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## ARTICLE

# PLURAL MARRIAGE AND COMMUNITY PROPERTY LAW

DIANE J. KLEIN\*

Plural marriage makes strange bedfellows. Fundamentalist Mormons, polyamorous/polyfidelitous sex radicals, and some feminists and proponents of same-sex marriage (including this author), share the view that freedom of intimate association under the United States Constitution, properly understood, must extend beyond the right to marry exactly one person of the opposite gender from oneself. But while it is one thing to endorse marriage freedom, as a matter of principle, it is quite another actually to implement it in law. If people could simultaneously have more than one spouse, the lawyer must ask, how would things actually work, from a marital property perspective? What would happen when someone died or got divorced? A community property state<sup>1</sup> that recognized plural marriage would need to adopt new rules for the division of marital property upon the death or divorce of a multiply married person, and the creation of suitable new rules requires not just minor changes of law, but the introduction of new marital property concepts.<sup>2</sup> Nevertheless, these

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<sup>1</sup> The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Additionally, under the Alaska Community Property Act, spouses can agree to have some or all of their property classified and treated as community property. See ALASKA STAT. §§ 34.77.010-34.77.995. Alaska is not considered a community property state for purposes of this Article.

<sup>2</sup> There are also important questions about the management of community property during

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revisions are manageable and fundamentally in keeping with the community property theory of marriage. These new concepts, and model statutes that employ them, are the subject of this Article.

INTRODUCTION

A fundamental liberty interest in the right to marry has unquestionably been established since at least the nineteenth century.<sup>3</sup> In 1888, the Supreme Court described marriage as “the most important relation in life, as having more to do with the morals and civilization of a people than any other institution . . . without which there would be neither civilization nor progress.”<sup>4</sup> In 1965, Justice Goldberg described marriage as “a relation as old and as fundamental as our entire civilization.”<sup>5</sup> The Supreme Court has held that the United States Constitution protects “[w]ithout doubt . . . the right of the individual to . . . marry, establish a home and bring up children, to worship God according to the dictates of his own conscience.”<sup>6</sup> In the past half-century, the Supreme Court has said that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”<sup>7</sup> and that “it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage.”<sup>8</sup> More recently, in *Zablocki v. Redhail*, the Court said,

[T]he decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.<sup>9</sup>

The Constitution may protect this fundamental freedom, but every-

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the marriage of plurally married people, as well as creditors’ rights. These issues will be addressed in a future Article.

<sup>3</sup> See *Maynard v. Hill*, 125 U.S. 190 (1888).

<sup>4</sup> *Id.* at 205, 211.

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J., concurring).

<sup>6</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>7</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>8</sup> *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977) (internal quotation marks omitted).

<sup>9</sup> *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

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where, marriage is in chains. Bigamy is currently illegal in every state,<sup>10</sup> outlawed by the state constitutions of five states,<sup>11</sup> and same-sex marriage is permitted in just five states and the District of Columbia.<sup>12</sup> For as long as the Supreme Court has praised marriage, polygamy (as plural marriage is typically referred to) has been subjected to a steady stream of obloquy and opprobrium in the courts.<sup>13</sup> The United States Supreme Court has called it an “offence against society,”<sup>14</sup> that “tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to de-

<sup>10</sup> See Appendix: Laws Against Bigamy.

<sup>11</sup> ARIZ. CONST. art. 20, para. 2 (“Polygamous or plural marriages, or polygamous cohabitation, are forever prohibited within this State.”); IDAHO CONST. art. I, § 4 (“Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.”); N.M. CONST. art. 21, § 1 (“Polygamous or plural marriages and polygamous cohabitation are forever prohibited.”); OKLA. CONST. art. 1, § 2 (“Polygamous or plural marriages are forever prohibited.”); UTAH CONST. ENABLING ACT, art. 3 (“[P]olygamous or plural marriages are forever prohibited.”).

<sup>12</sup> See CONN. GEN. STAT. ANN. § 1-1m (Westlaw 2010); D.C. CODE § 46-401 (Westlaw 2010); *Vamum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding that IOWA CODE ANN. § 595.2, which limited marriage to a union between a man and a woman, was unconstitutional); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that regardless of gender, any two otherwise qualified individuals can get married in Massachusetts); N.H. REV. STAT. ANN. § 457:4 (Westlaw 2010); VT. STAT. ANN. tit. 15, § 8 (Westlaw 2010). *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), established the right of same-sex couples to marry in California. This case was overturned by Proposition 8 in November, 2009, which enshrined opposite-sex marriage in the California Constitution; Proposition 8 was declared unconstitutional in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); that decision in turn was stayed pending appeal by *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). Four states and the District of Columbia make “domestic partnership” available to same-sex couples. See CAL. FAM. CODE §§ 297, 297.5 (Westlaw 2010); D.C. CODE §§ 32-701 (defining domestic partners), 32-702 (domestic partnership registration and termination procedures); HAW. REV. STAT. § 572C (Westlaw 2010); ME. REV. STAT. ANN. tit. 22, § 2710 (Westlaw 2010) (establishing domestic partnership registry); ME. REV. STAT. tit. 18-A, § 1-201(10-A) (Westlaw 2010) (defining domestic partner); OR. REV. STAT. ANN. § 106.300 (Westlaw 2010); 2007 Wash. Legis. Serv. 156 S.S.B. 5336 (Westlaw 2010) (establishing domestic partner registry). Another four offer “civil unions.” See CONN. GEN. STAT. ANN. §§ 46b-38aa, 46b-38bb, 46b-38oo (Westlaw 2010); N.H. REV. STAT. ANN. §§ 457-A:1, 457-A:6 (Westlaw 2010); N.J. STAT. ANN. § 26:8A-1 (Westlaw 2010); VT. STAT. ANN. tit. 15, §§ 1201, 1202, 1204(a)-(b) (Westlaw 2010). New Jersey maintains a domestic partner registry as well. See *Domestic Partnership*, N.J. DEPT OF HEALTH AND SENIOR SERVICES, <http://www.state.nj.us/health/vital/dp2.shtml>.

<sup>13</sup> See, e.g., *Pennekamp v. Florida*, 328 U.S. 331, 343 n.6 (1946) (quoting Florida Supreme Court, which referred to “polygamy or . . . other doctrines equally obnoxious to approved moral standards”); *United States v. Darui*, 545 F. Supp. 2d 108, 112 (D. D.C. 2008) (“evidence of polygamous activity is clearly so inflammatory in nature that when its probative value is weighed against its obvious prejudicial effect, the evidence is not admissible”); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 504 (N.Y. 2008) (noting, in custody dispute after divorce of same-sex partners validly married in Canada, that New York will recognize a marriage validly contracted elsewhere unless it is “abhorrent to New York public policy”; that “[t]he abhorrence exception is so narrow that it has been applied only to marriages involving polygamy or incest”; and that New York courts have declined to apply the exception to an incestuous uncle-niece marriage) (citing *In re May*, 114 N.E.2d 4 (N.Y. 1953)).

<sup>14</sup> *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

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grade woman, and to debase man,”<sup>15</sup> and “leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism.”<sup>16</sup> Proponents (not just practitioners) of polygamy have been barred from voting,<sup>17</sup> from holding public office or serving as jurors,<sup>18</sup> and from being admitted to the United States as immigrants.<sup>19</sup> In at least two states even today, merely *teaching about* polygamy can be against the law.<sup>20</sup>

Compelling — and, this author believes, ultimately conclusive — arguments can be made as to why our state and federal Constitutions should protect the right of all adults to marry very nearly whomever they choose.<sup>21</sup> The opponents of marriage freedom are correct in closely associating the legal barriers to same-sex marriage with the barriers to plu-

<sup>15</sup> *Davis*, 133 U.S. at 341.

<sup>16</sup> *Reynolds*, 98 U.S. at 166.

<sup>17</sup> IDAHO CONST. art. VI, § 3 (prior to 1982 amendment); *Shepherd v. Grimmet*, 31 P. 793 (Idaho 1892); *Wooley v. Watkins*, 22 P. 102 (Idaho 1889).

<sup>18</sup> *Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 926 (Utah 1993) (“[T]he Edmunds Act disenfranchised polygamists, declared them ineligible for public office, and forbade their service on juries.”) (citing Gustive O. Larson, *The Crusade and the Manifesto*, in *UTAH’S HISTORY* 257, 259 (Richard D. Poll et al. eds., 1978)).

<sup>19</sup> 8 U.S.C.A. § 1182(a)(10)(A) (Westlaw 2010); *Ali v. Reno*, 829 F. Supp. 1415 (S.D. N.Y. 1993) (Egyptian cleric); 22 C.F.R. § 40.101 (Westlaw 2010); *see also* Dag Ytreberg, 3A C.J.S. *Aliens* § 1201. Similarly, in *Rabia Bibi v. United Kingdom*, Application No. 19628/92, a Bangladeshi polygamist was denied the right to bring a second wife to Britain under the Immigration Act of 1988. The European Commission on Human Rights held that Article 8 of the European Convention on Human Rights was not violated thereby.

<sup>20</sup> The states are Michigan and Mississippi. Michigan Compiled Laws Section 750.441, titled “Teaching, Soliciting and Advocating the Practice of Polygamy,” provides, “Any person who shall solicit to a polygamous life, or teach polygamy as a correct form of family life, for the purpose of inducing men and women to enter into the practice of polygamy or advocate the doctrine and practice of polygamy, or attempt to persuade any person by private or public discourse to adopt a polygamous life, shall be guilty of a felony.” MICH. COMP. LAWS ANN. § 750.441 (Westlaw 2010). Mississippi Code Section 97-29-43 states, “If any person shall teach another the doctrines, principles, or tenets, or any of them, of polygamy; or shall endeavor so to do; or shall induce or persuade another by words or acts, or otherwise, to embrace or adopt polygamy, or to emigrate to any other state, territory, district, or country for the purpose of embracing, adopting, or practicing polygamy, or shall endeavor so to do, he shall, on conviction, be fined not less than twenty-five dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than one month nor more than six months, or both.” MISS. CODE ANN. § 97-29-43 (Westlaw 2010). In ROBERT HEINLEIN, *THE MOON IS A HARSH MISTRESS* (1966), Heinlein imagines a twenty-first century civilization on the Moon — with an intelligent supercomputer, lunar colonies, space travel — and a plurally married protagonist who gets arrested when he visits this planet (“Terra”), where bigamy and polygamy are *still* illegal in 2076 in the former United States, although out of Terra’s “eleven billion people perhaps seven billion lived where polygamy is legal.” ROBERT HEINLEIN, *THE MOON IS A HARSH MISTRESS* 263 (1966).

<sup>21</sup> Whether, for example, adults should be able to marry (and reproduce) within currently prohibited degrees of consanguinity is a question beyond the scope of this Article.

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ral marriage;<sup>22</sup> they err only in seeking to strengthen, rather than abolish, those barriers. Legal recognition of plural marriage, and the included case of same-sex marriage, is essential to true marriage freedom. Every person who genuinely supports freedom of intimate association ought to support this liberty, even those who do not desire for themselves any but the most conventional of unions.

The constitutional arguments in defense of these views have been skillfully made by others.<sup>23</sup> Rather than recapitulating or expatiating

<sup>22</sup> Justice Scalia has associated the justification for the denial of civil rights to homosexuals with the denial of civil rights to proponents or practitioners of plural marriage, and used both as examples of social ills. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., dissenting) (identifying as forms of conduct not entitled to constitutional protection “homosexual sodomy, polygamy, adult incest, and suicide”); *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting) (defending Colorado’s Amendment 2, prohibiting antidiscrimination laws in protection of homosexuals, by reference to the constitutionality of laws under which “[p]olygamists, and those who have a polygamous ‘orientation,’ have been ‘singled out’ by these provisions for much more severe treatment” than Amendment 2’s treatment of homosexuals); *Gonzales v. Oregon*, 546 U.S. 243, 296 (2006) (Scalia, J., dissenting) (referring to the “naked value judgment” that must be made about “the legitimacy of polygamy or eugenic infanticide”). State responses to *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that regardless of gender, any two individuals can get married in Massachusetts, combine same-sex marriage and polygamy as well. “[T]he Ohio General Assembly amended Revised Code Section 3101.01” such that “[a] marriage may only be entered into by one man and one woman” (thereby expressly foreclosing polygamy as well as same-gender unions).” *State v. Carswell*, 871 N.E.2d 547, 551 n.1 (Ohio 2007).

<sup>23</sup> See, e.g., Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL’Y 101 (2006) (questioning policy bases for criminalization of polygamy); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001) (First Amendment); Kristen A. Berberick, Comment, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105 (2007) (arguing that Utah’s bigamy statute is constitutional, but unconstitutional as applied to religious polygamists who do not seek to have their relationships recognized as legal marriages); David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); Samantha Slark, Study Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451 (2004) (privacy rights under the Fourteenth Amendment). No less a defender of liberty than John Stuart Mill himself remarked, “The article of the Mormonite doctrine which is the chief provocative to the antipathy which thus breaks through the ordinary restraints of religious tolerance[] is its sanction of polygamy; which . . . seems to excite unquenchable animosity when practiced by persons who speak English[] and profess to be a kind of Christian[]. No one has a deeper disapprobation than I have of this Mormon institution . . . being a mere riveting of the chains of one-half of the community, and an emancipation of the other from reciprocity of obligation towards them. Still, it must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution; . . . [I]t is difficult to see on what principles but those of tyranny they can be prevented from living there [in Utah] under what laws they please.” JOHN STUART MILL, ON LIBERTY 89-90 (Hackett 1978) (1859). In dicta, courts have occasionally contemplated the possibility that polygamy might at least be “victimless.” See, e.g., *State v. Guadagni*, 178 P.3d 473, 477 (Ariz. Ct. App. 2008) (“there may be instances in which bigamy is a ‘victimless crime’-with all parties to a plural marriage fully informed, willing participants, and no one’s interests acted *against*, in any ordinary sense of the word”). But see Ruth K. Khalsa, Note,

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upon those arguments, therefore, this Article will address some of the legal-theoretical questions of marriage law raised by plural marriage, and begin to work through some of the practical legislative choices that would need to be made in a state that permitted it. It is hoped that this will advance the project of marriage freedom by demonstrating that, although it would require some conceptual innovations in the law, plural marriage can be accommodated without doing violence to any of the basic principles of the marital property system.

This Article focuses on plural marriage in community property states for two primary reasons. First, community property jurisdictions are likely to contain a diversity of potential participants in a more inclusive institution of marriage. Two of the largest polygamous Fundamental Church of Jesus Christ of Latter-Day Saints (FLDS) communities are in community property states, Colorado City, Arizona,<sup>24</sup> and the YFZ Ranch outside Eldorado, Texas, raided in April 2008.<sup>25</sup> Centennial Park, Arizona, is home to a breakaway group from the FLDS,<sup>26</sup> as is Boundary County, in northern Idaho (near Bountiful, in Creston Valley, Canada).<sup>27</sup> One large polygamous family, the “Kingston clan,” has very substantial business interests in Nevada, California, and Idaho, and thus would be acquiring community or quasi-community property in those states.<sup>28</sup> At the same time, cities like Seattle, Washington, Los Angeles and San Francisco, California, Las Vegas, Nevada, and New Orleans, Louisiana,

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*Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665, 1692 (2005) (“In light of the high value modern U.S. culture places on individual autonomy and equality, the cornerstones of the companionate ideal of marriage, it is unlikely that polygamy could be legalized under the same individuality-focused rationale of Lawrence or Goodridge because polygamy tends to be premised on dependence, inequality, and even subordination.”); Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267 (2008) (arguing that polygamy may constitutionally be regulated under the Commerce Clause).

<sup>24</sup> JON KRAKAUER, UNDER THE BANNER OF HEAVEN 10 (Anchor Books 2004).

<sup>25</sup> *137 Children Removed from Polygamous Ranch*, CNN JUSTICE, Apr. 4, 2008, [http://articles.cnn.com/2008-04-04/justice/texas.ranch\\_1\\_polygamist-sect-yfz-ranch-marleigh-meisner?\\_s=PM:CRIME](http://articles.cnn.com/2008-04-04/justice/texas.ranch_1_polygamist-sect-yfz-ranch-marleigh-meisner?_s=PM:CRIME).

<sup>26</sup> Kirk Johnson & John Dougherty, *Raid on Sect in Texas Rattles Other Polygamists*, N.Y. TIMES, May 8, 2008, at A1, available at <http://www.nytimes.com/2008/05/08/us/08raid.html>.

<sup>27</sup> JON KRAKAUER, UNDER THE BANNER OF HEAVEN 31-42 (Anchor Books 2004); Nicholas K. Geranios, *Idaho Officials Studying Polygamists in Bonners Ferry*, SAN DIEGO UNION-TRIBUNE, Apr. 19, 2005, available at <http://legacy.signonsandiego.com/news/nation/20050418-1450-wst-idahopolygamists.html>; Susan Drumheller, *Women of Bountiful Plan Summit: B.C. Polygamist Colony Facing Increasing Scrutiny*, SPOKESMAN REVIEW, Apr. 17, 2005, available at [http://www.spokesmanreview.com/tools/story\\_pf.asp?ID=64978](http://www.spokesmanreview.com/tools/story_pf.asp?ID=64978).

<sup>28</sup> JON KRAKAUER, UNDER THE BANNER OF HEAVEN 18 (Anchor Books 2004); Brooke Adams, *Kingston Inc.: Polygamy's Entrepreneurial Empire, A Company, a Clan, a Corp. with a Plan*, SALT LAKE OBSERVER, Aug. 14, 1998, available at <http://www.xmission.com/~plporter/lds/kingston.htm>.

