but held that Texas’s same-sex sodomy statute violated the requirements for substantive due process.¹⁷ As Davis points out, some of *Lawrence*’s broad readers have hoped that it “will provide the foundation for recognizing sexual minorities as warranting constitutional status, which ultimately could lead to gay marriage as a federal right,” and other readers have “seized on the decision’s implications for plural marriage.”¹⁸

The connection between *Lawrence* and same-sex marriage has been made before. After all, the *Lawrence* decision has been read broadly, narrowly, and somewhere in between.¹⁹ And the groundbreaking same-sex marriage decision *Goodridge v. Department of Public Health*—in which the Massachusetts Supreme Court held that the Massachusetts marriage licensing statute, which did not permit same-sex couples to marry, violated the protections of equal liberty and equality in the Massachusetts constitution—was decided in 2003, the same year that *Lawrence* was decided.²⁰ Chief Justice Marshall, who wrote the majority opinion in *Goodridge*, relied on *Lawrence* to support his authority “to define the liberty of all, [but] not to mandate [his and the court’s] own moral code.”²¹ In this way it seems reasonable to argue that *Lawrence* paved the way for successful same-sex marriage decisions.²² But it is worth noting that *Lawrence* was not about same-sex marriage. In fact, as Dale Carpenter has argued, the plaintiffs in *Lawrence* were likely not even in a committed relationship.²³ Nevertheless,

16. *Id.* at 1957.

17. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

18. Davis, *supra* note 1, at 1981.

19. See Elizabeth M. Glazer, When Obscenity Discriminates, 102 Nw. U. L. Rev. 1379, 1415–18 (2008) (noting some “[c]ourts and commentators . . . have interpreted *Lawrence* broadly,” whereas other scholars and most courts have adopted a narrow interpretation in spite of and perhaps because of the decision’s ambiguities).

20. 798 N.E.2d 941, 969 (Mass. 2003).

21. *Id.* at 948 (quoting *Lawrence*, 539 U.S. at 571).

22. This confirms the connection between *Lawrence* and same-sex marriage that scholars have observed. See, e.g., Carlos A. Ball, The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of *Lawrence v. Texas*, 88 Minn. L. Rev. 1184, 1185 (2004) (“*Lawrence* is neither irrelevant to the question of same-sex marriage . . . nor dispositive Instead, the relationship between *Lawrence* and same-sex marriage falls somewhere in the middle.”); Laurence H. Tribe, *Lawrence v. Texas*: The “Fundamental Right” That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1898, 1933–45 (2004) (noting “[t]he *Lawrence* Court’s explicit recognition of the due process *right to demand respect* for conduct protected by the substantive guarantee of liberty” and describing impact of *Lawrence* on development of substantive due process doctrine (internal quotation marks omitted)).

23. See Dale Carpenter, The Unknown Past of *Lawrence v. Texas*, 102 Mich. L. Rev. 1464, 1478 (2004) (“[Plaintiffs] *Lawrence* and Garner may have been occasional sexual partners, but

Lawrence strengthened the connection between same-sex marriage and polygamy and thereby strengthened either iteration of the analogy between them.

B. Polygamy's Differences and Davis's Proposal

Davis argues that there are inherent differences between polygamy and same-sex marriage, and for that matter between polygamy and any dyadic marriage. Polygamy's defining feature, Davis argues, is its multiplicity—"being married to more than one spouse at a time."²⁴ And because that multiplicity typically develops over time, "polygamists do not present themselves as a complete(d) 'group' when they marry, but rather contemplate adding spouses serially."²⁵

Davis explains that this sort of serially multiple association "generates unique transaction costs, bargaining uncertainties, and possibilities for economic vulnerability and opportunism" that simply do not exist in dyadic same-sex marriages.²⁶ For example, because "[t]he marriage is constantly forming and constantly dissolving" as spouses enter and exit the marriage over time, it is unclear how much voting power or entitlement to property any spouse has, because that percentage could change at any time during the marriage.²⁷

