

Autonomy, Imperfect Consent, and Polygamist Sex Rights Claims

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INTRODUCTION

Charles Moore had been watching the challenge to the Texas sodomy law as it made its way to the United States Supreme Court.¹ When his partner called him to say that the Court had ruled the Texas antisodomy statute unconstitutional in *Lawrence v. Texas* on June 26, 2003, he was overjoyed.² Moore quickly found a copy of the decision online and devoured every word.³ He was thrilled by the court's holding that the law violated privacy rights guaranteed by the Due Process Clause of the Fourteenth Amendment and was excited by the decision's implications.⁴

Moore's excitement was somewhat surprising. He is not a gay man, nor is he involved in gay and lesbian causes.⁵ He is a fundamentalist Mormon who believes in the religious doctrine of plural marriage.⁶ His enthusiasm over *Lawrence* was not about its implications for lesbian, gay, bisexual, and transgender ("LGBT") rights, but about his hope that the ruling would provide support for the argument that the state should not be permitted to criminalize bigamy or polygamy between consenting adults.⁷ The partner who called to give Moore the news was his wife, and while she is currently his only wife, he

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1. Telephone Interview with Charles Moore (pseudonym) (Oct. 8, 2008 & Oct. 10, 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* "Plural marriage" is the term preferred by many fundamentalist Mormons for their form of polygamy. In this Comment, I use the term interchangeably with "polygamy."
7. *Id.*

has practiced polygamy in the past.⁸

Polygamy activists like Moore wasted little time in testing the boundaries of the *Lawrence* decision. Within the year, a married man, G. Lee Cook, his wife, D. Cook, and a woman he sought to legally marry as his second wife, J. Bronson, went into the Salt Lake City county clerk's office.⁹ They were seeking a marriage license for Mr. Cook and Ms. Bronson, with the consent and approval of Mrs. Cook.¹⁰ They paid the fee for the license and filled out the form.¹¹ Both on the form and in conversation, Mr. Cook was completely open about the fact that he was already married and wished to take a second wife.¹² Mrs. Cook indicated her assent.¹³ As fundamentalist Mormons, all three believed that polygamy, or plural marriage, was essential to their eternal salvation.¹⁴ Upon being informed that Mr. Cook already had a wife, the county clerk refunded the fee and refused to issue the marriage license, citing Utah laws prohibiting bigamy. The plaintiffs subsequently filed a civil suit against the county clerk, seeking to have Utah's antipolygamy laws declared invalid under the Federal Constitution.¹⁵

In the resulting case, *Bronson v. Swensen*, the plaintiffs challenged the antipolygamy laws on two grounds.¹⁶ One basis for their challenge drew on a long history of religious freedom challenges to bigamy laws. The *Bronson* plaintiffs also raised another, more novel, argument:¹⁷ they claimed that the challenged statutes violated their right to privacy, citing the freedom to form intimate sexual relationships enunciated in *Lawrence*.¹⁸ As part of a relatively

8. *Id.*

9. Complaint at 4–5, *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005) (2:04CV00021).

10. *Id.*

11. *Id.* at 4.

12. *Id.* at 4–5.

13. *Id.* at 5.

14. Complaint, *supra* note 9, ¶¶ 12–15. Memorandum in Support of Plaintiffs' Motion for Summary Judgment § I–III, *Bronson v. Swensen*, 394 F.Supp.2d 1329 (D. Utah 2005) (2:04CV00021). The mainline Church of Jesus Christ of Latter-day Saints (“LDS Church” or “Mormon Church”) has repudiated polygamy since 1890 and now excommunicates anyone who follows the practice, arguing that polygamists are not Mormons and should not be referred to as such. However, those who practice a form of polygamy that traces to the pre-1890 LDS Church refer to themselves as “fundamentalist Mormons,” so that is the terminology I use here.

15. Complaint, *supra* note 9, at 8.

16. *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005), *vacated*, 500 F.3d 1099 (10th Cir. 2007) [hereinafter *Bronson I*]; Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 14, § I–II.

17. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 14, § I.