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have long been home to sexual and relationship non-conformists of one kind or another.<sup>29</sup> There are self-identified “poly-” groups in all of the community property states.<sup>30</sup>

The second reason for focusing on community property states is that plural marriage, perhaps surprisingly, is not so easy to integrate into the community property theory of marital property ownership. As it turns out, it is not at all obvious how best to understand, classify, and divide the community property of a person with more than one spouse at a time, as must be done at death or divorce. This Article focuses on proposed revisions to the California Family Code (and Penal and Probate Codes, as appropriate), for several reasons. California is a bellwether state for marital and family law in general, and for community property law in

<sup>29</sup> Washington (*Seattle Polyamory Meetup Group*, MEETUP.COM, <http://polyamory.meetup.com/1/> (last visited Oct. 9, 2010)); California (many, including *Santa Cruz Polyamory Meetup Group*, MEETUP.COM, <http://polyamory.meetup.com/3/> (last visited Oct. 9, 2010); Nevada (*PolyVegas*, YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyVegas%2F> (last visited Oct. 9, 2010) (age-restricted site)); Louisiana (YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyLouisiana%2F> (last visited Oct. 9, 2010) (age-restricted site); *Polyamory in Louisiana*, YAHOO GROUPS, <http://groups.yahoo.com/group/polyamouryinlouisiana/> (last visited Oct. 9, 2010)).

<sup>30</sup> Arizona (*The Cave Creek Polyamory Meetup*, MEETUP.COM, <http://polyamory.meetup.com/409/> (last visited Oct. 9, 2010); LIBERATED CHRISTIANS, <http://www.libchrist.com/poly/contents.html> (last visited Oct. 9, 2010); California (many, including *Santa Cruz Polyamory Meetup Group*, MEETUP.COM, <http://polyamory.meetup.com/3/> (last visited Oct. 9, 2010); *Los Angeles Polyamory Meetup Group*, MEETUP.COM, <http://polyamory.meetup.com/393/> (Oct. 9, 2010); Idaho (*Inland North-West Poly*, YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2Finwpoly%2F> (last visited Oct. 9, 2010) (age-restricted site)); Louisiana (YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyLouisiana%2F> (last visited Oct. 9, 2010) (age-restricted site); *Polyamory in Louisiana*, YAHOO GROUPS, <http://groups.yahoo.com/group/polyamouryinlouisiana/> (last visited Oct. 9, 2010)); Nevada (*PolyVegas*, YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyVegas%2F> (last visited Oct. 9, 2010) (age-restricted site)); New Mexico (*Ethi-Q Slutdom*, MEETUP.COM, <http://eventful.com/albuquerque/events/the-ethical-slut-discussion-group-part-23-/E0-001-006662727-3> (last visited Oct. 9, 2010)); Texas (*Austin Polyamory Social Group*, YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2Fpoly-austin%2F> (last visited Oct. 9, 2010) (age-restricted site); *Poly-Houston*, POLYAMORY.ORG, <http://lists.polyamory.org/listinfo.cgi/poly-houston-polyamory.org> (last visited Oct. 9, 2010); *DFW-Poly*, YAHOO GROUPS, <http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FDFW-Poly%2F> (last visited Oct. 9, 2010) (age-restricted site)); Washington (*Seattle Polyamory Meetup Group*, MEETUP.COM, <http://polyamory.meetup.com/1/> (last visited Oct. 9, 2010)); and Wisconsin (*Madison Area Polyamory Society*, YAHOO GROUPS, <http://groups.yahoo.com/group/MAPSMembers/> (last visited Oct. 9, 2010); *Poly Eau Claire, Wisconsin*, YAHOO GROUPS, <http://groups.yahoo.com/group/PolyEauClaire/> (last visited Oct. 9, 2010); *Polyamory in Wisconsin*, YAHOO GROUPS, [http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyamory\\_In\\_Wisconsin%2F](http://groups.yahoo.com/adultconf?dest=%2Fgroup%2FPolyamory_In_Wisconsin%2F) (last visited Oct. 9, 2010) (age-restricted site); *PolyMilwaukee*, YAHOO GROUPS, <http://groups.yahoo.com/group/PolyMilwaukee/> (last visited Oct. 9, 2010)).

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particular. It is the most populous state in the United States.<sup>31</sup> Finally, in this author's opinion, it has the best-developed jurisprudence of community property law. The basic approach taken here can also be used in other states.

### I. PRELIMINARY LEGAL REFORMS REQUIRED FOR PLURAL MARRIAGE RIGHTS

Several immediate changes in the law would be required in order to secure and protect plural marriage rights, predominantly in state laws defining marriage, specifying legal barriers to valid marriage, and anti-bigamy criminal statutes.<sup>32</sup> These changes go deeper into the law than the changes required to accommodate same-sex marriage, which requires primarily semantic changes such as changing gender-specific terms like "husband" or "wife" to gender-neutral terms like "spouse," even when the gender of one or both spouses is specified.

Changing the legal definition of marriage is comparatively straightforward. California Family Code Section 300, for example, defines marriage as "a personal relation arising out of a civil contract *between a man and a woman*, to which the consent of the parties capable of making that contract is necessary."<sup>33</sup> Should same-sex marriage rights be restored in California, the italicized words could simply be deleted.<sup>34</sup> Alternatively,

<sup>31</sup> U.S. Census, Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000, available at <http://www.census.gov/population/www/cen2000/maps/respop.html>.

<sup>32</sup> It should be noted that establishing marriage freedom of this breadth would also require changing or overruling the state constitutions of Arizona, Idaho, New Mexico, Oklahoma, and Utah, which to this day contain provisions stating that polygamy is "forever prohibited." See ARIZ. CONST. art. XX, par. 2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, § 1; see also *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting). However, even those states whose constitutions prohibit polygamy have the power to change this. See, e.g., *Barlow v. Blackburn*, 798 P.2d 1360 (Ariz. Ct. App. 1990) (holding that the anti-polygamy clause in the state constitution was not void under equal footing doctrine, U.S. CONST. art. 4, § 3, cl. 1, on the theory that it was included solely to satisfy the requirements of the Enabling Act so that Arizona could gain statehood; whatever the limitations imposed by the Enabling Act, Arizona has had full power since statehood to repeal the antipolygamy clause). Full-scale legalization would also require repeal of § 3 of the federal Defense of Marriage Act, which states, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Defense of Marriage Act, 1 U.S.C.A. § 7 (Westlaw 2010). Certain other federal laws would also need to be changed, such as the law authorizing the exclusion of immigrants "coming to the United States to practice polygamy." See 8 U.S.C.A. § 1182(a)(10)(A) (Westlaw 2010); 22 C.F.R. § 40.101 (Westlaw 2010).

<sup>33</sup> CAL. FAM. CODE § 300(a) (Westlaw 2010) (emphasis added).

<sup>34</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

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the definition could be combined with section 297, defining domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”<sup>35</sup> Merging them would yield a working definition of marriage: “a personal relation arising out of a civil contract between adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring, to which the consent of the parties capable of making that contract is necessary.”

Civil laws relating to impediments to marriage would have to be amended or repealed. California Family Code Section 2201(a), a typical anti-bigamy statute,<sup>36</sup> provides that “[a] subsequent marriage contracted by a person during the life of a former husband or wife of the person, with a person other than the former husband or wife, is illegal and void from the beginning,” unless the former marriage has been annulled or dissolved or the former spouse is legally presumed dead.<sup>37</sup> This law might be amended to add an additional exception providing that a subsequent marriage is valid if “*the former spouse has been notified of and consented to the subsequent marriage.*”<sup>38</sup>

<sup>35</sup> CAL. FAM. CODE § 297(a) (Westlaw 2010).

<sup>36</sup> See, e.g., IND. CODE § 31-11-8-2 (Westlaw 2010) (“A marriage is void if either party to the marriage had a wife or husband who was living when the marriage was solemnized.”); IOWA CODE ANN. § 595.19(2) (Westlaw 2010) (“Marriages between persons either of whom has a husband or wife living are void”); KY. REV. STAT. ANN. § 402.020(1)(b) (Westlaw 2010) (“Marriage is prohibited and void: . . . Where there is a husband or wife living, from whom the person marrying has not been divorced”); ME. REV. STAT. ANN. tit. 19-A, § 701 (Westlaw 2010) (“A marriage contracted while either party has a living wife or husband from whom the party is not divorced is void.”); MASS. GEN. LAWS. ANN. ch. 207, § 4 (Westlaw 2010) (“A marriage contracted while either party thereto has a former wife or husband living [and not divorced] . . . shall be void.”); MO. ANN. STAT. § 451.030 (Westlaw 2010) (“All marriages, where either of the parties has a former wife or husband living, shall be void, unless the former marriage shall have been dissolved.”); NEV. REV. STAT. ANN. § 125.290 (Westlaw 2010) (“All marriages which are prohibited by law because of: . . . [e]ither of the parties having a former husband or wife then living, if solemnized within this State, are void without any decree of divorce or annulment or other legal proceedings.”); N.Y. DOM. REL. LAW § 6 (Westlaw 2010) (“A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living,” unless such former marriage has been annulled or dissolved); S.C. CODE ANN. § 20-1-80 (Westlaw 2010) (“All marriages contracted while either of the parties has a former wife or husband living shall be void.”); UTAH CODE ANN. § 30-1-2 (Westlaw 2010) (“The following marriages are prohibited and declared void: (1) when there is a husband or wife living, from whom the person marrying has not been divorced”); *Tagupa v. Tagupa*, 121 P.3d 924, 926 (Haw. Ct. App.2005) (“In Hawaii, living person A’s purported marriage to living person C, while living person A is lawfully married to living person B, is void *ab initio*.”) (citing *Kienitz v. Sager*, 40 Haw. 1, 2-3 (1953)). Less common is a statute like Kentucky Revised Statute Section 402.020(1)(e), prohibiting marriage “[b]etween more than two (2) persons” as such. See KY. REV. STAT. ANN. § 402.020(1)(e) (Westlaw 2010).

<sup>37</sup> CAL. FAM. CODE § 2201(a) (Westlaw 2010). California’s use of the term “former spouse” includes a current spouse, see CAL. FAM. CODE § 11.

<sup>38</sup> In this Article, proposed changes to existing statutes are noted in *italics*.

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Statutes criminalizing bigamy would also need to be repealed.<sup>39</sup> In California, this includes Penal Code Section 281(a) (“Every person having a husband or wife living, who marries any other person . . . is guilty of bigamy.”),<sup>40</sup> Penal Code Section 283 (“Bigamy is punishable by a fine not exceeding ten thousand dollars (\$10,000) or by imprisonment in a county jail not exceeding one year or in the state prison.”),<sup>41</sup> and Penal Code Section 284 (“Every person who knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than five thousand dollars (\$5,000), or by imprisonment in the state prison.”).<sup>42</sup>

With these legal reforms accomplished, a person still married to one person could legally marry another. Although it might be socially revolutionary, permitting plural marriage is comparatively easy from a legal point of view. The complications introduced by plural marriage occur when we begin to think about the following: whether the person with more than one spouse who marries again has created one large “community,” or multiple dyadic communities, for community property purposes; whether everyone in a plural marriage should be thought of as being married to every other person in the marriage, from a community property point of view; and how property should be distributed when one or more of the unions ends in death or divorce.<sup>43</sup>

## II. GUIDING PRINCIPLES

Several assumptions or basic principles will guide the discussion that follows. It will be demonstrated why these assumptions are justified, although not necessarily shared by each and every advocate of plural marriage, at least in the context of a legal exploration of the contours of marriage freedom.

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<sup>39</sup> See Appendix: Laws Against Bigamy.

<sup>40</sup> CAL. PENAL CODE § 281(a) (Westlaw 2010).

<sup>41</sup> CAL. PENAL CODE § 283 (Westlaw 2010).

<sup>42</sup> CAL. PENAL CODE § 284 (Westlaw 2010).

<sup>43</sup> Hence, this author must differ with commentators such as Samantha Slark, who implied that all that is required is for “[l]egislatures [to] simply repeal statutes criminalizing polygamy and bigamy. . . . Alternatively, the legislature could both repeal statutes criminalizing polygamy and bigamy and amend statutes governing the issuance of a marriage license to allow marriage licenses to be issued for polygamous marriages.” Samantha Slark, Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 460 (2004). Either way would be only the beginning. The rules surrounding management of community property and creditors’ rights over community property during marriage are also quite complicated, but beyond the scope of this Article.

First, a theory of marriage law based on autonomy in intimate association must be neutral as to gender and sexual preference.<sup>44</sup> The value and possession of autonomy is not and ought not be dependent on the gender to which one is assigned at birth, nor any later choice of social gender in conformity with or rejection of the assigned one. Nor is autonomy more valuable in, or more valued by, those of one or another of the more or less familiar sexual preferences or orientations (e.g., heterosexual, homosexual, bisexual). Whether any proposed union is with a person of the same or a different gender (now or as assigned at birth) or orientation than oneself will be regarded as irrelevant to the selection or defense of any proposed rule.

This presents one of the central paradoxes of a liberty-oriented defense of plural marriage. Many of the arguments made herein would be uncongenial, to say the very least, to many proponents and participants in plural marriage. It is a common belief that religious and traditional practitioners of “polygamy”<sup>45</sup> often adhere to very strong norms relating to the gender binary,<sup>46</sup> articulate and enforce radically disparate gender roles (often on gender essentialist grounds), and are aggressively sexist and heterosexist.<sup>47</sup> A liberty-and-autonomy-oriented defender of plural

<sup>44</sup> This is not the only possible argument in favor of plural marriage, though, as Levinson remarks, “The easiest defense of polygamy, of course, would be based on individual autonomy. If consenting adults wish to live in such a relationship, why ought not the state allow it?” Sanford Levinson, *Thinking About Polygamy*, 42 SAN DIEGO L. REV. 1049, 1055 (2005). Levinson sketches other more “utilitarian” arguments: “if one assesses marriage . . . as an institution focused, in the early stages on rearing children, and then later on taking care of ailing partners, then polygamy begins to look better and better. . . . If legally recognized polygamy were available, one might easily foresee a relatively large number of ‘communal marriages’ entered into by middle-aged or old-aged persons.” *Id.* at 1056, 1058.

<sup>45</sup> Used in this particular context, although not throughout this Article, to mean one man with many wives.

<sup>46</sup> The phrase “gender binary” is used here to mean the idea that human beings come in exactly two genders, corresponding rigidly to exactly two preexisting biological sexes. See generally Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GEND. 31 (2005).

<sup>47</sup> See, e.g., Brian H. Bix, *State Interest and Marriage – The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 102 n.46 (2003) (“By my comments, I do not mean to imply that there have not been past and present unpleasant associations with polygamous practices, including sexist assumptions or the exploitation of under-age women.”); see generally Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, Feb. 28, 2003, at A1; Sonja Starr & Lea Brilmayer, *Family Separation Is a Violation of International Law*, 21 BERKELEY J. INT’L LAW 213, 244 (2003) (“When practiced by particular groups within Western countries – most notably by the Mormons in the United States during the nineteenth century, and to a much smaller extent today – mainstream society has condemned polygamy as immoral, sexist, and destructive to children, and has pressured these groups to change their practices.”); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 696 (2001) (“The vast majority of those known as polygamists – both of Mormon and non-Mormon origin – actually practice polygyny, one man with multi-

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marriage need share none of these views; this author personally rejects all of them.

This author's own commitments to gender and sexual-preference neutrality, as well as neutrality between religious and non-religious worldviews and understandings of the marriage relation, mean that this analysis will proceed from the assumption that any acceptable legal change that would validate a man having multiple wives would also validate a woman having multiple spouses; however, this does not necessarily result in polyandry, because she may be married to women as well. All-male and all-female marriages, marriages between or including persons who do not identify as either traditional gender, as well as egalitarian group marriages, including same-sex unions may also exist. A fortiori, if three men or three women can all be married to one another, of course *two* men or two women can be, same-sex unions being a "lesser included case" in plural marriage. Same-sex marriage is therefore subsumed in the liberty and autonomy-based defense of plural marriage.<sup>48</sup>

The examples that follow employ a (comparatively) simple three- or four-person "cast of characters," unimagatively named A, B, C, and D. Four individuals are sufficient to raise most of the theoretical problems. Scalability issues for group marriages of even more persons will also (briefly) be discussed where appropriate. Letters, rather than gender-identified names, have been selected deliberately; for the same reason, gendered pronouns and status-identifying terms (like "husband" and "wife," "widow and "widower") have been avoided as much as possible.

### III. MODELS OF PLURAL MARRIAGE

Anecdotal evidence suggests that the ménage à trois is the most

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ple wives, while polyandry, one wife with multiple husbands, is rare and often condemned. Even discounting for a degree of anti-Mormon hysteria – tales of incest, underage girls forced into polygamy with older men, slave-like situations for unwilling plural wives – the typical polygamist family still seems like a male sexist's dream world.”).

<sup>48</sup> A related argument, taken up by commentators, is to what extent arguments in favor of same-sex marriage must necessarily apply to plural marriage as well. As Sanford Levinson remarks, “If I were advising gay- and lesbian-rights groups, I would heartily counsel them to distance themselves from the socially marginal groups that today advocate polygamy. There would be little to gain, and possibly much to lose, by embracing the strange practices of decidedly off-putting people from Utah and Arizona as part of the argument on behalf of better treatment for gays and lesbians. But this is, obviously, entirely a political point.” Sanford Levinson, *Thinking About Polygamy*, 42 SAN DIEGO L. REV. 1049, 1049, 1054-55 (2005). Note that even as sophisticated a commentator as Levinson carelessly fails to distinguish between “advocating polygamy” and advocating marriage rights for polygamists (a difference as significant as that between “advocating abortion” and “advocating abortion rights”).