Davis argues that one must take into account the differing dynamics in plural marriages when proposing a system to regulate polygamy that "reduce[s] the strategic and opportunistic behavior" that characterizes plural marriages.²⁸ Davis proposes that such a model incorporate default rules for spouses,²⁹ allow the marital unit to "grow and contract without incurring the costs and instability of continual dissolution and formation,"³⁰ require unanimous approval by all existing spouses in order to add a spouse to the marital unit,³¹ provide "gender neutral no-fault rules allowing unilateral exit" from the marriage by any spouse,³² require that spouses decide up front whether a marriage is dyadic or plural, and finally, favor dyadic marriage as a default.³³ As a result of the specific problems generated by the serial multiplicity that characterizes polygamy, Davis argues, the analogy between same-sex marriage and polygamy does not offer any guidance for someone—like Davis—who endeavors to regulate polygamy.

were not in a long-term, committed relationship when they were arrested.").

24. Davis, *supra* note 1, at 2007.

25. *Id.*

26. *Id.* at 2002.

27. See *id.* at 1990 (describing how "the addition of each subsequent spouse increase the claims on the marital 'pie'" and thus "alter a spouse's influence within the unit").

28. *Id.* at 2019.

29. *Id.* at 2004–06.

30. *Id.* at 2007.

31. *Id.* at 2008.

32. *Id.* at 2011.

33. *Id.* at 2013–16.

II. FROM SODOMY TO SAME-SEX MARRIAGE, AND BACK AGAIN

Perhaps part of the reason that the same-sex marriage analogy to polygamy has caused a bottleneck in the polygamy debate is that the analogy between same-sex marriage and polygamy is frankly not very good. This Part describes the fundamental differences between same-sex marriage and polygamy before arguing that sodomy is a much better analogy to polygamy than is same-sex marriage. Despite the differences between same-sex marriage and polygamy, the analogy between them has curiously persisted since the Court decided *Lawrence*. This Part then offers a possible rationale for the analogy's persistence despite fundamental differences between its two analogues.

A. *The Analogy's Problems*

Even though both same-sex marriage and plural marriage relate to marriage, the analogy between them is inapt because of polygamy's serial multiplicity but also for two additional and very obvious reasons.

1. *The Fight for Same-Sex Marriage Has Not Been All That Successful.* — First, the effort to legally recognize same-sex marriages has not been all that successful. Thus, it is curious why proponents of polygamy wish to use it as an analogue when the right to same-sex marriage is not yet widely accepted. Currently, same-sex marriages are recognized in four states and in the District of Columbia.³⁴ This represents tremendous progress in the battle for marriage

34. Same-sex marriage is legally recognized in Connecticut, Massachusetts, New Hampshire, and Vermont. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (holding state statutory prohibition against same-sex marriage impermissibly discriminated against gay people on account of their sexual orientation in violation of Connecticut's constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (invalidating Massachusetts law prohibiting same-sex couples from "the protections, benefits, and obligations of civil marriage"); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. Times, Jun. 3, 2009, at A19 ("The New Hampshire Legislature approved revisions to a same-sex marriage bill . . . making the state the sixth to let gay couples wed."); Nikita Stewart & Tim Craig, *D.C. Council Votes to Recognize Gay Nuptials Elsewhere; Decision Comes as Vermont Legalizes Same-Sex Marriage*, Wash. Post, Apr. 8, 2009, at A1 ("Vermont became the fourth state to recognize same-sex marriage . . ."). Until recently, same-sex marriage was also recognized in Iowa and California. See *The Iowa House v Zach Wahls and His Moms, Democracy in America*, The Economist, Feb. 4, 2011, at http://www.economist.com/blogs/democracyinamerica/2011/02/politics_and_morality_gay_marriage (on file with the *Columbia Law Review*) ("Iowa's Republican-controlled House of Representatives voted 62-37 . . . to approve a proposed amendment to the state constitution that would ban same-sex marriage, undoing the controversial 2009 Iowa Supreme Court decision."). The Iowa Supreme Court decision, *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009), held a provision in the Iowa Code prohibiting same-sex marriages unconstitutional because it violated the equal protection clause of Iowa's constitution. In California, gay marriages have been ruled legal. But as a result of a stay imposed on the Northern District of California's ruling in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (overruling Proposition 8 and asserting "the right to marry protects an individual's choice of marital partner regardless of gender") until the Ninth Circuit decides the appeal, same-sex marriage is not yet legally recognized in California. See Lisa Leff, *Calif. AG Asks Appeals Court to Lift Gay Marriage Ban While Prop. 8 Case Winds Through Court*, Associated Press, March 1, 2011, available at Factiva, Doc No. APRS000020110301e731002ky ("California's attorney general . . . joined lawyers for