18. *Id.* § I (citing *Lawrence v. Texas*, 539 U.S. 558, 572 (2003)). Though a criminal defendant facing charges of bigamy and unlawful sexual conduct with a minor raised a *Lawrence*-based defense around the same time as the *Bronson* case, the criminal case did not concern a relationship between consenting adults as he was being prosecuted for his marriage to a sixteen-year-old girl. *State v. Holm*, 137 P.3d 726 (Utah 2006).

new generation of fundamentalist Mormon polygamy activists,¹⁹ the *Bronson* plaintiffs constructed a legal argument that used secular ideas about freedom from government-imposed morality and the right to autonomy in forming sexual and familial relationships that echo the rhetoric of movements for gay rights, feminism, and other movements for sex rights.²⁰ The *Bronson* plaintiffs have a complicated and ambivalent relationship to the notion of sex rights, however, as they defend against allegations that polygamous men abuse women and children and struggle to reconcile sex rights arguments with a religious tradition rooted in traditional gender roles.

This use of sexual freedom rhetoric may, at first glance, be a surprising way to defend the marriage practices of a conservative religious group that is often viewed as patriarchal to abusive extremes. The coupling of religious conservatism and sexual freedom may be particularly jarring in light of the recent controversies over the involvement of the Church of Jesus Christ of Latter-day Saints (“LDS Church” or “Mormon Church”) in passing the anti-same-sex marriage Proposition 8 in California.²¹ The use of sex rights rhetoric, traditionally seen as the province of the political left, by a conservative religious group prompts a variety of questions. Are polygamy activists truly committed to ideals of sexual freedom and relationship diversity, or is their deployment of this rhetoric merely opportunistic or disingenuous? Does their use of this rhetoric constitute some sort of illegitimate appropriation from the “rightful owners” of such arguments—namely, LGBT and feminist activists and others on the political left? Will the use of such rhetoric by polygamists undermine the integrity of those arguments? Given the conservative and patriarchal values held by many fundamentalist Mormons, do the polygamy activists’ other cultural or political commitments undermine the deployment of sex rights arguments in other contexts?

Using this tension as a starting point, this Comment seeks to determine whether polygamy activism is intelligible within a broader sex rights framework. If so, what insights does such activism offer to the ongoing debates over sex rights? A close examination reveals that the *Bronson* case is not out of the ordinary in a complex tradition of sex rights claims. Such claims have often had a multifaceted, or even contradictory, relationship with varying ideas of autonomy, equality, and freedom from sexual- and gender-based harm. One of

19. See Jeffrey Michael Hayes, Comment, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 100–01 (2007).

20. As explained in Part III below, I use the term “sex rights” in this Comment to refer to an interrelated set of claims advanced by feminists, LGBT rights activists, and others involving such values as gender equality, self determination with regards to sexuality and gender expression, and freedom from abuse based on gender or sexuality.

21. Matthai Kuruvila, *To Pass Measure, Catholics and Mormons Allied*, S.F. CHRON., Nov. 10, 2008, at A1. As I discuss later, it is important to note that the *Bronson* plaintiffs are fundamentalist Mormons, and thus are not members of the mainstream LDS Church, which was involved in the battle over Proposition 8.

polygamy activism's most interesting contributions to this tradition is the way it prompts questions about the law's treatment of an issue that has surfaced in other sex rights claims but has never been satisfactorily resolved: what I will refer to as "imperfect consent." The term "imperfect consent" describes moments where the ability of a person to consent to an act is questionable either because the act is arguably harmful to the person, or because social or cultural pressures potentially compromise the person's autonomy. Polygamy raises questions about autonomy and imperfect consent when women claim the right to choose polygamous relationships despite concerns that social or religious coercion may cast doubt upon whether they are choosing such relationships freely. Through a comparison of the legal treatment of polygamy, pornography, sadomasochism, and abortion, this Comment will explore the law's failure to address questions of imperfect consent in a principled manner and will present suggestions to remedy this failure.