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common plural arrangement, in life and in fiction.<sup>49</sup> But even with a group as small as three persons, there are at least two models upon which a plural marriage might be built; a fourth person adds two more possibilities. Each of these is a form of plural marriage, but each reflects a somewhat different understanding of what plural marriage is or could be, and each requires different treatment under community property principles.

## A. ASYMMETRIC POLYGAMY

Consider a married couple, A and B. Some time after marrying A, B desires to marry C. Under current law, B can do so only after divorcing A.<sup>50</sup> If B does not divorce A before marrying C, B and C would be engaged in the criminal practice of bigamy.<sup>51</sup> On the other hand, if plural marriage were legal, B could marry C without divorcing A. (See Figure 1.)

After the second marriage, B would have two spouses (bigamy, or simple polygamy) – but A and C would each have only one, B. This is sometimes called a “V” arrangement, with B as the “hinge” spouse.<sup>52</sup> The death of B would leave two surviving spouses, A and C. However, the death of A would leave only one – B; B would, of course, still be married to C. Similarly, the divorce of A and B would have no effect on the marital status of C.

<sup>49</sup> See, e.g., POLYAMORYONLINE.ORG, [http://www.polyamoryonline.org/articles/polyanna\\_120605.html](http://www.polyamoryonline.org/articles/polyanna_120605.html) (last visited Sept. 19, 2010); ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 134 (1966) (“He was married in commonest [sic] type, a troika in which he was senior husband”; on Luna, where men outnumber women 2 to 1, the most common marriage form is one woman with two husbands); SAMUEL R. DELANY, *BABEL* 17 (1966) (describing “triples”); JOE HALDEMAN, *WORLDS* (1981) (describing “triunes”); NOEL COWARD, *DESIGN FOR LIVING* (1933) (play); MICHAEL CUNNINGHAM, *A HOME AT THE END OF THE WORLD* (1998); GILBERT ADAIR, *HOLY INNOCENTS* (1989); and the films *Jules and Jim* (1962), *Paint Your Wagon* (1969), *Cabaret* (1972), *Y tu mamá también* (2001), and *Bandits* (2001).

<sup>50</sup> See Appendix: Laws Against Bigamy.

<sup>51</sup> See Appendix: Laws Against Bigamy.

<sup>52</sup> POLYAMORYSOCIETY.ORG, <http://www.polyamorysociety.org/language.html> (last visited Sept. 19, 2010).

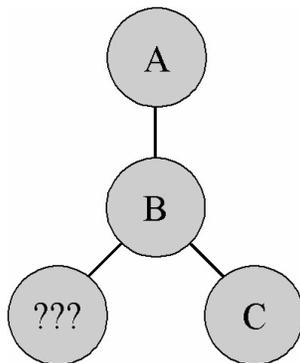


Figure 1

This asymmetric model, when instantiated by one husband with multiple wives, is what is most commonly meant by those using the term “polygamy.”<sup>53</sup> It is the model adopted by those for whom these marriage practices have a strong customary foundation, even a religious mandate, including FLDS and independent Mormon polygamists,<sup>54</sup> some Mus-

<sup>53</sup> And indeed, some commentators object *only* to this form, arguing that “the state, exercising legitimate paternalistic powers, ought to be able to ban marriages that are structurally problematic in this way [asymmetrical polygamy or polyandry]. . . . [But] marriages that take the form of *ménages-a-trois*, or *ménages-a-quatre*, and so on – marriages in which (in some sense) each of the spouses is ‘married’ to each of the other spouses” do not have this problem. Samuel C. Rickless, *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 SAN DIEGO L. REV. 1043, 1048 (2005).

<sup>54</sup> In fact, what FLDS Mormons practice is more properly described as androcentric heterosexual asymmetric polygyny. The Principles that describe it are gender-specific – “celestial marriage” involves a man taking multiple wives; a woman’s sexual involvement with multiple men is still considered “adultery” and is a capital offense. Doctrine & Covenants 132:61, *available at* <http://scriptures.lds.org/dc/132/46,47,48,49> (“And again, as pertaining to the law of the priesthood – if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then is he justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified. But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery, and shall be destroyed; for they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfil the promise which was given by my Father before the foundation of the world, and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.”). *See also* Gordon B. Hinckley, *What Are People Asking About Us?*, ENSIGN, Nov. 1998, at 70, *available at* [http://lds.org/ldsorg/v/index.jsp?locale=0&sourceId=9c672f2324d98010VgnVCM1000004d82620a\\_\\_\\_&vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD](http://lds.org/ldsorg/v/index.jsp?locale=0&sourceId=9c672f2324d98010VgnVCM1000004d82620a___&vgnextoid=bbd508f54922d010VgnVCM1000004d82620aRCRD) (“People inquire about our position on those who consider themselves so-called gays and lesbians. My response is that we love them as sons and daughters of God. They may have certain inclinations which are powerful and which may be difficult to control. Most people have inclinations of one kind or another at various times. If they do not act upon these inclinations, then they can go forward as do all other members of

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lims,<sup>55</sup> and some Africans.<sup>56</sup> For these reasons, polygamy itself is often regarded as heavily gendered, patriarchal, sexist,<sup>57</sup> traditional, or even reactionary, misogynistic, or archaic in its gender politics.<sup>58</sup> Fertility and family-building are often central to the understanding of the marriage relationship and may take precedence over companionate dimensions of coupling.<sup>59</sup> At the same time, the relationships between and among the wives can be quite intimate, although not sexually; they often live in close quarters and participate in one another's daily lives, including the bringing up of one another's children, much more closely than do most siblings or friends outside that environment.<sup>60</sup>

Typical, real-life practices notwithstanding, nothing about this "hub and spoke" (perhaps we should call it "hubby and spoke") model re-

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the Church. If they violate the law of chastity and the moral standards of the Church, then they are subject to the discipline of the Church, just as others are.")

<sup>55</sup> See Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 854-57 (2001) (British Muslims).

<sup>56</sup> See *id.* at 844-54; see also Theodore C. Bergstrom, *On the Economics of Polygyny* (1994) available at <http://www.bec.ucla.edu/polygyny3.pdf> ("The institutions that we model appear to be particularly close to those found in the polygynous societies of Africa where polygyny is the norm. In the countries of the Sahel region of Africa, the percentage of women living in polygynous households ranges from 45% to 55%. In West Africa, Central Africa, and East Africa, these percentages are mostly in the range from 25% to 35%.")

<sup>57</sup> Often this is assumed without argument; e.g., "In the U.S. Constitution, Blacks were counted as three-fifths of a person for representation purposes. Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man." Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 858 (2001) (British Muslims). John Hartung, *Polygyny and Inheritance of Wealth*, 23 CURRENT ANTHROPOLOGY 1 (1982), presents a very interesting argument to the conclusion that "humans tend to transmit wealth to male descendants where polygyny is possible," a different form of sexism than is usually identified as problematic in polygamy.

<sup>58</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890), *overruled on other grounds by Romer v. Evans*, 517 U.S. 620 (1996); see also John Arbuthnot, *An Argument for Divine Providence, Taken from the Constant Regularity Observ'd in the Births of Both Sexes*, 27 PHILOSOPHICAL TRANSACTIONS [of the Royal Society, London] 186, 189 (1710) available at <http://rstl.royalsocietypublishing.org/content/27/325-336/186.full.pdf> ("Polygamy is contrary to the Law of Nature and Justice, and to the Propagation of the Human Race; for where Males and Females are in equal number, if one Man takes Twenty Wives, Nineteen Men must live in Celibacy, which is repugnant to the Design of Nature; nor is it probable that Twenty Women will be so well impregnated by one Man as by Twenty.")

<sup>59</sup> Ruth K. Khalsa, Note, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665, 1693 (2005), contrasts the "procreative-economic purpose" of marriage in which "polygamy is rooted" with "companionate" models that support opposite-sex and same-sex monogamous marriages. *Id.* at 1693. Khalsa appears never to have heard of group marriage, or to have considered whether plural marriage might do as well (or at least, no worse!) at furthering companionship and individual fulfillment, as monogamous marriage.

<sup>60</sup> See Irwin Altman, *Husbands and Wives in Contemporary Polygamy*, 8 J.L. & FAM. STUD. 389 (2006).

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quires that the central person be a man, and all radial persons be women, persons of a different gender than the hub, or the same gender as one another. The distinctive feature of this model, from a community property point of view, is not that it has a man at the center and women arrayed around him. It is that most participants have one spouse, but one participant has more. In a group of  $n$  persons, the radial spouses have exactly one spouse, while the hub has  $n-1$ . This is what this Article will refer to as “asymmetric polygamy.”<sup>61</sup> This term is meant to be descriptive, not pejorative, and there is no necessary implication that the person with more spouses is more favored, privileged, or powerful than the person(s) with fewer.

## B. GROUP MARRIAGE

Under the group-marriage model, B may marry C without divorcing A, and A and C may also marry one another. Each person in the marriage group is married to everyone else – in this case, both of the other two. In this form of plural marriage, the death of one spouse always leaves multiple surviving spouses. In addition, while any pair might divorce, only a divorce of or by both of the others would completely extract the third, severing the legal relationships between them and leaving behind a married couple and one former spouse of the other two. (See Figure 2, below.)

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<sup>61</sup> It is thus a mistake first to *define* polygamy this way, and then draw conclusions that purport to apply more broadly. See, e.g., Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131 (2004), viewing with skepticism “polygamous situations where all parties involved claim to be consenting adults,” and expressly using “polygamy” to refer exclusively to FLDS-style polygyny: “For the purposes of this note, unless otherwise noted, the term ‘polygamist’ is used in reference to Fundamentalist Mormons practicing polygamy in the United States, primarily in the Southwest. For the purposes of this note, the terms ‘plural marriage,’ ‘celestial marriage,’ and ‘spiritual wifery’ will all be considered synonymous to polygamy.” *Id.* at 131 n.12. Ward then concludes that there is “a compelling state interest to prevent polygamous marriage, one that substantially trumps any claim to a privacy right that a polygamist might assert.” *Id.* at 150-51. If, as Ward argues, such marriages result from pressure “tantamount to coercion,” even a regime that permitted plural marriage could criminalize such conduct, just as it does with monogamous marriage today. *Id.* at 151. Coercion is not permissible, even for a first marriage; therefore, her argument misses the point. It also proves too little, since it is unable to reach, for example, coercive first marriage in polygamous communities. See ELISSA WALL, *STOLEN INNOCENCE* (2008).

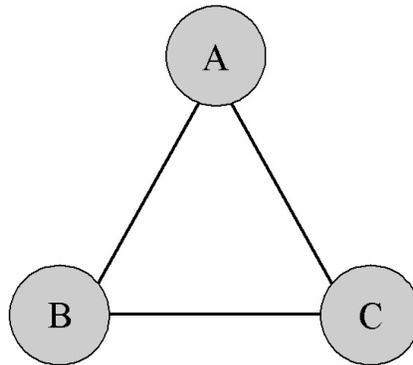


Figure 2

This more egalitarian model necessarily includes same-sex marriage, because at least one of the unions described will involve two persons born or socially identified as the same gender, and, in fact, all three participants might be of the same biological and social gender. Each person in the relationship has the same number of spouses ( $n-1$ ) and is married to each of the other persons in the relationship. The term “group marriage” will be used for this type of arrangement.

#### C. “LINE” MARRIAGE, “DAISY-CHAINS,” HYBRIDS, AND SCALABILITY

Asymmetric polygamy and group marriage would both be legal if bigamy were decriminalized, and they would probably cover a significant fraction of the actual arrangements people might desire.<sup>62</sup> But they do not exhaust the possibilities. Although these two arrangements are “scalable” for groups of four or more persons, there are also distinctive forms for larger groups.

<sup>62</sup> See Appendix: Laws Against Bigamy; see also POLYAMORYONLINE.ORG, [http://www.polyamoryonline.org/articles/polyanna\\_120605.html](http://www.polyamoryonline.org/articles/polyanna_120605.html) (last visited Sept. 19, 2010); ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 134 (1966) (“He was married in commonest [sic] type, a troika in which he was senior husband”; on Luna, where men outnumber women 2 to 1, the most common marriage form is one woman with two husbands); SAMUEL R. DELANY, *BABEL* 17 (1966) (describing “triples”); JOE HALDEMAN, *WORLDS* (1981) (describing “triunes”); NOEL COWARD, *DESIGN FOR LIVING* (1933) (play); MICHAEL CUNNINGHAM, *A HOME AT THE END OF THE WORLD* (1998); GILBERT ADAIR, *HOLY INNOCENTS* (1989).

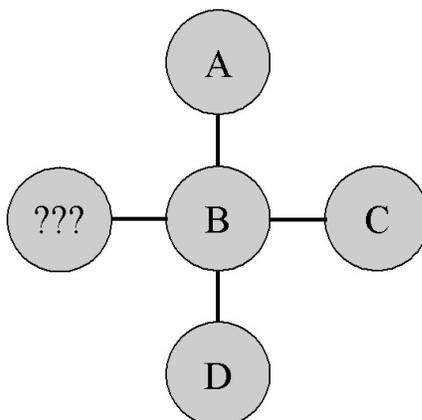


Figure 3

In four-person asymmetric polygamy, the “hub” simply acquires another spouse. (Figure 3, above.) In a four-person group marriage, all three existing spouses marry the fourth. (Figure 4, below.)

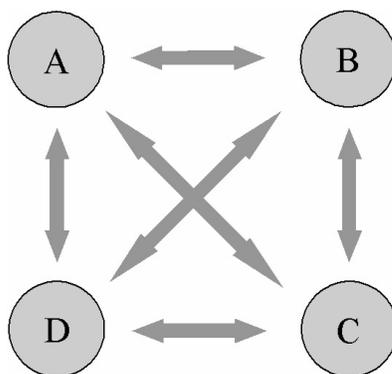


Figure 4

The first model unique to the four-person case is the “line” marriage. In a line marriage, A is married to B, who is also married to C, who is also married to D.<sup>63</sup> (Figure 5, below.) A three-person line mar-

<sup>63</sup> The terminology is drawn from Heinlein, although his “line” marriages more closely resemble group marriages, in which everyone is married to everyone, but in which all sex is heterosexual. ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 42-43 (1966) (“Our marriage is nearly a hundred years old. . . . twenty-one links, nine alive today, never a divorce. . . . Spacing has no rule, just what suits us. Been alternation [by gender] up to latest link, last year. We married a girl when alternation called for boy. . . . senior husband . . . spent our wedding night with her – but consummation was only formal. Number-two husband . . . took care of it later”).

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riage is de facto identical to asymmetric polygamy with a hub and two radial spouses; the difference between them does not emerge until a fourth person is added.



Figure 5

A variant on this is the “daisy chain” marriage. (Figure 6, below.) A “daisy chain” arrangement might be adopted by four heterosexuals, two men (A and C) and two women (B and D). Each person is married to the two opposite-sex members of the group. Again, note that a three-person daisy-chain is the same as the three-person group marriage; it takes a fourth person to bring out the difference.

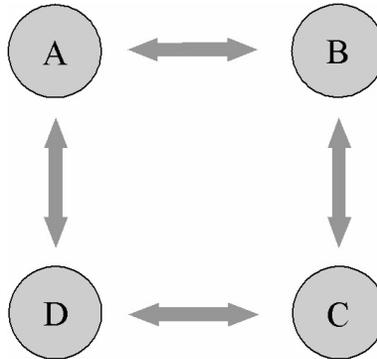


Figure 6

Hybrid forms are also possible in which, for example, A, B, and C are all married to one another, but C is also married to D, and no one else is. (Figure 7, below.)

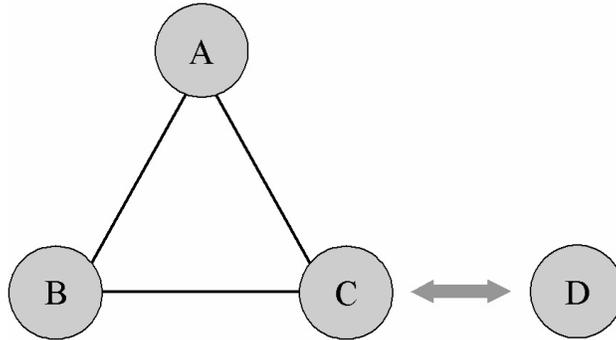


Figure 7

Thus, C has three spouses (A, B, and D), A and B each have two, and D has one (C).

In another variant, A is married to B, C, and D; D is married to A and E; B and C are married only to A, and E is married only to D. (Figure 8, below).

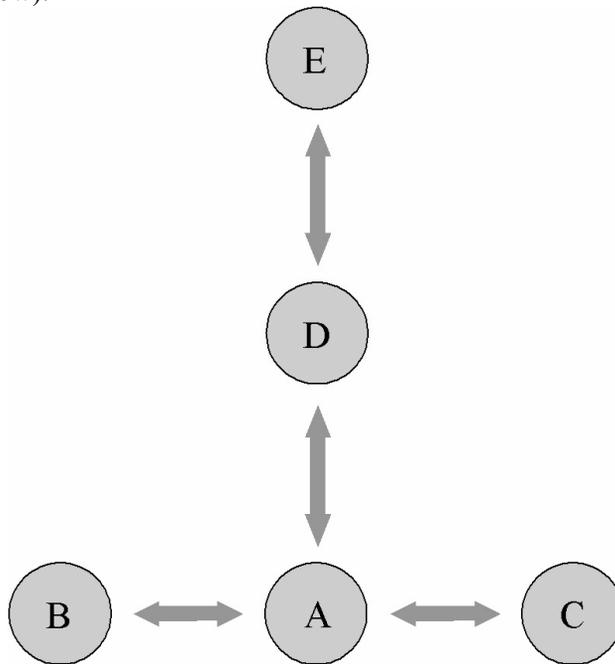


Figure 8

Still larger groups present a myriad of possibilities (a hub-and-spoke marriage in which some, but not all, spokes are also married to one

another; a person who is a spoke in one relationship and a hub with respect to other individuals; etc.). For the sake of simplicity in what follows, however, this Article will focus on the two models that cover the three-person case, asymmetric polygamy and group marriage, and the two that arise for the four-person case, the line and daisy-chain models. The crucial questions and results can be generated for those cases and then applied to larger and more complex groups.