equality, but is far from a win. This is not meant to denigrate those who have expended efforts to win marriage equality; a gradual victory may be all that those fighting for marriage equality desire. Bill Eskridge, for example, has argued that the path to legally recognizing same-sex marriage should be “step-by-step and incremental.”³⁵ And though the result of the current effort to federally legalize same-sex marriage³⁶ is as yet uncertain, the move to do so has been criticized by some of same-sex marriage’s original and staunchest supporters.³⁷

2. *Same-Sex Marriage Has Not Been Criminalized.* — Second, as Davis notes in her Article, another important difference between same-sex marriage and polygamy is that polygamy has been criminalized whereas same-sex “unions were denied recognition and licensure, but there were no prosecutions for attempting same-sex marriage.”³⁸ Quite differently, Davis explains, “plural marriages are a crime, with prosecutions often based on courts finding ‘constructive marriages,’ an ironic and bizarre form of recognition.”³⁹

B. *Sodomy: A Better Analogy*

Same-sex marriage and polygamy are different in some pretty obvious ways. Sodomy and polygamy, on the other hand, are much more closely analogous. Of course, sodomy does not (necessarily) possess the quality of serial multiplicity that polygamy does, but the effort to legalize it has been successful and it, like polygamy, has been criminalized. The legalization of sodomy—or, more precisely, the illegality of statutes banning sodomy—occurred in 2003, when the Court decided *Lawrence*. Statutes like the Texas same-sex sodomy statute that was held unconstitutional in *Lawrence*⁴⁰ may not have been enforced for some time before the Court decided *Lawrence*,⁴¹ but sodomy was criminalized just as polygamy is. In fact, the lack of enforcement likens antipolygamy laws to antisodomy laws,⁴² making the resistance to

two same-sex couples and the city of San Francisco in asking a federal appeals court to allow gay marriages to resume while the court considers the constitutionality of the state’s voter-approved ban.”).

35. William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *McGeorge L. Rev.* 641, 647 (2000).

36. See *Perry*, 704 F. Supp. 2d at 991; Am. Found. for Equal Rights, *Our Work*, at <http://www.afer.org/our-work/our-arguments/> (on file with the *Columbia Law Review*) (last visited May 18, 2011) (discussing Foundation’s efforts regarding California’s Proposition 8).

37. See, e.g., Jesse McKinley, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, *N.Y. Times*, May 28, 2009, at A1 (reporting some in gay-rights movement “expressed . . . outright annoyance at the possibility that a loss before the Supreme Court could spoil the chances of future lawsuits on behalf of same-sex marriage”).

Matt Coles, the director of the LGBT project at the American Civil Liberties Union, told the *New York Times* that filing a federal lawsuit was “not something that didn’t occur to us”: “Federal court? Wow. Never thought of that.” *Id.*

38. Davis, *supra* note 1, at 1987.

39. *Id.*

40. *Tex. Penal Code Ann.* §§ 21.01(1), 21.06(a) (West 2003).

41. See Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 *Calif. L. Rev.* 643, 651–53 (2001) (describing lack of enforcement of sodomy laws).

42. See Davis, *supra* note 1, at 1960 n.11 (discussing historical enforcement of

analogizing polygamy to sodomy even more puzzling.

C. *The Effort to Downplay Sex and Difference*

To be sure, this Response is not the first to analogize sodomy and polygamy.⁴³ What has not been examined is why the same-sex marriage analogy to polygamy has persisted if it presents such obvious problems.

It is not really surprising that an analogy to sodomy has not been popular. Despite the fact that sodomy and polygamy are more closely analogous than are same-sex marriage and polygamy, sodomy highlights the ways in which gays are sexual, and the ways in which gays are different. Highlighting either is risky.