#### IV. NOTICE AND CONSENT

Even in their current, monogamous formulations, marriage laws recognize the importance of consent (autonomy) and choice (liberty) in entering into the marriage relationship.<sup>64</sup> Legal plural marriage need not derogate from that. In keeping with the autonomy-enhancing approach to marriage law, the validity of a plural marriage must depend, at a minimum, upon notice being provided to any and all existing spouses.

Consent is somewhat more complicated. The marriage relationship is, ideally, one between adults and equals. It is unlike the relationship between parent and child, in which parents need not obtain a child's consent before adding another child, or a different spouse, to the family. The decision to add a spouse implicates an individual's freedom of intimate association, which makes a requirement of a third party's consent, even if that third party is already one's spouse, more problematic. In group marriages, the need for all-around consent is obvious. If both A and B are to marry C, all three must necessarily consent to the entirety of the arrangement. Without belaboring the analogy, this is approximately a partnership model in which, as is well established, "[n]o person can become a member of a partnership without the consent of all the partners."<sup>65</sup> What justifies this is that all partners will have duties and responsibilities to one another, and each partner's interests in the

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<sup>64</sup> See, e.g., CAL. FAM. CODE § 301 (Westlaw 2010) ("An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, and not otherwise disqualified, are *capable of consenting* to . . . marriage.") (emphasis added); CAL. FAM. CODE § 302(a) (Westlaw 2010) ("An unmarried male or female under the age of 18 years is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry."); CAL. FAM. CODE § 305 (Westlaw 2010) ("Consent to and solemnization of marriage may be proved under the same general rules of evidence as facts are proved in other cases.").

<sup>65</sup> See, e.g., *Tucker v. Ellbogen*, 793 P.2d 592, 598 (Colo. App. 1989); *In re Estate of Smith*, 749 P.2d 512, 515 (Mont. 1988); *Buffkin v. Strickland*, 312 S.E.2d 579 (S.C. Ct. App. 1984); see also REVISED UNIF. P'SHIP ACT § 401(i) (1997) ("A person may become a partner only with the consent of all of the partners."); REVISED UNIF. P'SHIP ACT § 401 cmt. 10 (1997) ("Subsection (i) continues the substance of UPA Section 18(g) that no person can become a partner without the consent of all the partners.").

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partnership are affected by the addition of new partners.

However, if only B (not A) marries C, as in asymmetric polygamy or line marriage, and only B (not A) acquires legal marital duties towards C, the need for A's consent is not self-evident. Requiring A's consent as a prerequisite for B's formation of a subsequent valid marital union with C reduces B's sexual and intimate associational freedom and thus must be justified. By way of comparison, current divorce law has no consent requirement<sup>66</sup> – B does not need A's consent to divorce A.<sup>67</sup> Being “trapped” in a marriage is regarded as a very serious deprivation of B's intimate associational liberty;<sup>68</sup> in the case of a conflict, B's desire to end the marriage trumps A's desire to stay married. Should plural marriage be like this, so that B's desire to marry C always trumps A's desire that B not do so? The answer is not obvious.

A consent requirement for plural marriage gives existing spouses like A the power to “hold up” the subsequent marriage by withholding consent, or to obtain other concessions, and introduces a “barrier to entry” although B has no “barrier to exit.” Moreover, a consent requirement is not the existing spouse's sole source of power. If B marries C, A may divorce B and reject the arrangement, or remain married to B and ratify the new marriage. The risk of A divorcing B if B marries C without A's consent may induce B to obtain that consent even if it is not strictly required, depending on the power balance in their relationship and on B's desire to stay married to A as compared to the desire to marry C. Without a consent requirement, A would have no power to prevent or void the subsequent marriage.

The analogy from business partnership law may help resolve this impasse. Consent is necessary in that context<sup>69</sup> because adding partners changes the rights and duties of existing partners.<sup>70</sup> Even though A does not owe any marital obligations to C, insofar as A's marital rights are adversely affected by B's additional spouse, A's consent would be re-

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<sup>66</sup> See CAL. FAM. CODE § 2338 (Westlaw 2010) (no mention of consent in determination of order).

<sup>67</sup> Interestingly, in Heinlein's fictional world, divorce from a plural marriage requires the consent of all persons married to that spouse. ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 260 (1996) (“[It] takes unanimous decision of all wives to divorce a husband.”).

<sup>68</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.”) (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

<sup>69</sup> UNIF. P'SHIP ACT § 18(g) (1914) (“No person can become a member of a partnership without the consent of all of the partners.”).

<sup>70</sup> UNIF. P'SHIP ACT § 18(e) (1914) (“All partners have equal rights in the management and conduct of the partnership business.”).

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quired. Consent by existing spouses turns out to be necessary in order to reconcile plural marriage with existing community property law. Further, an all-around consent requirement for any plural marriage may help to allay some ethical concerns about inherent inequality in these marriage forms, particularly those in which not all spouses enter into multiple marital unions.<sup>71</sup>

## V. PLURAL MARRIAGE IN COMMUNITY PROPERTY STATES

## A. THE THEORY OF COMMUNITY PROPERTY

The community property theory of marriage and marital property can be thought of as positing that, upon marriage, a new entity comes into being, the “community,” distinct from either of the spouses.<sup>72</sup> For the duration of the marriage, the community owns the labor of each spouse and all of the proceeds therefrom.<sup>73</sup> All of the property owned by unmarried people, and some of the property owned by married people, is generally derivatively called “separate” property.<sup>74</sup> For example, property acquired by a spouse during marriage, not by labor or its proceeds, but instead by gift, bequest, or inheritance, and the passive accretion thereon, generally is and remains the separate property of that spouse.<sup>75</sup>

<sup>71</sup> Heinlein reaches the same conclusion in his fictional setting. ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 217 (1966) (“But he was clearly talking about marriage and nobody ever proposes another wedding in our marriage without first giving everybody a long careful chance to look the prospect over. You just didn’t *do* it any other way! . . . ‘In this family,’ Mum went on, ‘we have always felt that our husbands should be allowed a veto. Odd of us, perhaps, but Tillie started it and it has always worked well . . . .’”).

<sup>72</sup> See 1 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 2:5 (3d ed. 2010).

<sup>73</sup> See, e.g., NEV. REV. STAT. ANN. § 123.220 (Westlaw 2010) (“Community property defined,” “All property, other than that stated in NRS 123.130, acquired after marriage by either husband or wife, or both, is community property unless otherwise provided by: 1. An agreement in writing between the spouses.”); TEXAS CONST. art. 16, § 15 (“All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property”). Wisconsin calls this property “marital property.” WIS. STAT. ANN. § 766.31(3) (Westlaw 2010) (“Each spouse has a present undivided one-half interest in each item of marital property.”). All property acquired by married people during the marriage is presumptive marital property under Wisconsin law, see WIS. STAT. ANN. § 766.31(1), (2) (Westlaw 2010), including “income earned or accrued by a spouse or attributable to property of a spouse during marriage.” WIS. STAT. ANN. § 766.31(4) (Westlaw 2010).

<sup>74</sup> Wisconsin calls it “individual property.” See WIS. STAT. ANN. § 766.31(7) (Westlaw 2010).

<sup>75</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-211(A) (Westlaw 2010) (“All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is: 1. Acquired by gift, devise or descent.”); LA. CIV. CODE ANN. art. 2341

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Although the different community property states take various approaches at the more detailed level (for example, how to characterize the appreciation of an asset owned separately by one spouse before marriage, such as a business or a work of art), the basic concept is that, during marriage, the community itself is the primary property-acquiring entity. All property owned by a married person can be classified either as community or separate.<sup>76</sup> Enforceable pre- and postnuptial agreements may allow couples to adjust this classification to a greater or lesser degree.<sup>77</sup>

Every marriage ends, either with death or divorce, and this requires the distribution of property. If the marriage ends with the death of one spouse, half of the community property estate goes to the survivor, and the other half, allocated to the decedent spouse, passes by will or through

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(Westlaw 2010) (“The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.”); NEV. REV. STAT. ANN. § 123.130 (Westlaw 2010) (“1. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is her separate property. 2. All property of the husband owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is his separate property.”); TEX. FAM. CODE ANN. § 3.001 (Westlaw 2010), “Separate Property” (“A spouse’s separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.”); WIS. STAT. ANN. § 766.31(7) (Westlaw 2010) (“Property acquired by a spouse during marriage . . . is individual property if acquired by any of the following means: (a) By gift during lifetime or by a disposition at death by a 3rd person to that spouse and not to both spouses. A distribution of principal or income from a trust created by a 3rd person to one spouse is the individual property of that spouse unless the trust provides otherwise. (b) In exchange for or with the proceeds of other individual property of the spouse.”).

<sup>76</sup> See CAL. FAM. CODE §§ 760, 770 (Westlaw 2010).

<sup>77</sup> See, e.g., CAL. PROB. CODE § 100(b) (Westlaw 2010) (“Notwithstanding subdivision (a), a husband and wife may agree in writing to divide their community property on the basis of a non pro rata division of the aggregate value of the community property or on the basis of a division of each individual item or asset of community property, or partly on each basis. Nothing in this subdivision shall be construed to require this written agreement in order to permit or recognize a non pro rata division of community property.”); IDAHO CODE ANN. § 32-712(b)(2) (Westlaw 2010) (in dividing assets, the court may consider “[a]ny antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement”); N.M. STAT. ANN. § 40-3A-1 – 3A-10 (Westlaw 2010) (Uniform Premarital Agreement Act); WIS. STAT. ANN. § 766.58 (Westlaw 2010) (including prenuptial agreements with marital property agreements).

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intestacy.<sup>78</sup> This treatment is uniform among the community property states, although the specific rules for intestate distribution of community property vary somewhat.<sup>79</sup> If the marriage ends in divorce, the community property estate is again divided between the former spouses, with different states using different principles to guide the distribution. For example, California divides the community estate “equally,”<sup>80</sup> Arizona divides it “equitably,”<sup>81</sup> and Texas divides it “in a manner that the court deems just and right,” with no presumption of equality.<sup>82</sup> Idaho divides the assets “in such proportions as the court . . . deems just,” although “compelling reasons” are required to deviate from “a substantially equal division in value.”<sup>83</sup> But however the marital property is divided, community property law has always operated on the assumption that it would be divided between exactly two people.<sup>84</sup> Plural marriage complicates this picture considerably.

#### B. HOW MANY COMMUNITIES?

After B, who is already married to A, marries C, is there now a single community, including all three of them? Or are there two communi-

<sup>78</sup> See, e.g., CAL. PROB. CODE § 100(a) (Westlaw 2010), (“Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.”).

<sup>79</sup> In California, Idaho, Nevada, New Mexico, and Washington, the surviving spouse receives the intestate decedent’s entire share of the community property. CAL. PROB. CODE § 6401(a) (Westlaw 2010); IDAHO CODE ANN. § 15-2-102(b) (Westlaw 2010); NEV. REV. STAT. § 123.250(1)(b)(1) (Westlaw 2010); N.M. STAT. ANN. § 45-2-102(B) (Westlaw 2010); WASH. REV. CODE § 11.04.015(1)(a) (Westlaw 2010). In Arizona, Texas and Wisconsin, the surviving spouse receives the decedent’s entire share of the community property only if the decedent has no issue or all issue are also issue of the surviving spouse. ARIZ. REV. STAT. ANN. § 14-2102(1) (Westlaw 2010); TEX. PROB. CODE § 45(a) (Westlaw 2010); WIS. STAT. ANN. § 852.01(a)(1) (Westlaw 2010). In Louisiana, the surviving spouse receives the decedent’s community property only if the decedent has no issue at all. LA. CIV. CODE ANN. art. 889 (Westlaw 2010).

<sup>80</sup> CAL. FAM. CODE § 2550 (Westlaw 2010) (“Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall . . . divide the community estate of the parties equally.”).

<sup>81</sup> ARIZ. REV. STAT. ANN. § 25-318 A (Westlaw 2010) (“In a proceeding for dissolution of the marriage . . . the court shall assign each spouse’s sole and separate property to such spouse. It shall also divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct.”).

<sup>82</sup> TEX. FAM. CODE § 7.001 (Westlaw 2010) (“In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.”).

<sup>83</sup> IDAHO CODE ANN. § 32-712(1), (1)(a) (Westlaw 2010).

<sup>84</sup> *But see*, Hafner v. Hafner (*In re* Estate of Hafner), 229 Cal. Rptr. 676, 688 (Cal. Ct. App. 1986), and cases discussed therein, dividing decedent’s property between a surviving spouse and an innocent putative bigamous spouse.

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ties, one including A and B, and the other including B and C? Is B part of one community, with more than two members, or part of multiple but separately dyadic communities? Do we reach a different result if A also marries C? These questions are both abstract and concrete. How many communities have been created must be determined in order to characterize the property of a plurally married person correctly. The number of communities has a tremendous impact on the principles of division that will apply when the marriage ends, making the structure of the marriage or marriages a very important decision that either policymakers or participants in legalized plural marriage would need to make.

Analyzing each marriage as creating a new community is simpler than regarding plural marriages as creating an ever-larger community with a variable number of members. If each marriage is analogized to a business venture, it is comparatively straightforward to see how one would do the accounting for two marriages that begin at different times, involve different people, generate different revenue, and so on. One community would be created by A and B's marriage, a second community by B's marriage to C, and so on. However, the multiple-communities approach runs into an immediate problem from community property law. How are we to determine the contribution of the already-married person to the new community? That spouse's labor already belongs, in its entirety, to the first community, with nothing "left over" to contribute to the second.<sup>85</sup> If B is married to both A and C, how much of B's marital earnings go to the A ⇔ B community, and how much to the B ⇔ C community?

The natural suggestion is that, beginning with the second marriage, the earnings of the plurally married person are divided into 1/n shares, where n = the number of spouses that person has (or the number of communities of which that person is a part). A person with one spouse contributes 1/1, or all, earnings to that community; with two, 1/2 goes to each community; with three, 1/3 to each, and so on. This avoids the unfairness of all unions after the first marriage receiving contributions only from the later spouse(s) (C, in our example), and guides allocation in a group marriage. But is it fair to A who, prior to the B ⇔ C marriage, was part of a community that benefited from the entire earnings of both of its members? A legal doctrine to regulate this diminution in the community estate is necessary. Fortunately, we already have one – transmutation.

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<sup>85</sup> CAL. FAM. CODE § 760 (Westlaw 2010) ("Except as otherwise provided by statute, *all* property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." (emphasis added)).

## C. MULTIPLE COMMUNITIES AND TRANSMUTATION

“Transmutation” is the term for the reclassification of assets from community to separate property, or vice versa.<sup>86</sup> When a spouse’s contribution to the first community is reduced from all earnings to 1/n (and then to 1/(n+1) with each subsequent marriage), and those earnings become the property of the second community, this is a transmutation of that fractional share of the first community’s property into the second community’s property.

In California, transmutation of community property is governed by the Family Code. California Family Code Section 850 provides that “married persons may by agreement or transfer, with or without consideration . . . (a) Transmute community property to separate property of either spouse[,] (b) Transmute separate property of either spouse to community property[,] (c) Transmute separate property of one spouse to separate property of the other spouse.”<sup>87</sup> Under California Family Code Section 852(a), “[a] transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.”<sup>88</sup>

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<sup>86</sup> BLACK’S LAW DICTIONARY (8th ed. 2004), defines “transmutation” as “[a] change in the nature of something; esp., in family law, the transformation of separate property into marital property, or of marital property into separate property.” In Wisconsin, this is called “reclassification.” See, e.g., WIS. STAT. ANN. § 766.31(10) (Westlaw 2010).

<sup>87</sup> CAL. FAM. CODE § 850 (Westlaw 2010).

<sup>88</sup> CAL. FAM. CODE § 852(a) (Westlaw 2010); see also IDAHO CODE ANN. § 32-906 (Westlaw 2010); Borghi v. Gilroy (*In re Estate of Borghi*), 169 P.3d 847 (Wash. Ct. App. 2007) (requiring a writing). The Texas Constitution enshrines similar principles: “[P]ersons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses’ community property.” TEX. CONST. art. 16, § 15. Wisconsin law provides that, “Spouses may reclassify their property by gift, conveyance . . . signed by both spouses, marital property agreement, [or] written consent . . . . If a spouse gives property to the other spouse and intends at the time the gift is made that the property be the individual property of the donee spouse, the income from the property is the individual property of the donee spouse unless a contrary intent of the donor spouse regarding the classification of income is established.” WIS. STAT. ANN. § 766.31(10) (Westlaw 2010). *But see*

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The 1/n transmutation model for subsequent marriage is not only the fairest to all the spouses; a transmutation approach also demonstrates the necessity for requiring the consent of any existing spouse to any subsequent marriage, precisely because each subsequent marriage diminishes any prior community's share of the multiply married partner's earnings. Because B's salary is going to be divided between the community of which A is a part and the new community of which C is a part, A's consent must be obtained.<sup>89</sup> More formally, because any contribution to the community estate of the subsequent marriage from the earnings of the already-married spouse requires a transmutation of that spouse's earnings under section 852(a), a writing joined in or consented to "by the spouse whose interest in the property is adversely affected" is required.<sup>90</sup> Otherwise, A is being deprived of a vested interest in property, and B is in breach of the fiduciary duty spouses owe to one another.<sup>91</sup>

The transmutation doctrine can handle line and daisy-chain marriages quite easily. If, after A's marriage to B, and then B's to C, C wishes to marry D, the same analysis will apply. B's consent is required, but not A's, because A's property interests are not adversely affected. If A and B are already married, and C and D are already married, when B and C wish to marry, the consent of both A and D is required. If B and C marry, their default contributions to the new B ⇔ C community will be 1/2 of each of their earnings, with the other half going to the A ⇔ B and C ⇔ D communities, respectively. Alternatively, of course, B and C could enter into a binding prenuptial agreement by which they contributed a different fraction (or none) of their earnings to the B ⇔ C community.<sup>92</sup>

Both to acknowledge plural marriage, and to facilitate allocations other than strictly 1/n, a further subpart could be added to section 850, to wit, "married persons may by agreement or transfer, with or without con-

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Macias v. Macias, 968 P.2d 814, 818 (N.M. Ct. App. 1998) (requiring "clear and convincing evidence of spousal intent" to transmute from separate to community); Sprenger v. Sprenger, 878 P.2d 284, 286 (Nev. 1994) (same).

<sup>89</sup> See CAL. FAM. CODE §§ 850, 852(a) (Westlaw 2010).

<sup>90</sup> CAL. FAM. CODE § 852(a) (Westlaw 2010); see also IDAHO CODE ANN. § 32-906; Borghi v. Gilroy (*In re Estate of Borghi*), 169 P.3d 847, 849 (requiring a writing).

<sup>91</sup> See, e.g., N.M. STAT. ANN. § 40-2-2 (Westlaw 2010) ("Either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.").

<sup>92</sup> Agreements not to create community property are enforceable. CAL. FAM. CODE § 1500 (Westlaw 2010). Query whether, if A and B, and C and D, respectively, had made such agreements, B and C still to need the consent of A and D to marry. Whether A and B, and C and D, have also waived inheritance rights may be relevant.

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sideration . . . (d) *Transmute community property of one marriage to community property of another marriage.*” Alternatively, § 850(a) could be used to transmute a fractional share of a spouse’s earnings to the separate property of that spouse, which could then be transmuted by that spouse into the community property of the subsequent marriage under section 850(b).

## D. THE ONE-COMMUNITY MODEL

The multiple-communities approach works well enough for plural marriage to be a suitable default rule. But for group marriages, in which each spouse is married to each of the other spouses, as well as some asymmetric, line, or daisy-chain marriages, a one-community approach may better reflect the expectations, intentions, and behavior of the parties. The one-community approach might be more accurate, for example, for marriages in which everyone lives together, and all earnings are pooled – in which the group members think of themselves as one family. This model also may be more appropriate when the marriages happen simultaneously or very close together in time. Under the one-community approach, C’s earnings after marriage to A and B would simply be added to the community estate acquired by A and B over the years of their prior marriage. Members of such groups may or may not all be married to one another,<sup>93</sup> and they may or may not all be sexually intimate, but they form one marital community for community property purposes.

Because one goal of legalizing plural marriage is to increase the freedom of adults to order their intimate affairs as they wish, plurally married people ought to have the option of creating multiple communities or just one, either before or during any marriage, and the appropriate treatment of their marital property upon the death of a spouse or a dissolution of a marriage will then depend upon how the relationships are characterized. With multiple communities as the default rule, one-community treatment would require evidence of the parties’ intent and of their subsequent conduct.<sup>94</sup>

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<sup>93</sup> For example, in FLDS-style polygamy, while the “sister wives” are not married to each other, and are not sexually intimate, they do regard themselves as one family (hence the nomenclature), and often a man will marry women who are related to each other. The families of one man often function as a single economic unit, sometimes living together, often pooling earnings, and so on. CAROLYN JESSOP, *ESCAPE* (2007).

<sup>94</sup> See CAL. PROB. CODE § 6402; *Dye v. Battles (In re Estate of Dye)*, 112 Cal. Rptr. 2d 362 (Cal. Ct. App. 2001) (holding that decedent was presumed to know the default intestacy rules, and such rules applied without other evidence that decedent did not intend for those rules to apply).

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## VI. DISTRIBUTION AT DEATH

Proverbially, a marriage lasts “‘til death do us part,” at which point the marital property needs to be divided. Community property states uniformly divide the community estate at death, with half going to the surviving spouse by operation of law,<sup>95</sup> and the other half disposed of by will or intestacy.<sup>96</sup> For intestate decedents, all of the community property generally goes to the surviving spouse,<sup>97</sup> with separate property di-

<sup>95</sup> See, e.g., NEV. REV. STAT. § 123.250(1) (Westlaw 2010) (“upon the death of either husband or wife: (a) An undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property.”); WIS. STAT. ANN. § 861.01(1) (“Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property.”).

<sup>96</sup> See, e.g., N.M. STAT. ANN. § 45-2-805(A) (Westlaw 2010) (“Upon the death of either spouse, one-half of the community property belongs to the surviving spouse, and the other half is subject to the testamentary disposition of the decedent . . . .”); WASH. REV. CODE ANN. § 11.02.070 (Westlaw 2010) (“upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse or surviving domestic partner, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend [intestate]”).

<sup>97</sup> CAL. PROB. CODE § 6401(a) (Westlaw 2010). Four other community property states do not condition the surviving spouse’s share of the community estate of the decedent on the existence or otherwise of issue or close family. See also IDAHO CODE ANN. § 15-2-102(b) (“As to community property: (1) The one-half (1/2) of community property which belongs to the decedent passes to the surviving spouse.”); NEV. REV. STAT. 123.250(1)(b) (“The remaining interest [the decedent’s one-half interest in community property]: (1) Is subject to the testamentary disposition of the decedent or, in the absence of such a testamentary disposition, goes to the surviving spouse.”); N.M. STAT. ANN. § 45-2-102(B) (“[A]s to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse.”); WASH. REV. CODE § 11.04.015(1) (Westlaw 2010) (“The surviving spouse or state registered domestic partner shall receive the following share: (a) All of the decedent’s share of the net community estate . . . .”). In the remaining four, even the descent of the community estate depends on whether the decedent has issue, and in Arizona, Texas and Wisconsin, it depends further on whether those issue are children of the surviving spouse. Arizona is the most severe; under ARIZ. REV. STAT. ANN. § 14-2102(1) (Westlaw 2010), the surviving spouse receives all of the decedent’s community property “1. If there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse also . . . .” but “[i]f there are surviving issue one or more of whom are not issue of the surviving spouse . . . no interest in the one-half of the community property that belonged to the decedent.” Under TEX. PROB. CODE § 45 (Westlaw 2010), “(a) On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if: (1) no child or other descendant of the deceased spouse survives the deceased spouse; or (2) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. (b) On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse.” In Wisconsin, the surviving spouse receives the entire estate (marital and individual property), “If there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse and the decedent.” WIS. STAT. ANN. § 852.01(1)(a)(1) (Westlaw 2010). Louisiana also gives issue an interest in an intestate’s community estate, but in a distinctive way. LA. CIV. CODE ANN. art. 889 (Westlaw 2010), “Devolution of community property,” states, “If the

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vided between the surviving spouse and issue or close family of the decedent.<sup>98</sup> In this section, proposed revised probate statutes are presented.

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deceased leaves no descendants, his surviving spouse succeeds to his share of the community property.” But LA. CIV. CODE ANN. art. 890 (Westlaw 2010), “Usufruct of surviving spouse,” provides, “If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent’s share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first.”

<sup>98</sup>CAL. PROB. CODE § 6401(c) (Westlaw 2010). Idaho divides the separate property between a surviving spouse and issue or parents. “The intestate share of the surviving spouse is as follows: (a) As to separate property: (1) If there is no surviving issue or parent of the decedent, the entire intestate estate; (2) If there is no surviving issue but the decedent is survived by a parent or parents, one-half (1/2) of the intestate estate; (3) If there are surviving issue of the deceased spouse, one-half (1/2) of the intestate estate.” IDAHO CODE ANN. § 15-2-102 (Westlaw 2010). Nevada’s approach is similar to California’s, in giving all of the separate property estate to the surviving spouse of an intestate decedent without issue or close family, one-half if there is one child or issue of a predeceased child, and one-third if there are issue of more than one child. NEV. REV. STAT. § 134.040 (Westlaw 2010) (“1. If the decedent leaves a surviving spouse and only one child, or the lawful issue of one child, the estate goes one-half to the surviving spouse and one-half to the child or the issue of the child. 2. If the decedent leaves a surviving spouse and more than one child living, or a child and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to the children and the lawful issue of any deceased child by right of representation.”); NEV. REV. STAT. § 134.050 (Westlaw 2010) (“1. If the decedent leaves no issue, the estate goes one-half to the surviving spouse, one-fourth to the father of the decedent and one-fourth to the mother of the decedent, if both are living. If both parents are not living, one-half to either the father or the mother then living. 2. If the decedent leaves no issue, or father or mother, one-half of the separate property of the decedent goes to the surviving spouse and the other one-half goes in equal shares to the brothers and sisters of the decedent. 3. If the decedent leaves no issue or surviving spouse, the estate goes one-half to the father of the decedent and one-half to the mother of the decedent, if both are living. If both parents are not living, the whole estate goes to either the father or the mother then living. 4. If the decedent leaves no issue, father, mother, brother or sister, or children of any issue, all of the separate property of the decedent goes to the surviving spouse.”). New Mexico gives all of the intestate separate property to the surviving spouse if there are no issue, but only one-quarter if there are issue, without reference to other surviving family. N.M. STAT. ANN., § 45-2-102(A) (Westlaw 2010) (“The intestate share of the surviving spouse is determined as follows: . . . as to separate property: (1) if there is no surviving issue of the decedent, the entire intestate estate; or (2) if there is surviving issue of the decedent, one-fourth of the intestate estate . . .”). The Texas Probate Code (which refers to separate property as the “personal estate”) limits the spousal share to one-third if the decedent had issue or close family, and also treats real property different than personal property. TEX. PROB. CODE § 38(b) (Westlaw 2010) (“Intestate Leaving Husband or Wife,” stating, “Where any person having title to any estate, real, personal or mixed, other than a community estate, shall die intestate as to such estate, and shall leave a surviving husband or wife, such estate of such intestate shall descend and pass as follows: 1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants. 2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased has neither surviving father nor mother nor surviving brothers or sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole

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While the revised statutes proposed here may be a bit unwieldy, this section is intended to demonstrate that each state's current basic approach to the division of community property upon the death of a spouse, and to the intestate succession both of community and separate property in that event, can be preserved intact, while simultaneously accommodating multiple forms of plural marriage.

California Probate Code Section 100(a) provides that "[u]pon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent."<sup>99</sup> California Probate Code Section 6401(a) states that "[a]s to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100."<sup>100</sup> The California Probate Code thus ensures that every surviving spouse receives no less than half of the community property estate, under section 100(a), and may receive all of it from an intestate decedent, under section 6401(a).

For a plurally married person, the statutes' references to "*the com-*

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of the estate of such intestate." Washington also divides the separate estate between the surviving spouse and issue (without reference to the other parent) or close family. WASH. REV. CODE § 11.04.015(1) (Westlaw 2010) ("The surviving spouse or state registered domestic partner shall receive the following share . . . (b) One-half of the net separate estate if the intestate is survived by issue; or (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his parents, or by one or more of the issue of one or more of his or her parents; or (d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent."). In Wisconsin, the surviving spouse receives all of the separate (or what Wisconsin calls "individual" property) "if there are no surviving issue of the decedent, or if the surviving issue are all issue of the surviving spouse and the decedent," but "[i]f there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of decedent's property other than the following property: a. The decedent's interest in marital property. b. The decedent's interest in property held equally and exclusively with the surviving spouse as tenants in common." WIS. STAT. ANN. § 852.01 (Westlaw 2010). Louisiana's approach is unique: Louisiana Civil Code article 891, titled "Devolution of separate property . . .," provides, "If the deceased leaves no descendants but is survived by a father, mother, or both, and by a brother or sister, or both, or descendants from them, the brothers and sisters or their descendants succeed to the separate property of the deceased subject to a usufruct in favor of the surviving parent or parents. If both parents survive the deceased, the usufruct shall be joint and successive." LA. CIV. CODE ANN. art. 891 (Westlaw 2010). Under Louisiana Civil Code article 892, "[i]f the deceased leaves neither descendants nor parents, his brothers or sisters or descendants from them succeed to his separate property in full ownership to the exclusion of other ascendants and other collaterals. If the deceased leaves neither descendants nor brothers or sisters, nor descendants from them, his parent or parents succeed to the separate property to the exclusion of other ascendants and other collaterals." Only if there is no family at all, does a surviving spouse take separate property intestate; it is not divided into shares. LA. CIV. CODE ANN. art. 892 (Westlaw 2010). Louisiana Civil Code article 894, titled "Separate property; rights of surviving spouse," provides, "If the deceased leaves neither descendants, nor parents, nor brothers, sisters, or descendants from them, his spouse not judicially separated from him shall succeed to his separate property to the exclusion of other ascendants and other collaterals." LA. CIV. CODE ANN. art. 894 (Westlaw 2010).

<sup>99</sup> CAL. PROB. CODE § 100(a) (Westlaw 2010).

<sup>100</sup> CAL. PROB. CODE § 6401(a) (Westlaw 2010).

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munity property” and “*the* surviving spouse” are insufficiently precise terms. A proposed Revised California Probate Code Section 100(a), with necessary definitions, reads as follows:

*Definitions.*

“*Marital community.*” A “*marital community*” refers to two or more persons,

- (i) at least two of whom are married to one another,
- (ii) each of whom is married to at least one of the others, and
- (iii) who form one community for community property purposes.

“*Surviving community.*” A “*surviving community*” refers to a marital community,

- (i) at least two of whom are married to one another at the decedent’s death,
- (ii) at least one of whom was married to the decedent, and
- (iii) who continue the marital community after the decedent’s death.

Upon the death of a married person, as to any marital community of which the decedent was a member,

- (i) If there is exactly one surviving spouse and no other surviving member of the marital community, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.
- (ii) If there is more than one surviving spouse, but no surviving community, a fractional share of the community property of each marriage, whose numerator is 1 and whose denominator is the number of members of that marital community including the decedent, belongs to the decedent, and the remaining share belongs to the surviving spouse(s) as their separate property.
- (iii) If all surviving spouses are members of a surviving community, a fractional share of the community property, whose numerator is 1 and whose denominator is the number of members of the surviving community plus 1, belongs to the decedent, and the remaining share belongs to the surviving community as community property.

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(iv) *If there are three or more surviving spouses, at least one of whom wishes not to continue the marital community, and at least two of whom wish to continue the marital community, the fractional share of the community property, whose numerator is 1 and whose denominator is the number of surviving spouses plus 1, belongs to the decedent, and the remaining shares belong to the surviving spouses and the surviving community on a per-capita basis.*

Obviously, subdivisions (ii), (iii), and (iv) introduce the most significant innovations. The “surviving community,” as a post-mortem holder of community property, is a new concept in marital law, as are the expansion of the marital community beyond two persons, and any fractional division reflecting the possibility of more than one surviving spouse.<sup>101</sup> When a monogamous marriage ends in death, there is exactly one formerly married person who is still alive. That person is the “surviving spouse.” Revised California Probate Code Section 100(a)(i) covers this situation, as well as plural marriages in which the death of a person leaves just one surviving spouse – for example, the death of a plural wife in asymmetric androcentric polygamy (with a multiple-communities analysis), or the death of a person at either “end” of a line marriage.

In some cases, a person dies with multiple spouses, but those spouses are not married to, nor do they form one marital community with, one another. Alternatively, the survivors and decedent may have formed one marital community during the decedent’s life, but it ends with the decedent’s death. This would typically be the situation after the death of a husband with multiple wives. In such situations, Revised California Probate Code Section 100(a)(ii) directs us to identify the community estate of each marriage, and allocate a fractional share (1/n) to the heirs or devisees of the decedent, and 1/n to each surviving spouse of that marriage (as separate property). Doing this more than once, because the decedent leaves multiple surviving spouses, is no great complication. If this person dies intestate, the entire community property estate of each

<sup>101</sup> Revised CAL. PROB. CODE § 100(a)(i) and (ii) also owe something to a line of California cases involving the division of an intestate estate between a surviving spouse and a bigamous putative spouse. In *Estate of Hafner*, the court reviewed these cases and concluded, “every court which has considered the issue of succession to a decedent’s intestate estate, as between a surviving legal spouse and a surviving putative spouse, has awarded one-half of the quasi-marital property to the putative spouse and the other half to the legal spouse, or spouse and children.” *Hafner v. Hafner (In re Estate of Hafner)*, 229 Cal. Rptr. 676, 688 (Cal. Ct. App. 1986). A tentative move in this same direction is suggested by Michèle Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse so as to Include de Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461 (2007).