Mary Anne Case argued in 1993—ten years before either *Lawrence* or *Goodridge* was decided—that the presence of same-sex couples and the details of their copulation were notably absent from the history of gay rights litigation.⁴⁴ Case observed that “[c]ourts accord the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed”⁴⁵ This observation may be undermined by the real story behind *Lawrence*.⁴⁶ But the real story behind *Lawrence* did not appear in the case’s record, nor has it affected the way *Lawrence* has been read since it was decided.⁴⁷

The fact that *Lawrence* is credited with paving the way for same-sex marriage actually supports Case’s theory about gay couples and copulation. The theoretical implications of *Lawrence* are many. Some are more overtly sexual than others. The Fifth Circuit relied on *Lawrence* in striking down the Texas Obscene Device Act.⁴⁸ The Eleventh Circuit, in roughly the same situation four years earlier, declined the opportunity to rely on *Lawrence* to invalidate a similar law in Alabama.⁴⁹ But these are not the cases that come to mind when one thinks of *Lawrence*.

Lawrence has become a decision about same-sex marriage. And while at the time Case wrote, there were no court decisions favoring same-sex

antipolygamy laws in various “high-profile” cases).

43. See, e.g., *id.* at 1984 nn.88–89 (citing two examples of litigants analogizing polygamy to sodomy ruling in *Lawrence*).

44. See generally Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643 (1993) (commenting on absence of same-sex couples from history of gay rights litigation, as reconstructed by Pat Cain in Patricia A. Cain, *Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1551 (1993)).

45. *Id.* at 1644.

46. See *supra* note 23 and accompanying text (noting plaintiffs in *Lawrence* not in committed relationship).

47. See *supra* notes 19–22 and accompanying text.

48. See *Reliable Consultants Inc. v. Earle*, 517 F.3d 738, 744 (5th Cir. 2008) (“Because of *Lawrence*, the issue before us is whether the Texas statute impermissibly burdens the individual’s substantive due process right to engage in private intimate conduct of his or her choosing.”).

49. See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1250 (11th Cir. 2004) (“[W]e reject the ACLU’s request that we redefine the constitutional right to privacy to cover the commercial distribution of sex toys.”).

marriage,⁵⁰ it is unsurprising in light of her theory that a case about sodomy is now known as a case about marriage. Attitudes toward gays and lesbians have certainly changed since 1993, as they have since 2003, but those attitudes still seem to depend on homosexuals' "behaving 'just like everybody else.'"⁵¹ Copulation seems still to be taboo, even after the Supreme Court squarely addressed it.

III. STRATEGIZING WITH PURPOSE

Gays, lesbians, and polygamists are, in some ways, just like everybody else. But in some ways they are not. The fact that the sodomy analogy to polygamy has not been invoked in the way that the same-sex marriage analogy to polygamy has been is unsurprising. Those engaged in the debate about the legal recognition of plural marriage—some of whom are members of the LGBT rights movement and some of whom are not—seem to have taken a cue from the LGBT rights movement itself: Highlight sameness and downplay difference. While some sodomy statutes applied equally to opposite-sex couples and the act of sodomy is possible between opposite-sex couples, sodomy statutes were directed against homosexuals because sodomy was the act that conceptually separated homosexuals from heterosexuals.⁵²

But *Lawrence* struck down statutes that specifically differentiated gay people. For that reason, it should no longer be taboo to use those statutes as analogues in subsequent battles for civil rights, particularly when the analogy that has been invoked (that to same-sex marriage) suffers from a difference in kind. But the persistence of this bad analogy offers a lesson, not only to those who advocate for polygamy but also to those who advocate for LGBT rights. The LGBT rights movement has, in the past few years, resisted the incorporation of certain constituent groups—transgender people, bisexuals, and polygamists, among others. The incorporation of these other sexual minorities—like the sodomy analogy—highlights the ways in which gays and lesbians are different from everybody else. This Part urges those who advocate for LGBT rights to be aware of the extent to which they are wedded to sameness. Difference is not always bad.

A. *Fractured Movement*

The LGBT rights movement is regrettably fractured. In order to secure victories in its two biggest battles—for same-sex marriage recognition and for the prohibition of discrimination in the workplace—LGBT rights advocates have "intentionally le[ft] parts of the community behind."⁵³ The recent

50. The decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which was subsequently invalidated by the 1998 amendment to the Hawaii constitution, was issued after the publication of Case's article.

51. See Case, *supra* note 44, at 1664 (explaining cases in which gay couples had been afforded certain rights were also cases in which couples were not having sex).

52. See *Lawrence v. Texas*, 539 U.S. 558, 568–71 (2003) (noting while laws banning sodomy had not always been directed against homosexuals in particular, beginning in the 1970's these laws began to single out same-sex relations for criminal prosecution).

53. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 *Colum. J.*

exclusion of transgender people from an earlier draft of the Employment Non-Discrimination Act (ENDA)⁵⁴ on the theory that their inclusion would prevent ENDA's eventual passage, which has not yet occurred, provides a notable example.

If enacted into law, the most recent version of ENDA, like the 2009 version, "would prohibit the states, as well as other employers, from discriminating against their employees on the basis of sexual orientation and gender identity."⁵⁵ ENDA was introduced in the House of Representatives by Representative Barney Frank on April 6, 2011 and in the Senate by Senator Jeff Merkley on April 13, 2011.⁵⁶ In addition, previous versions of ENDA, which would have prohibited discrimination on the basis of sexual orientation but not gender identity, have been introduced in every Congress since the 103rd Congress, with the exception of the 109th Congress.⁵⁷ This exclusion caused sharp division among LGBT rights advocates. In particular, the Human Rights Campaign (HRC) infamously supported a noninclusive ENDA, which prohibited discrimination on the basis of sexual orientation but not on the basis of gender identity, because HRC concluded that a more inclusive ENDA would not pass out of the House of Representatives.⁵⁸ HRC received a lot of criticism for its position on ENDA,⁵⁹ which it later reversed, explaining that its earlier opposition to a transinclusive ENDA "would do more to advance

Gender & L. 21, 22 n.6 (2010) (citing Cynthia Laird, *Tense Meeting with HRC Over ENDA*, Bay Area Reporter, Jan. 10, 2008, at <http://www.ebar.com/news/article.php?sec=news&article=2589> (on file with the Columbia Law Review); Transgender Inclusion May Spell Trouble for ENDA, Workplace Professor Blog (Oct. 3, 2007) at http://lawprofessors.typepad.com/laborprof_blog/2007/10/transgender-incl.html (on file with the Columbia Law Review)); see also Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236, 240 (2006) (observing gay rights movement has become increasingly assimilationist); Marc Spindelman, *Homosexuality's Horizon*, 54 Emory L.J. 1361, 1365 (2005) (analyzing ways in which Goodridge decision employed "like straight" logic).

54. See H.R. 3685, 110th Cong. § 2(2) (2007) (prohibiting employment discrimination on basis of sexual orientation but not gender identity).

55. Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. §2(2) (2011); H.R. 1397, 112th Cong. §2(2) (2011); see also Recent Proposed Legislation—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity, 123 Harv. L. Rev. 1803, 1803 (2010) (analyzing 2009 version of ENDA).

56. S. 811; H.R. 1397.

57. See Recent Proposed Legislation—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity, *supra* note 55, at 1806 & n.23. (noting history of ENDA and citing Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. Rev. 1, 9–12 (2009)).

58. See Laird, *supra* note 53 ("While HRC had previously gone on record as supporting only ENDA that included both sexual orientation and gender identity protections, it abandoned that position once . . . lawmakers on Capitol Hill determined there were not enough votes for the inclusive ENDA to pass out of the House of Representatives.").

59. See HRC T's Up for More Peaceful ENDA Discourse, Good as You Blog (Mar. 26, 2009, 8:24 PM), at http://www.goodasyou.org/good_as_you/2009/03/hrc-ts-up-for-more-peace-enda-discourse.html (on file with the Columbia Law Review) ("Remember in 2007 when their failure to oppose a non-inclusive ENDA led many LGBT activists to Harangue/Ridicule[sic]/Challenge HRC? Well happily, the future seems more Hopeful Regarding Cooperation on passing an inclusive measure.").

inclusive legislation.”⁶⁰ Transgender and bisexual people are minorities among minorities. Their identities overlap to a certain extent with those of gays and lesbians but at times diverge.