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marriage reverts to the survivor(s), just as it would for a monogamous surviving spouse.<sup>102</sup>

However, group marriages, in which everyone is married to everyone, or asymmetric polygamous or daisy-chain marriages in which the spouses form a single marital community, render this treatment both inaccurate and undesirable. Although we need to carve out a devisable, descendible separate property share for the deceased spouse, the entirety of the marital property should not be “divvied up” among the remaining spouses in individual separate property slices. In such cases, it is not accurate to speak of a “surviving spouse” or even of “surviving spouses” because the marriage is ongoing, and the marital community survives the loss of one spouse. After the deceased spouse’s share is calculated, what remains should retain its community property character. Revised California Probate Code Section 100(a)(iii) uses the new concept of the “surviving community” to cover this situation.<sup>103</sup>

<sup>102</sup> See CAL. PROB. CODE §§ 100(a), 6401(a) (Westlaw 2010).

<sup>103</sup> This innovation will also allow us to revise the statutes of the other community property states. For example, Nevada revised Statutes section 123.250(1) currently reads, “upon the death of either husband or wife: (a) An undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property.” NEV. REV. STAT. § 123.250(1) (Westlaw 2010). Together with the new definitions, Revised § 123.250(1) would read, “Upon the death of any husband or wife, (a) *If there is exactly one surviving spouse and no other surviving member of the marital community*, an undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property. (b) *If there is more than one surviving spouse, but no surviving community*, a fractional share of the community property of each marriage, whose numerator is 1 and whose denominator is the number of members of the marital community including the decedent, belongs to the decedent, and the remaining share is the property of the surviving spouse(s) and is their sole separate property. (c) *If there is a surviving community*, a fractional share of the community property, whose numerator is 1 and whose denominator is the number of members of the surviving community plus 1, belongs to the decedent, and the remaining share belongs to the surviving community as community property.” Similarly, New Mexico Statutes section 45-2-805(A), which currently reads, “Upon the death of either spouse, one-half of the community property belongs to the surviving spouse, and the other half is subject to the testamentary disposition of the decedent,” N.M. STAT. ANN. § 45-2-805(A) (Westlaw 2010), would be revised to read (along with the definitions), “Upon the death of any spouse, (a) *If there is exactly one surviving spouse and no other surviving member of the marital community*, one-half of the community property belongs to the surviving spouse, and the other half is subject to the testamentary disposition of the decedent,” (b) *If there is more than one surviving spouse, but no surviving community*, a fractional share of the community property of each marriage, whose numerator is 1 and whose denominator is the number of members of the marital community including the decedent, is subject to the testamentary disposition of the decedent, and the remaining share belongs to the surviving spouse(s). (c) *If there is a surviving community*, a fractional share of the community property, whose numerator is 1 and whose denominator is the number of members of the surviving community plus 1, is subject to the testamentary disposition of the decedent, and the remaining share belongs to the surviving community as community property.” Wisconsin Statutes section 861.01(1), which currently reads, “Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property,” WIS. STAT. ANN. § 861.01(1) (Westlaw 2010) would be revised to read, “Upon the death of any spouse, (a) *If there is exactly one surviving spouse and no*

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With this in place, we can turn to California Probate Code Section 6401(a), covering intestate succession. Section 6401(a) currently reads, “[a]s to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100.”

To track Revised California Probate Code Section 100(a), California Probate Code Section 6401(a) can be amended to read,

As to community property,

*(i) If there is exactly one surviving spouse and no other survivor of the marital community, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Revised Section 100.*

*(ii) If there is more than one surviving spouse, but no surviving community, the intestate share of each surviving spouse(s) is the fractional share of the community property of each community that belongs to the decedent under Revised Section 100, divided by the number of such spouses.*

*(iii) If all surviving spouses are members of a surviving community, the intestate share of the surviving community is the fractional share of the community property that belongs to the decedent under Revised Section 100.*

*(iv) If there are three or more surviving spouses, at least one of whom wishes not to continue the marital community, and at least two of whom wish to continue the marital community, the intestate share of the community property that belongs to the decedent under Revised Section 100 is to be divided per capita among the surviving spouses, with the shares allocated to surviving spouses in a surviving community remaining the community property of that community.*

Note that Revised Section 6401(a)(iii), like all intestacy statutes, would only apply to those who die without a will. Persons in plural marriages would still have the power to leave their 1/n share of the community

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*other surviving member of the marital community, the surviving spouse retains his or her undivided one-half interest in each item of marital property, (b) If there is more than one surviving spouse, but no surviving community, each surviving spouse retains a fractional share of the community property of each marriage, resulting from subtracting from 1 a fraction whose numerator is 1 and whose denominator is the number of members of the marital community including the decedent, divided by the number of such surviving spouses. (c) If there is a surviving community, the surviving community retains its undivided fractional interest in each item of marital property, a fractional interest calculated as 1 minus a fraction whose numerator is 1 and whose denominator is the number of members of the surviving community plus 1.”*

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property by will, including a holographic will, in most community property states,<sup>104</sup> to whomever they want.

Finally, California Probate Code Section 6401(c) provides for the intestate distribution of the deceased spouse's separate property:

As to separate property, the intestate share of the surviving spouse or surviving domestic partner . . . is as follows:

(1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.

(2) One-half of the intestate estate in the following cases:

(A) Where the decedent leaves only one child or the issue of one deceased child.

(B) Where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them.

(3) One-third of the intestate estate in the following cases:

(A) Where the decedent leaves more than one child.

(B) Where the decedent leaves one child and the issue of one or more deceased children.

(C) Where the decedent leaves issue of two or more deceased children.<sup>105</sup>

The basic idea is that the surviving spouse receives a decreasing amount of the intestate deceased spouse's separate property, depending on how many children or other close family members the deceased

<sup>104</sup> Holographic wills are valid under the laws of Arizona, California, Idaho, Louisiana, Nevada, and Texas. ARIZ. STAT. ANN. § 14-2503 (Westlaw 2010) (requiring signature and material parts of the will to be in the testator's handwriting); CAL. PROB. CODE ANN. § 6111 (Westlaw 2010) (same); IDAHO CODE ANN. § 15-2-503 (Westlaw 2010) (same); LA. CIV. CODE ANN. art. 1588 (Westlaw 2010) (written and signed by the testator, and dated); NEV. REV. STAT. § 133.090 (Westlaw 2010) (signature, date and material provisions are written by the hand of the testator); TEX. PROB. CODE ANN. § 60 (Westlaw 2010) (entirely written by the testator). Washington, Wisconsin, and New Mexico do not recognize holographic wills, but will probate such wills if they are valid where and when executed. WASH. REV. CODE § 11.12.020 (Westlaw 2010); WIS. STAT. ANN. § 853.05 (Westlaw 2010); N.M. STAT. ANN. § 45-2-50654-1A-503 (Westlaw 2010).

<sup>105</sup> CAL. PROB. CODE § 6401(c) (Westlaw 2010); *accord* ARIZ. REV. STAT. ANN. § 14-2101 (Westlaw 2010); IDAHO CODE ANN. § 15-2-102 (Westlaw 2010); NEV. REV. STAT. §§ 134.040, 134.050 (Westlaw 2010); N.M. STAT. § 45-2-102(A) (Westlaw 2010); TEXAS PROBATE CODE § 38(b) (Westlaw 2010); WASH. REV. CODE § 11.04.015 (Westlaw 2010); WIS. STAT. ANN. § 852.01 (Westlaw 2010); and LA. CIV. CODE art. 891, 892, and 894 (Westlaw 2010).

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spouse has.<sup>106</sup> This statute would be easy to modify, simply by changing the first sentence to read, “As to separate property, the intestate share of the surviving spouse, surviving domestic partner *or surviving community . . .*” With this amendment, if a member of a group marriage dies intestate, childless, and without close family members, all of that person’s property will go to the surviving community; otherwise, the separate property will be split between the surviving community and any close family of the intestate, precisely tracking the existing intestacy statute.

Most other community property states take an approach similar to that of California, and their laws could be similarly revised. Arizona law, however, is different enough to warrant attention.<sup>107</sup> One statute covers both the separate and community property estates of the decedent, but distributes them differently depending on whether the decedent left issue who are not also issue of the surviving spouse. Under Arizona Revised Statutes Section 14-2102(1), “the entire intestate estate,” “both separate property and the one-half of community property that belongs to the decedent, passes to the surviving spouse: 1. If there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse also . . . .”<sup>108</sup> But “[i]f there are surviving issue one or more of whom are not issue of the surviving spouse, [the surviving spouse’s share is] one-half of the intestate separate property and no interest in the one-half of the community property that belonged to the decedent.”<sup>109</sup> The surviving spouse in California always takes the entirety of an intestate decedent’s community property, while in Arizona, the decedent’s share goes to issue if the surviving spouse is not the other parent of all of the decedent’s issue. In both states, the surviving spouse shares the decedent’s separate property with the decedent’s issue.

To accommodate plural marriage, Revised Section 14-2102(1) should read,

The following part of the intestate estate, as to both separate property and the one-half of community property *of each community* that belongs to the decedent, passes to the surviving spouse(s) *or surviving community*:

<sup>106</sup> See CAL. PROB. CODE § 6401(c) (Westlaw 2010).

<sup>107</sup> See ARIZ. REV. STAT. ANN. § 14-2102 (Westlaw 2010).

<sup>108</sup> ARIZ. REV. STAT. ANN. § 14-2102 (Westlaw 2010).

<sup>109</sup> ARIZ. REV. STAT. ANN. § 14-2102(2) (Westlaw 2010).

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1. *If there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse(s) also, and*

*(a) there is exactly one spouse, the entire intestate estate passes to the surviving spouse.*

*(b) there is more than one surviving spouse, but no surviving community, the intestate share of each surviving spouse is that fractional share of the intestate estate whose numerator is 1 and whose denominator is the number of surviving spouses.*

*(c) there is a surviving community and no surviving spouses who are not members of that community, the entire intestate estate passes to the surviving community as community property.*

*(d) there is at least one surviving community and at least one surviving spouse who is not a member of a surviving community, the one-half of community property of each community that belongs to the decedent passes to each surviving community, and the separate property of the decedent passes to the surviving spouses per capita as each spouse's separate property.*

2. *If there are surviving issue one or more of whom are not issue of any of the surviving spouse(s), one-half of the intestate separate property to each surviving spouse per capita and no interest in the one-half of the community property that belonged to the decedent.*

This revised statute preserves Arizona's policy choices for distributing community and separate property; surviving spouse(s) are the most favored heir(s) after issue.

The revised statutes proposed here retain each state's current basic approach to distribution at death, while simultaneously accommodating multiple forms of plural marriage. In each case, the decedent spouse is given testamentary freedom over an appropriate share of the community property of the marital community or communities of which he or she was a part, and the pattern of intestate succession favors surviving spouses and issue of the decedent exactly as does current law. The central innovation, the idea of the "surviving community," comes into play only when a proper functional analysis of the decedent's specific plural marriage warrants one-community treatment. Multiple communities, brought into being by each successive marriage, ending with the death of one spouse, and resulting in the distribution of the community property accumulated by that married couple, would be the default approach.

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## VII. DISTRIBUTION AT DIVORCE

The lifetime dissolution of a marriage accomplishes an inter vivos severance of a given marital community, and, like the death of a spouse, requires distribution of community property. Non-community property states, sometimes called “common law” or “equitable distribution” states, have historically used quite different principles to award marital property at divorce than were applied at the end of a lifelong marriage. In these jurisdictions, a surviving spouse (however brief the marriage) is entitled to a “forced share” of marital property (usually one third),<sup>110</sup> but at divorce, after a “failed” marriage, courts traditionally divide property by employing principles of fault, need, and contribution, all of which could lead to quite unequal divisions of property.<sup>111</sup>

Community property states approach things quite differently. Six of the nine community property states either mandate equal division<sup>112</sup> or start from that presumption.<sup>113</sup> The suggested modified rules for plural marriage will also use that starting point. However, the same factors that permit courts in some community property states to deviate from equal division in monogamous divorce – things like the duration of the marriage(s), prenuptial agreements, earning potential and needs of each spouse, the existence of separate property, whether maintenance (alimony) is being awarded, childcare and homemaking contributions, retirement benefits<sup>114</sup> – would also apply to dissolution of plural marriages.

## A. PRINCIPLES OF PROPERTY DIVISION FOR DISSOLUTION OF PLURAL MARRIAGES

In many cases, the property division upon dissolution of one or more of a person’s plural marriages would require only minimal adjustment of existing rules.

<sup>110</sup> For a helpful discussion of the elective share, see Lawrence Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 104 (2003).

<sup>111</sup> See, e.g., Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996).

<sup>112</sup> See CAL. FAM. CODE § 2550 (Westlaw 2010); LA. REV. STAT. ANN. § 9:2801(4)(b) (Westlaw 2010); *Ruggles v. Ruggles*, 860 P.2d 182, 188 (N.M. 1993).

<sup>113</sup> See IDAHO CODE ANN. § 32-712 (Westlaw 2010); NEV. REV. STAT. § 125.150(1)(b) (Westlaw 2010); WIS. STAT. ANN. § 767.61(3) (Westlaw 2010).

<sup>114</sup> IDAHO CODE ANN. § 32-712 (Westlaw 2010); WIS. STAT. ANN. § 767.61(3)(a)-(m) (Westlaw 2010).

*1. Dissolution that Ends a Community*

Any dissolution that ends a marital economic community permits and indeed requires the distribution of that community's property to the former spouses in shares of  $1/n$ , where  $n$  = the number of spouses. This is the principle behind existing monogamous property division rules, like California's, which states simply, "[e]xcept upon the written agreement of the parties . . . in a proceeding for dissolution of marriage . . . the court shall . . . divide the community estate of the parties equally."<sup>115</sup> Where  $n = 2$ , "equally" of course means in half, and each former spouse is thus awarded half of the community property. This model can be scaled: if A, B, and C are all married to one another, and all divorce one another, "divid[ing] the community estate equally" means dividing it into three equal shares. At most, we might wish to clarify the statute by amending it to read, in pertinent part, "in a proceeding for dissolution of *any* marriage . . . the court shall . . . divide the community estate *of that marriage between* the parties equally."<sup>116</sup>

As was described above, each marriage presumptively creates its own community for community property purposes, and therefore, each dissolution requires distribution of the community assets *of that marriage* equally, or otherwise in accordance with state law. Dissolution of one of multiple, distinct unions, for example in a line marriage or asymmetric polygamy, falls within the existing rule. If A is married to B, C, and D, the divorce of A from B will presumptively entitle A and B each to a share of the  $A \Leftrightarrow B$  community estate as his or her separate property, post-dissolution, and the divorce of A from C entitles each to a share of the  $A \Leftrightarrow C$  community estate. The ongoing marriage of A to D, or of B to C, B to D, or C to D has no effect on this analysis.

*2. One Spouse Dissolving All Marriages of That Spouse*

Nor does A's simultaneous divorce from multiple spouses with whom he or she formed a single economic community cause especially difficult problems, although it changes the calculations somewhat. If A is married to B and C, and the three of them formed one economic community, A's divorce from both of them entitles A, presumptively at least, to a  $1/n$  share of the unified community estate, where  $n = 3$ . This is dis-

<sup>115</sup> CAL. FAM. CODE § 2550 (Westlaw 2010).

<sup>116</sup> Louisiana's law, that "[t]he court shall divide the community assets and liabilities so that each spouse receives property of an equal net value," LA. REV. STAT. ANN. § 9:2801(4)(b) (Westlaw 2010), needs no modification, though it might be clarified, "[t]he court shall divide the community assets and liabilities *of each marriage* so that each spouse receives property of an equal net value."

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tinct from the above example, where A receives half of two community estates,  $A \Leftrightarrow B$  and  $A \Leftrightarrow C$ .<sup>117</sup> If A is married to B, C, and D, and they all form one community, A's presumptive share upon divorcing them all is again  $1/n$ , where  $n = 4$ . The effect of one-community treatment is that only one community estate is divided, into fractional shares, rather than each of three communities being divided in half.

### 3. *Divorce from a Continuing Community*

But what do the others get? In dividing property after dissolution, we must not only calculate, but also characterize, the property interests of all the affected spouses. This is where the idea of the "continuing community" – a variation on the "surviving community" developed for the inheritance situation – comes in. "Continuing community" treatment is presumptively appropriate if the spouses divorced by A are married to one another, *and* they all formed one economic community during A's marriage(s) and will maintain that community after divorce by A. In that event, A's departure does not warrant a separate property award to each of them individually. While A takes a  $1/n$  share of the former community estate as separate property, the rest of the property, the whole minus the  $1/n$  share, remains the community estate of the "continuing community."

In fact, this device is appropriate any time a person is divorced from a continuing community. For example, if A is a radial spouse in asymmetric polygamy who divorces the hub, the presumptive treatment would be to divide the assets of that marriage. But even though A was only married to one person – the hub – the remaining group may qualify as a continuing community, so long as they all formed one economic community during A's marriage and will continue as such, because the remaining spouses are still married to one another. If so, A's share would be  $1/n$  of the entire community estate, with the rest remaining the community property of the hub and remaining radial spouses.

We have thus far accounted for monogamous dissolution, the dissolution of one or more plural marriages susceptible to a multiple-

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<sup>117</sup> Unlike most nonfiction legal commentators, Heinlein at least addresses these issues. ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* 260 (1996) ("But let's take one lady and two men as typical. She decides to divorce one. Say it's friendly, with other husband agreeing and one she is getting rid of not making fuss. Not that it would do him any good. Okay, she divorce him; he leaves. Still leaves endless things. Men might be business partners, co-husbands often are. Divorce may break up partnership. Money matters to settle. This three may own cubic [real property] together, and while will be in her name, ex-husband probably has cash coming or rent. And almost always are children to consider, support and so forth. Many things. No, madam, divorce is never simple.").

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communities analysis, and the dissolution of all of a person's marital ties to a continuing community of persons married to, and/or forming one economic community with, one another. Each of these dissolutions completely severs a person's relationship with a particular marital economic community.

4. *Partial Divorce (Dissolution of Fewer than All Marriages Within a Single Community)*

A different sort of problem is presented by someone who seeks to dissolve one or more of several marriages, while remaining a part of an ongoing economic community including one or more former and one or more present spouses. The simplest case is when A, B, and C are all married to one another, the three of them form one economic community, and then A and B (but *not* A and C) divorce.<sup>118</sup> What property distribution should A receive? We cannot properly award A half of the A ↔ B community estate, because, by hypothesis, no A ↔ B estate ever came into being – there is only the A ↔ B ↔ C estate. Nor does it seem appropriate to award A 1/n of the entire community estate, because the line marriage or asymmetric group continues as an economic community, and furthermore, A is still *part of* that community. One's property rights as a member of one plurally married marital community do not depend on how many *spouses* one has, so long as the number is greater than one, but rather, on how many *persons* are in the community.<sup>119</sup> The A ↔ B dissolution does not change the number of persons in the community, and thus, A's entitlement to a share of the community assets does not “vest” until the community ceases or A leaves it entirely. Because of the ongoing A ↔ C or A ↔ D union, the dissolution of the A ↔ B union does not satisfy either of these, and A is entitled to nothing at all.<sup>120</sup> A's change of marital status vis-à-vis B will not give the divorce court jurisdiction to divide any community estate.

5. *Dissolution that Increases the Number of Communities*

In still other cases, there may have been one community during the

<sup>118</sup> The next-simplest case would be the “broken” B ↔ C ↔ D ↔ A one-community daisy chain, which becomes a line marriage after A divorces B but remains married to D.

<sup>119</sup> We can see this by comparing the share received by A in departing completely from a one-community four-person daisy chain marriage (A is married to B and D) with the share received by A in departing from a one-community four-person group marriage (A is married to B, C, and D). A receives 1/n, or 1/4, in either case.

<sup>120</sup> The author thanks Siobhan Mahaffey for a very useful conversation to this conclusion, as well as that contained in the next paragraph.

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marriage, but there will not be one community post-dissolution. The  $A \leftrightarrow B$  dissolution may transform a one-community group marriage into a multiple-community line marriage.

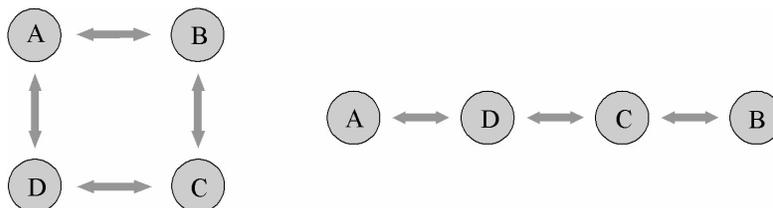


Figure 9

Figure 9 represents a daisy-chain marriage before and after dissolution of  $A \leftrightarrow B$  union. In the three-person case, the  $A \leftrightarrow B$  dissolution turns the group marriage into asymmetric polygamy with C as the hinge and two communities. Here, all-around  $1/n$  treatment for the accumulated one-community estate is the most straightforward and fair division. Going forward, either each separate marriage would accumulate its own community property with fractional contributions from multiply married spouses, or suitable marital property transmutation agreements could be executed by any subgroup of three or more, wishing, for example, to “re-constitute” one community.

Ending just one of multiple unions that join someone to one plurally married community thus has somewhat surprising all-or-nothing effects. Counter-intuitively, A divorcing only from B potentially disrupts the arrangements more than expelling A, or A leaving completely. If *all* of the marriages that connect A to the group are dissolved, A can be awarded  $1/n$  and the continuing community keeps the remaining community estate as community property. If not, A remains a member of an ongoing community with all the rights of a member, or the community ends, and multiple communities, organized around each marriage, take its place. There is no seamless way to extract A only partially from a complex web of marital arrangements that form a single economic community. From one point of view, these rules prevent A from “eating his (or her) cake and having it, too” – taking as separate property a share of the community property estate while remaining not just a contributing member, but also a beneficiary member of that very same community. At the same time, so long as A remains a member of that community, being divorced *by* one of plural spouses will postpone, although not prevent, A’s entitlement to a share of community property.

## B. THE PROPOSED STATUTE

In order to implement the approach described above, statutes governing division of property at divorce would require significant supplementation. California Family Code Section 2550 could be amended quite modestly, to read, “*Subject to Section 2550.5, in a proceeding for dissolution of any marriage . . . the court shall . . . divide the community estate of that marital community between the parties equally.*” The proposed additional section would read,

*Proposed Section 2550.*

*“Continuing community.” A “continuing community” refers to a marital community,*

- (i) at least one of whom was married to the former spouse,*
- (ii) at least two of whom remain married to one another after dissolution,*
- (iii) who formed a single economic community with the former spouse, and*
- (iv) who intend to continue as a marital community after dissolution.*

*If any party in a proceeding for dissolution of any marriage has more than one spouse, the court must make a determination as to the number of marital communities of which each such person is a part. The community estate of each marital community for which dissolution of a marriage is sought is to be divided separately. For each such marital community of which the spouse obtaining dissolution will no longer be a part, the spouse shall be awarded a share of the community property of that marital community equal to a fraction whose numerator is 1 and whose denominator is the number of persons constituting that marital community prior to dissolution. The remaining community estate is to be awarded in equal shares to the other spouse(s) as separate property, unless there is a continuing community. If a continuing community is shown, the remaining community estate is retained by the continuing community as its community property.*

It follows from this rule that if a person is part of a plural marriage that is one marital community, and he or she seeks to dissolve one of the marriages without separating from the continuing community, the court will be without jurisdiction to make an award of community property to

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that person at that time. This result may encourage plurally married people either to order their intimate and financial lives on a multiple-communities model, or not to bother divorcing just one of multiple spouses in an ongoing marital community of which he or she intends to remain a part.

Some of the “strategic” dimensions of this proposed approach quickly emerge. Although the presumption is that each marriage creates its own community property estate, spouses may seek to overcome that presumption and obtain one-community treatment. This will be driven by the fact that sometimes half of one marriage’s community estate will be considerably larger than a 1/n share of the aggregate community estate. Other times, however, it will be considerably smaller. A radial spouse who was a very significant financial contributor to an asymmetric polygamous or line marriage might seek half of the assets of the community to which he or she contributed, for example, a house purchased with savings from that spouse’s earnings, on a presumptive multiple-communities approach, rather than settle for the potentially much smaller 1/n share. This divorcing spouse might argue that contributions from earnings to the upkeep of persons not his or her spouses were gifts or transmutations, not evidence of a single community. The continuing community, by contrast, would argue for one-community treatment, reducing the divorcing spouse’s share to 1/n.<sup>121</sup>

Such disputes concerning the classification of particular assets as separate or community property, however, are not fundamentally different in kind than those with which the probate and divorce courts are already familiar.<sup>122</sup> Guidance in determining whether there are multiple communities or just one could be drawn from cases evaluating whether transmutation of separate into community property has occurred by “commingling” (for example, whether property was segregated, could be traced or identified, who managed it).<sup>123</sup>

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<sup>121</sup> Similar issues might arise upon the death of a plurally married person, depending on the disposition made by will.

<sup>122</sup> See, e.g., *Hatcher v. Hatcher*, 933 P.2d 1222 (Ariz. Ct. App. 1996); *In re Marriage of Haines*, 39 Cal. Rptr. 2d 673 (Cal. Ct. App. 1995); *Fountain v. Fountain*, 644 So. 2d 733 (La. Ct. App. 1994); *In re Marriage of Hirsch*, 259 Cal. Rptr. 39 (Cal. Ct. App. 1989).

<sup>123</sup> For an interesting discussion of these issues, see Leslie Joan Harris, *Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Distribution Law*, 83 OR. L. REV. 1291 (2004).

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## C. APPLICATION IN COMMUNITY PROPERTY STATES WITHOUT A MANDATE OR PRESUMPTION OF EQUAL DIVISION

For those community property states that adhere to strict equality in dividing marital property at divorce, Proposed Section 2550.5 or a very similar statute would be appropriate. For those with only a presumption of equality, the concept of the “marital community” and “continuing community” still apply, but the crucial middle sentence should be modified to read,

For each such marital community of which the spouse obtaining dissolution will no longer be a part, *unless there are compelling reasons otherwise*, the spouse shall be awarded a share of the community property of that marital community equal to a fraction whose numerator is 1 and whose denominator is the number of persons constituting that marital community prior to dissolution.

Deviations from equality would also permit a court to award a divorcing plurally married spouse *more* than 1/n. Idaho courts consider factors including duration of the marriage, prenuptial agreements, earning potential and needs of each spouse, whether maintenance (alimony) is being awarded, and retirement benefits.<sup>124</sup> Wisconsin law directs the court to give “appropriate economic value” to “homemaking and child care services.”<sup>125</sup> To the extent that some divorcing plural spouses might be comparatively disadvantaged in the job market because of lack of skills or numerous young children, these factors might well come into play. The “source of income,” “needs,” and “present and potential earning capability”<sup>126</sup> of a still-married spouse, including ongoing support from other spouses, for example, might warrant a quite unequal division in favor of the person departing the plural marriage.

In states that guide the court’s marital property division with terms like “just,” “equitable,” and “right,”<sup>127</sup> the key sentence might read:

For each such marital community of which the spouse obtaining dissolution will no longer be a part, the spouse shall be awarded a *just and equitable* share of the community property of that marital community.

Should such a statute be adopted, the more mathematically precise

<sup>124</sup> IDAHO CODE ANN. § 32-712(1)(b) (Westlaw 2010).

<sup>125</sup> WIS. STAT. ANN. § 767.61(3)(d) (Westlaw 2010).

<sup>126</sup> IDAHO CODE ANN. § 32-712(1)(b) (Westlaw 2010).

<sup>127</sup> See, e.g., ARIZ. REV. STAT. § 25-318 (Westlaw 2010); TEX. FAM. CODE ANN. § 7.001 (Westlaw 2010); WASH. REV. CODE ANN. § 26.09.080 (Westlaw 2010).

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versions of the proposed statutes might at least provide some guidance, if not persuasive authority, as a starting point.

CONCLUSION

The analysis offered above is a first foray into thinking about how existing law in community property states might be modified not only to take account of plural marriage, but to carry out the parties' expectations and do substantive justice between the spouses when those marriages, or the pairwise unions of which they are composed, inevitably end through death or divorce. We have seen that the most significant determinant of the share a former spouse receives at dissolution is not whether the marriage is asymmetric polygamy or group marriage, nor even how many spouses a person has, but whether the person is regarded as having been part of multiple communities or just one. One-community treatment is available, and may be more functionally accurate and psychologically and emotionally apt, even in situations in which each person is not actually married to every other person, such as in androcentric asymmetric heterosexual polygamy. While it may be administratively simplest to assume that each marriage brings a new marital community into being, making this a suitable default rule, it is also clear that plural spouses ought to be able to "opt in" to one-community treatment if all affected spouses so desire. In some contested probate or divorce cases, the court might find "one community," and distribute property accordingly, even when not all persons in the marriage were married to one another. The burden of proof would be on the surviving community to prove that the deceased or divorcing spouse is entitled only to a 1/n share of the entire community estate, rather than 1/2 of the community estate of each marriage contracted by that departing or departed spouse.

In conclusion, it should be noted that persons in plural marriages – like persons in conventional marriages – might do well to use prenuptial and marital property agreements to order their lives other than as suggested here. Nevertheless, it is likely that even if plural marriage were legalized, few people would take the trouble to make such agreements.<sup>128</sup> Therefore, default rules like intestacy statutes and principles of community property division not only express a society's best judgment about what justice requires and wisdom recommends in such situations, but also have a tremendous practical significance.

It is hoped that the foregoing analysis, while not necessarily defini-

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<sup>128</sup> See BRETT R. TURNER & LAURA W. MORGAN, ATTACKING AND DEFENDING MARITAL AGREEMENTS (2001).

tive on the question of how best to accommodate plural marriage into a community property state's law, makes clear that it is possible to do so in harmony with the principles that guide current law. Whatever the political or social barriers to the legalization of plural marriage – and they may be insurmountable – it cannot fairly be said that it would be impossible to adjust our laws to take account of it.

#### APPENDIX: LAWS AGAINST BIGAMY

**Alabama:** Ala. Code § 13A-13-1(a), (c) (Westlaw 2010) (“A person commits bigamy when he intentionally contracts or purports to contract a marriage with another person when he has a living spouse. . . . Bigamy is a Class C felony.”).

**Alaska:** Alaska Stat. § 11.51.140(a)(1)-(3), (b) (Westlaw 2010) (“A person commits the crime of unlawful marrying if the person knowingly marries or purports to marry another when that person or the other is lawfully married to a third person; more than one person simultaneously; or a person who simultaneously is marrying another person. Unlawful marrying is a class A misdemeanor.”).

**Arizona:** Ariz. Const. art. XX, para. 2 (“Polygamous or plural marriages, or polygamous cohabitation, are forever prohibited within this State.”).

**Arkansas:** Ark. Code Ann. § 13-3606(A) (Westlaw 2010) (“A person having a spouse living who knowingly marries any other person is guilty of a class 5 felony”); Ark. Code Ann. § 13-3607 (Westlaw 2010) (“A person who knowingly marries the spouse of another, in any case in which such spouse would be guilty of bigamy, is guilty of a class 5 felony.”); Ark Code Ann. § 5-26-201(a), (c) (Westlaw 2010) (“A person commits bigamy if, being married, he or she purports to marry another person. . . . Bigamy is a Class A misdemeanor.”).

**California:** Cal. Penal Code § 281(a) (Westlaw 2010) (“Every person having a husband or wife living, who marries any other person, except in the cases specified in § 282, is guilty of bigamy.”); Cal. Penal Code § 283 (Westlaw 2010) (“Bigamy is punishable by a fine not exceeding ten thousand dollars (\$10,000) or by imprisonment in a county jail not exceeding one year or in the state prison.”); Cal. Penal Code § 284 (Westlaw 2010) (“Every person who knowingly and willfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than five thousand dollars (\$5,000), or by imprisonment in the state prison.”).

**Colorado:** Colo. Rev. Stat. Ann. § 14-2-110(1)(a) (Westlaw 2010) (“The following marriages are prohibited: A marriage entered into prior to the dissolution of an earlier marriage of one of the parties, except a currently valid mar-

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riage between the parties;”); Colo. Rev. Stat. Ann. § 18-6-201(1)-(2) (Westlaw 2010) (“Any married person who, while still married, marries or cohabits in this state with another commits bigamy. . . . Bigamy is a class 6 felony.”); Colo. Rev. Stat. Ann. § 18-6-202 (Westlaw 2010) (“Any unmarried person who knowingly marries or cohabits with another in this state under circumstances known to him which would render the other person guilty of bigamy under the laws of this state commits marrying a bigamist, which is a class 2 misdemeanor.”).

**Connecticut:** Conn. Gen. Stat. Ann. § 53a-190(a), (c) (Westlaw 2010) (“A person is guilty of bigamy when he marries or purports to marry another person in this state if either is lawfully married; or so marries or purports to marry another person in any other state or country in violation of the laws thereof, and knowingly cohabits and lives with such other person in this state as husband and wife. . . . Bigamy is a class D felony.”).

**Delaware:** Del. Code Ann. tit. 11 § 1001 (Westlaw 2010) (“A person is guilty of bigamy when the person contracts or purports to contract a marriage with another person knowing the person has a living spouse, or knowing the other person has a living spouse. Bigamy is a class G felony.”).

**District of Columbia:** D.C. Code § 22-501(a) (Westlaw 2010) (“Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years . . .”).

**Florida:** Fla. Stat. Ann. § 826.01 (Westlaw 2010) (“Whoever, having a husband or wife living, marries another person shall . . . be guilty of a felony of the third degree . . .”); Fla. Stat. Ann. § 826.03 (Westlaw 2010) (“Whoever knowingly marries the husband or wife of another person, knowing him or her to be the spouse of another person, shall be guilty of a felony of the third degree . . .”).

**Georgia:** Ga. Code Ann. § 16-6-20(a), (c) (Westlaw 2010) (“A person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another person or carries on a bigamous cohabitation with another person. . . . A person convicted of the offense of bigamy shall be punished by imprisonment for not less than one nor more than ten years.”); Ga. Code Ann. § 16-6-21(a), (c) (Westlaw 2010) (“An unmarried man or woman commits the offense of marrying a bigamist when he marries a person whom he knows to be the wife or husband of another. . . . A person convicted of the offense of marrying a bigamist shall be punished by imprisonment for not less than one nor more than ten years.”).

**Hawai‘i:** Haw. Rev. Stat. § 709-900(1), (2) (Westlaw 2010) (“A person commits the offense of illegally marrying if the person intentionally marries or purports to marry, knowing that the person is legally ineligible to do so. Illegally marrying is a petty misdemeanor.”).

**Idaho:** Idaho Const. art. I, § 4 (“Bigamy and polygamy are forever prohib-

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ited in the state, and the legislature shall provide by law for the punishment of such crimes.”); Idaho Code Ann. § 18-1101 (Westlaw 2010) (“Every person having a husband or wife living, who marries any other person . . . is guilty of bigamy.”); Idaho Code Ann. § 18-1103 (Westlaw 2010) (“Bigamy is punishable by fine not exceeding \$2,000 and by imprisonment in the state prison not exceeding three (3) years.”); Idaho Code Ann. § 18-1104 (Westlaw 2010) (“Every person who knowingly and wilfully marries the husband or wife of another, in any case in which such husband or wife would be punishable under the provisions of this chapter, is punishable by fine not less than \$2,000, or by imprisonment in the state prison not exceeding three (3) years.”).