Public support for a transinclusive ENDA ultimately brought about support among LGBT rights advocates for a version of ENDA that prohibited discrimination on the basis of sexual orientation and gender identity, which describes the latest versions of the bill which were introduced this spring.⁶¹ The interests of transgender people have not yet been fully integrated into the LGBT rights movement’s goals, but litigation,⁶² scholarly attention,⁶³ and the political attention that the ENDA debate attracted have heightened the collective sensitivity to the harms that transgender people face.

The LGBT rights movement has incorporated transgender people to some degree but need not wait for a major event to include other constituent groups like bisexuals and polygamists. Scholars such as Katherine Franke, Nancy Levit, and Marc Spindelman have observed that the pragmatic strategy for lawyers litigating for LGBT rights has been to use the “‘homo kinship’ model or ‘like straight’ logic to argue for parental rights or same-sex marriage.”⁶⁴

60. HRC Finally Ready to Back Trans-Inclusive ENDA, Queerty, Mar. 26, 2009, at <http://www.queerty.com/hrc-finally-ready-to-back-trans-inclusive-enda-20090326/> (on file with the Columbia Law Review).

61. See *supra* notes 55–56 and accompanying text (describing most recent version of ENDA).

62. See, e.g., *Barnes v. Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (affirming *Smith* on same grounds for discrimination against transgender plaintiff Phelicia Barnes); *Smith v. City of Salem*, 378 F.3d 566, 572–75 (6th Cir. 2004) (holding transgender plaintiff Jimmie Smith could state actionable claim for discrimination under Title VII); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984) (concluding, in case involving transgender plaintiff Karen Ulane, Title VII’s prohibition against “sex” discrimination did not cover discrimination based on gender identity); *Schroer v. Billington*, 577 F. Supp. 2d 293, 300, 303 (D.D.C. 2008) (holding Diane Schroer experienced discrimination in violation of Title VII when employer rescinded job offer after Schroer told employer she was transitioning from male to female).

63. See, e.g., *Transgender Rights* 3–24, 51–69 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) (tracking political history of transgender rights and challenge binary system presents for transgender rights); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum. L. Rev.* 392, 395 (2001) (noting “[t]ransgender rights litigation presents an opportunity to broaden judicial understandings of sex by helping courts comprehend that gender identity, rather than anatomy, is the primary determinant of sex.”); Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 651, 666–72 (2009) [hereinafter Glazer & Kramer, *Transitional Discrimination*] (arguing need for antidiscrimination law to incorporate transitional identity as one worth protecting); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 *Berkeley Women’s L.J.* 15, 17–18 (2003) (examining role of medical evidence to track transgender experience); Elizabeth M. Glazer & Zachary A. Kramer, *Trans Fat, Law & Soc. Inquiry* (forthcoming 2011) (manuscript at 5–6, 22–30), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337129 (on file with the Columbia Law Review) (reviewing Anna Kirkland, *Fat Rights: Dilemmas of Difference and Personhood* (2008) and analogizing discrimination against fat plaintiffs to discrimination against transgendered plaintiffs).

64. Levit, *supra* note 53, at 23 & n.7 (relying on, *inter alia*, the Combined Statement of ACLU, GLAAD, Equality Federation, Lambda Legal, & NCLR, *Make Change, Not Lawsuits*, at http://www.thetaskforceactionfund.org/take_action/guides/change_not_lawsuits.pdf (on file with the Columbia Law Review) (last visited May 18, 2011), which urged strategic lawsuits); see also Franke, *supra* note 53, at 239 (expressing concern that “the rights-bearing subject of the lesbian gay

This logic dictates, for example, that LGBT rights lawyers should litigate cases in states where residents are more likely to agree that gays and lesbians should have the right to marry. This logic also dictates that lawyers arguing for LGBT rights should treat their cases like controlled experiments; only one factor—their clients' sexual preference for members of the same sex—differentiates their clients from everybody else. Unfortunately, this logic has caused the movement for LGBT to exclude, at times intentionally, important constituent groups.