**Illinois:** 720 Ill. Comp. Stat. 5/11-12(a), (c), 11-13(a), (b) (Westlaw 2010) (“Any person having a husband or wife who subsequently marries another or cohabits in this State after such marriage commits bigamy. . . . Bigamy is a Class 4 felony. . . . Any unmarried person who knowingly marries another under circumstances known to him which would render the other person guilty of bigamy under the laws of this State, or who cohabits in this State after such a marriage, commits the offense of marrying a bigamist. Marrying a bigamist is a Class A misdemeanor.”); 750 Ill. Comp. Stat. 5/212(a)(1) (Westlaw 2010) (“The following marriages are prohibited: a marriage entered into prior to the dissolution of an earlier marriage of one of the parties . . .”).

**Indiana:** Ind. Code 35-46-1-2(a) (Westlaw 2010) (“A person who, being married and knowing that his spouse is alive, marries again commits bigamy, a Class D felony.”).

**Iowa:** Iowa Code Ann. § 726.1 (Westlaw 2010) (“Any person, having a living husband or wife, who marries another, commits bigamy. . . . Any person who marries another who the person knows has another living husband or wife commits bigamy. Bigamy is a serious misdemeanor.”).

**Kansas:** Kan. Stat. Ann. § 21-3601(a)(1)-(3), (c) (repealed 2010). (“Bigamy is any of the following: Marriage within this state by any person who shall have another spouse living at the time of such marriage; marriage within this state by an unmarried person to a person known to such unmarried person to be the spouse of some other person; cohabitation within this state after marriage in another state or country under circumstances described in subsection (a)(1) or (a)(2). . . . Bigamy is a severity level 10, nonperson felony.”).

**Kentucky:** Ky. Rev. Stat. Ann. 530.010(1)(a)-(b), (3) (Westlaw 2010) (“A person is guilty of bigamy when he: Purports to marry another person knowing he has a husband or wife or knowing the other person has a husband or wife; or Cohabits in this state after a bigamous marriage in another state. . . . Bigamy is a Class D felony.”).

**Louisiana:** La. Rev. Stat. Ann. § 14:76 (Westlaw 2010) (“Bigamy is the marriage to another person by a person already married and having a husband or wife living; or the habitual cohabitation, in this state, with such second husband

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or wife, regardless of the place where the marriage was celebrated. . . . Whoever commits the crime of bigamy shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.”); La. Rev. Stat. Ann. §14:77 (Westlaw 2010) (“Abetting in bigamy is the marriage of an unmarried person to the husband or wife of another, with knowledge of the fact that the party is married and without a reasonable and honest belief that such party is divorced or his marriage annulled, or that the party’s husband or wife is dead. Whoever commits the crime of abetting in bigamy shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.”); La. Civ. Code Ann. art. 88 (Westlaw 2010) (“A married person may not contract another marriage.”).

**Maine:** Me. Rev. Stat. Ann. tit. 17-A, § 551(1), (2) (Westlaw 2010) (“A person is guilty of bigamy if, having a spouse, he intentionally marries or purports to marry, knowing that he is legally ineligible to do so. Bigamy is a Class E crime.”).

**Maryland:** Md. Code Ann., Crim. Law § 10-502(b)-(d) (Westlaw 2010) (“While lawfully married to a living person, a person may not enter into a marriage ceremony with another. A person who violates this section is guilty of the felony of bigamy and on conviction is subject to imprisonment not exceeding 9 years. An indictment or warrant for bigamy is sufficient if it substantially states: ‘(name of defendant) on (date), in (county), having a living spouse, feloniously entered into a marriage ceremony with (name of subsequent spouse), in violation of § 10-502 of the Criminal Law Article, against the peace, government, and dignity of the State.’”).

**Massachusetts:** Mass. Gen. Laws Ann. ch. 272, § 15 (Westlaw 2010) (“Whoever, having a former husband or wife living, marries another person or continues to cohabit with a second husband or wife in the commonwealth shall be guilty of polygamy, and be punished by imprisonment in the state prison for not more than five years or in jail for not more than two and one half years or by a fine of not more than five hundred dollars . . .”).

**Michigan:** Mich. Comp. Laws Ann. § 551.5 (Westlaw 2010) (“No marriage shall be contracted whilst either of the parties has a former wife or husband living, unless the marriage with such former wife or husband, shall have been dissolved.”); Mich. Comp. Laws Ann. § 750.439 (Westlaw 2010) (“Any person who has a former husband or wife living, who shall marry another person, or shall continue to cohabit with such second husband or wife, in this state, he or she shall, except in the cases mentioned herein, be guilty of the crime of polygamy, a felony.”); Mich. Comp. Laws Ann. § 750.440 (Westlaw 2010) (“Any person who knowingly enters into a marriage with another, which is prohibited to the latter by the foregoing provisions of this chapter, is guilty of a felony.” (footnote omitted)).

**Minnesota:** Minn. Stat. Ann. § 517.03(a)(1) (Westlaw 2010) (“The follow-

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ing marriages are prohibited: a marriage entered into before the dissolution of an earlier marriage of one of the parties becomes final . . . .”); Minn. Stat. Ann. § 609.355, subdiv. 1, 2(1)-(3) (Westlaw 2010) (“In this section ‘cohabit’ means to live together under the representation or appearance of being married. Whoever does any of the following is guilty of bigamy and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both: knowingly having a prior marriage that is not dissolved, contracts a marriage in this state; or contracts a marriage with another in this state with knowledge that the prior marriage of the other is not dissolved; or marries another outside this state with knowledge that either of them has a prior marriage that has not been dissolved, and then cohabits with the other in this state.”).

**Mississippi:** Miss. Code Ann. § 97-29-13 (Westlaw 2010) (“Every person having a husband or wife living, who shall marry again, and every unmarried person who shall knowingly marry the husband or wife of another living, except in the cases hereinafter named, shall be guilty of bigamy, and imprisoned in the penitentiary not longer than ten years.”).

**Missouri:** Mo. Ann. Stat. § 568.010, 1(1)-(2), 4(1)-(2), 5 (Westlaw 2010) (“A married person commits the crime of bigamy if he: Purports to contract another marriage; or Cohabits in this state after a bigamous marriage in another jurisdiction. . . . An unmarried person commits the crime of bigamy if he Purports to contract marriage knowing that the other person is married; or Cohabits in this state after a bigamous marriage in another jurisdiction. Bigamy is a class A misdemeanor.”).

**Montana:** Mont. Code Ann. § 40-1-401(1)(a) (Westlaw 2010) (“The following marriages are prohibited: a marriage entered into prior to the dissolution of an earlier marriage of one of the parties . . . .”); Mont. Code Ann. § 45-5-611(1), (2) (Westlaw 2010) (“A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage . . . . A person convicted of bigamy shall be fined not to exceed \$500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.”); Mont. Code Ann. § 45-5-612(1), (2) (Westlaw 2010) (“A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy. A person convicted of the offense of marrying a bigamist shall be fined not to exceed \$500 or be imprisoned in the county jail for any period not to exceed 6 months, or both.”).

**Nebraska:** Neb. Rev. Stat. § 28-701(1)-(3) (Westlaw 2010) “If any married person, having a husband or wife living, shall marry any other person, he shall be deemed guilty of bigamy . . . . Any unmarried person who knowingly marries a person who is married commits bigamy. Bigamy is a Class I misdemeanor.”); Neb. Rev. Stat. § 42-406 (Westlaw 2010) (“If any Indian who is married according to the provisions of sections 42-402 to 42-404 shall, while his or

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her husband or wife is living, be married to another person, either in legal form or according to Indian custom, he or she shall be guilty of bigamy and shall be punished therefor as provided by law.”).

**Nevada:** Nev. Rev. Stat. § 201.160(1), (2) (Westlaw 2010) (“Bigamy consists in the having of two wives or two husbands at one time, knowing that the former husband or wife is still alive. If a married person marries any other person while the former husband or wife is alive, the person so offending is guilty of a category D felony . . . .”); Nev. Rev. Stat. § 201.170 (Westlaw 2010) (“If a person, being unmarried, knowingly marries the husband or wife of another, that person is guilty of a category D felony . . . .”).

**New Hampshire:** N.H. Rev. Stat. Ann. § 639:1 (Westlaw 2010) (“A person is guilty of a class B felony if, having a spouse and knowing that he is not legally eligible to marry, he marries another.”).

**New Jersey:** N.J. Stat. Ann. § 2C:24-1(a), (b) (Westlaw 2010) (“A married person is guilty of bigamy, a disorderly persons offense, if he contracts or purports to contract another marriage . . . . A person is guilty of bigamy if he contracts or purports to contract marriage with another knowing that the other is thereby committing bigamy.”).

**New Mexico:** N.M. Stat. Ann. art. 3, § 9 (Westlaw 2010) (“Every person who shall be convicted of bigamy or polygamy, shall be imprisoned not more than seven years nor less than two years.”); N.M. Const. art. XXI, § 1 (“Polygamous or plural marriages and polygamous cohabitation are forever prohibited.”); N.M. Stat. Ann. § 30-10-1 (Westlaw 2010) (“Bigamy consists of knowingly entering into a marriage by or with a person who has previously contracted one or more marriages which have not been dissolved by death, divorce or annulment. Both parties may be principals. Whoever commits bigamy is guilty of a fourth degree felony.”).

**New York:** N.Y. Penal Law § 255.15 (Westlaw 2010) (“A person is guilty of bigamy when he contracts or purports to contract a marriage with another person at a time when he has a living spouse, or the other person has a living spouse. Bigamy is a class E felony.”).

**North Carolina:** N.C. Gen. Stat. Ann. § 14-183 (Westlaw 2010) (“If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be punished as a Class I felon. . . . If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy.”).

**North Dakota:** N.D. Cent. Code 12.1-20-13(1) (Westlaw 2010) (“A person who marries another person, while married to another person, is guilty of a class C felony.”).

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**Ohio:** Ohio Rev. Code Ann. § 2919.01(A), (C) (Westlaw 2010) (“No married person shall marry another or continue to cohabit with such other person in this state. . . . Whoever violates this section is guilty of bigamy, a misdemeanor of the first degree.”).

**Oklahoma:** Okla. Const. art. 1, § 2 (“Polygamous or plural marriages are forever prohibited.”); Okla. Stat. Ann. tit. 21, § 881 (Westlaw 2010) (“Every person who having been married to another who remains living, marries any other person . . . is guilty of bigamy.”); Okla. Stat. Ann. tit. 21, § 883 (Westlaw 2010) (“Any person guilty of bigamy shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding five (5) years.”); Okla. Stat. Ann. tit. 21, § 884 (Westlaw 2010) (“Any person who knowingly marries the husband or wife of another, in any case in which such husband or wife would be punishable according to the foregoing provisions, shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding five (5) years, or in a county jail not exceeding one (1) year, or by a fine not exceeding Five Hundred Dollars (\$500.00), or by both such fine and imprisonment.”).

**Oregon:** Or. Rev. Stat. § 163.515(1), (2) (Westlaw 2010) (“A person commits the crime of bigamy if the person knowingly marries or purports to marry another person at a time when either is lawfully married. Bigamy is a Class C felony.”).

**Pennsylvania:** 18 Pa. Cons. Stat. Ann. § 4301(a), (b) (Westlaw 2010) (“A married person is guilty of bigamy, a misdemeanor of the second degree, if he contracts or purports to contract another marriage . . . . A person is guilty of bigamy if he contracts or purports to contract marriage with another knowing that the other is thereby committing bigamy.”).

**Puerto Rico:** P.R. Laws Ann. tit. 33, § 4141 (Westlaw 2010) (“Any person who remarries without the former marriage having been annulled or lawfully dissolved, shall be punished by imprisonment as provided below . . . . The penalty to be imposed for this crime shall be that of imprisonment for a fixed term of two (2) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of three (3) years; if there should be extenuating circumstances, it may be reduced to a minimum of one year.”).

**Rhode Island:** R.I. Gen. Laws Ann. § 11-6-1 (Westlaw 2010) (“Every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be fined not exceeding one thousand dollars (\$1,000) . . . .”).

**South Carolina:** S.C. Code Ann. § 16-15-10 (Westlaw 2010) (“Any person who is married who shall marry another person shall . . . [o]n conviction, be punished by imprisonment in the Penitentiary for not more than five years nor less than six months or by imprisonment in the jail for six months and by a fine of not less than five hundred dollars.”).

**South Dakota:** S.D. Codified Laws § 22-22A-1 (Westlaw 2010) (“Any

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person who, while married to another presently living person, marries any other person, is guilty of bigamy. . . . Bigamy is a Class 6 felony.”).

**Tennessee:** Tenn. Code Ann. § 39-15-301(a)(1)-(2), (c) (Westlaw 2010) (“A person commits bigamy who: Is married and purports to marry a person other than the person’s spouse in this state under circumstances that would, but for the person’s existing marriage, constitute a marriage; or Knows that a person other than the person’s spouse is married and purports to marry the person in this state under circumstances that would, but for the person’s existing marriage, constitute a marriage. . . . Bigamy is a Class A misdemeanor.”).

**Texas:** Tex. Penal Code Ann. § 25.01(a)(1)(A)-(B), (a)(2)(A)-(B), (b), (e)(1)-(2) (Westlaw 2010) (“An individual commits an offense if: he is legally married and he: purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor’s prior marriage, constitute a marriage; or lives with a person other than his spouse in this state under the appearance of being married; or he knows that a married person other than his spouse is married and he: purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person’s prior marriage, constitute a marriage; or lives with that person in this state under the appearance of being married. For purposes of this section, ‘under the appearance of being married’ means holding out that the parties are married with cohabitation and an intent to be married by either party. . . . An offense under this section is a felony of the third degree, except that if at the time of the commission of the offense, the person whom the actor marries or purports to marry or with whom the actor lives under the appearance of being married is: 16 years of age or older, the offense is a felony of the second degree; or younger than 16 years of age, the offense is a felony of the first degree.”).

**Utah:** Utah Const. art. 3 (“[P]olygamous or plural marriages are forever prohibited.”); Utah Code Ann. § 76-7-101(1), (2) (Westlaw 2010) (“A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person. Bigamy is a felony of the third degree.”).

**Vermont:** Vt. Stat. Ann. tit. 13, § 206 (Westlaw 2010) (“A person having a husband or wife living who marries another person, or continues to cohabit with such second husband or wife in this state, shall be imprisoned not more than five years.”).

**Virginia:** Va. Code Ann. § 18.2-362 (Westlaw 2010) (“If any person, being married, shall, during the life of the husband or wife, marry another person in this Commonwealth, or if the marriage with such other person take place out of the Commonwealth, shall thereafter cohabit with such other person in this Commonwealth, he or she shall be guilty of a Class 4 felony.”); Va. Code Ann. § 18.2-363 (Westlaw 2010) (“If any persons, resident in this Commonwealth,

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one of whom has a husband or wife living, shall, with the intention of returning to reside in this Commonwealth, go into another state or country and there intermarry and return to and reside in this Commonwealth cohabiting as man and wife, such marriage shall be governed by the same law, in all respects, as if it had been solemnized in this Commonwealth.”); Va. Code Ann. § 20-38.1(a)(1) (Westlaw 2010) (“The following marriages are prohibited: A marriage entered into prior to the dissolution of an earlier marriage of one of the parties.”).

**Virgin Islands:** V.I. Code Ann. tit. 14, § 361 (Westlaw 2010) (“Whoever, having a husband or wife, marries any other person, commits bigamy and shall be fined not more than \$2,000 or imprisoned not more than 3 years, or both.”); V.I. Code Ann. tit. 14, § 363 (Westlaw 2010) (“Whoever knowingly and willfully marries the husband or wife of another, in any case in which the husband or wife would be punishable under the provisions of this chapter, shall be fined not more than \$2,000 or imprisoned not more than 3 years, or both.”).

**Washington:** Wash. Rev. Code Ann. § 9A.64.010(1), (4) (Westlaw 2010) (“A person is guilty of bigamy if he intentionally marries or purports to marry another person when either person has a living spouse. . . . Bigamy is a class C felony.”); Wash. Rev. Code Ann. § 26.04.020(1)(a) (Westlaw 2010) (“Marriages in the following cases are prohibited: When either party thereto has a wife or husband living at the time of such marriage;”).

**West Virginia:** W. Va. Code § 61-8-1 (Westlaw 2010) (“Any person, being married, who, during the life of the former husband or wife, shall marry another person in this State, or, if the marriage with such other person take place out of this State, shall thereafter cohabit with such other person in this State, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years.”).

**Wisconsin:** Wis. Stat. Ann. § 944.05(1)(a)-(c), (2) (Westlaw 2010) (“Whoever does any of the following is guilty of a Class I felony: Contracts a marriage in this state with knowledge that his or her prior marriage is not dissolved; or Contracts a marriage in this state with knowledge that the prior marriage of the person he or she marries is not dissolved; or Cohabits in this state with a person whom he or she married outside this state with knowledge that his or her own prior marriage had not been dissolved or with knowledge that the prior marriage of the person he or she married had not been dissolved. In this section ‘cohabit’ means to live together under the representation or appearance of being married.”).

**Wyoming:** Wyo. Stat. Ann. § 6-4-401(a), (c) (Westlaw 2010) (“A person commits bigamy if, being married and knowing that his spouse is alive, he marries again. . . . Bigamy is a felony punishable by imprisonment for not more than five (5) years, a fine of not more than five thousand dollars (\$5,000.00), or both.”).