B. *Getting Back to Our Roots by Adding Branches*

The strategy of the LGBT rights movement has gotten in the way of its purpose. The strategy of the movement has been to highlight the ways in which gays and lesbians, and to some extent transgender people, are similar to normal, heterosexual people. While this strategy has not been entirely unreasonable,⁶⁵ it has caused the movement to exclude those who have experienced discrimination for the same reason that gays and lesbians have—because the sex they have is different from monogamous, heterosexual sex that occurs within a dyadic marriage. And the discrimination harms that polygamous people face are real.⁶⁶ For example, they risk losing custody of their children,⁶⁷ losing their jobs,⁶⁸ verbal abuse,⁶⁹ and other forms of prejudice.⁷⁰

Because the current strategy has produced gains, it is reasonable for those who advocate on behalf of LGBT people to continue employing that strategy. But the current strategy grew out of a history of protecting difference.⁷¹ It is

rights movement has now become ‘the couple’”); Spindelman, *supra* note 53, at 1368–75 (explaining success of “like straight” arguments in Goodridge).

65. It has, after all, generated laudable short-term gains for the advancement of rights for gays and lesbians. Some would argue that it has generated gains for transgender people, as well, though I would contend, as I have before, that these gains have not been won in the appropriate way. See Glazer & Kramer, *Transitional Discrimination*, *supra* note 63, at 655–58, 665–71 (urging adoption of cause of action for transitional discrimination—discrimination on basis of transitional identity—in cases involving transgender employment discrimination instead of application of gender-nonconformity principle from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

66. See Ann E. Tweedy, *Polyamory as a Sexual Orientation*, U. Cin. L. Rev. (forthcoming 2011) (manuscript at 43–45), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632653 (on file with the Columbia Law Review) (describing various discrimination harms polyamorous people face).

67. See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277, 310–12 (2004) (retelling story of mother who lost custody of her child because she lived with and considered herself married to two men).

68. See *id.* at 362 (“People living in polyamorous relationships worry about losing their jobs due to discrimination based on their relationships, and no statute or principle has been held to protect individuals from such job discrimination.”).

69. See Tweedy, *supra* note 66, at 44–45 (citing statistical evidence that “about a quarter of respondents had experienced verbal abuse based on their polyamorism”).

70. See *id.* at 44 (“[O]ut polyamory has been associated generally with social stigma and attendant loss of power within monogamous society, such that poly individuals report having lost friends, being alienated from their families, and being ostracized from spiritual and other communities as a result of revealing their polyamory.” (internal quotations omitted)).

71. See Cain, *supra* note 44, at 1587–95, 1612–17 (describing early litigation efforts to

important not to forget about difference entirely, because without difference we would not have any civil rights battles to fight.

CONCLUSION

Adrienne Davis argues that the analogy between same-sex marriage and polygamy has distracted attention from the feature of polygamy that presents the particular challenge for its regulation, namely its characteristic of serial multiplicity. This Response has considered why the same-sex marriage analogy might have had the distracting effect that Davis observes. Sodomy and polygamy present a more obvious analogous pairing than do same-sex marriage and polygamy, but that analogy has not been invoked with the same frequency as the same-sex marriage analogy.

Sodomy, unlike same-sex marriage, highlights the ways in which homosexuals and heterosexuals differ. Marriage is a way for homosexuals to be just like everybody else. Polygamy is different from dyadic marriage, and it is different from homosexuality. Thus, it is unsurprising that those who wish to promote polygamy have resisted the analogy to sodomy in favor of the analogy to marriage. But their resistance presents an opportunity to examine the incorporation of difference within a movement.

This Response has argued that the sodomy analogy to polygamy should be invoked because it is simply a better analogy to polygamy than is same-sex marriage. In addition, this Response has argued that the resistance with which the sodomy analogy to polygamy has been met is analogous to the resistance with which polygamists have faced from the LGBT rights movement. Neither promotes the purpose of the movement, and this Response has argued for the incorporation of difference with respect to both.

Preferred citation: Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM.
L. REV. SIDEBAR 66 (2011),
http://www.columbialawreview.org/assets/sidebar/volume/111/66_Glazer.pdf.

target antisodomy laws causing movement to shift strategy).