Part I lays out a framework for an exploration of the *Bronson* claims in the context of a broad field of sex rights claims. This Part provides a conceptual overview of sex rights and explores links between different types of sex rights claims. It further situates polygamy activists within the sex rights traditions developed by the feminist and gay rights movements and highlights some potential contradictions of polygamist activists as sex rights claimants.

Part II outlines the facts and history of *Bronson v. Swensen* and the challenged laws. Here I give a brief account of Mormon polygamy as practiced by the mainstream Mormon Church in the nineteenth century and as it is still practiced by fundamentalist Mormons. I will discuss the legal and political response to plural marriage over the past 150 years and how this response created the legal landscape in which the *Bronson* plaintiffs brought their case. This Part also includes an exploration of the historical and contemporary reasons that the plaintiffs brought the complaint out of a civil matter—the denial of a marriage license—but primarily sought to challenge the criminal statute outlawing bigamy. Part II will close with an overview of the plaintiffs' two main arguments for striking down Utah's bigamy laws: religious freedom and privacy.

The contradictions noted in Parts I and II raise questions about whether polygamy activists' work contradicts or compromises the integrity of the sex rights analysis and rhetoric pioneered by feminist and LGBT activists. Part III argues that some of the ambivalences and contradictions within polygamy activism are shared by other groups deploying sex rights rhetoric, such as same-sex marriage activists and sex-positive feminists. This Part will explore and examine parallels in four areas: rhetoric and tactics, tension between being a sex rights claimant and a sex rights violator, sex claims that are simultaneously progressive and conservative, and efforts to shut down "slippery slope" concerns about sex rights claims.

Having situated polygamy activism in a broader sex rights framework, I address what insights and contributions such activism provides for that framework. In Part IV, I argue that polygamy activism raises concerns about imperfect consent, forcing the question of whether subcultural and religious constraints make the consent of women to polygamous relationships questionable or invalid. I explore other sex rights claims that have implicated imperfect consent: pornography, sadomasochism, and abortion. I then suggest that to address key concerns about the harms of polygamy, courts must be given a statutory basis to inquire into imperfect consent. This could be done either by introducing a defense of consent to the crime of bigamy, or by replacing the crime of bigamy with a new crime of coerced marriage. This Part closes with suggestions to help steer the courts' considerations of imperfect consent in a more principled and satisfying direction.

I

BRONSON IN CONTEXT: THE COMPLEXITY OF SEX RIGHTS CLAIMS

To better understand the arguments made by the *Bronson* plaintiffs and other polygamy activists, it is helpful to situate their claims within a broader framework of sex rights. While the idea of sex rights per se is not necessarily a cognizable framework within United States jurisprudence, one can discern a broader web of strategies and rhetorical positions in some areas of legal doctrine, in popular discourse, and in the work of advocates. Examining the claims of polygamy activists in this broader framework will help to contextualize and make sense of the strategies and potential contradictions in the claims of those defending plural marriage.

The category of sex rights includes, among other issues, women's rights and LGBT rights. Conceptual ties between the two movements are visible in such shared values as autonomy, bodily self-determination, and freedom from violence based on gender or sexual orientation.²² These overarching shared values may also point to a broader scope of sex rights claims. For example, the shared value of bodily self-determination can be seen both in arguments that a woman has a right to choose abortion and in arguments for allowing transgendered people to medically alter their sex. This principle can then be applied to controversies that are outside of the traditional purview of either the women's or LGBT movements, such as the question of whether or not children with intersex conditions should be given cosmetic genital surgery before they are old enough to consent.²³

Though United States jurisprudence does not recognize a right to sexual autonomy as such, case law concerning liberty and privacy interests often links

22. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 49 (2008).

23. See, e.g., National Organization for Women, 2001 National Conference Resolutions: Freedom of Choice for Intersex Girls—A Girl's Right to Choose, <http://www.now.org/organization/conference/resolutions/2001.html#intersex>.

different types of sex rights claims. One such line of cases addresses privacy within marital relationships to make decisions about contraception in *Griswold v. Connecticut*,²⁴ the (albeit limited) privacy right of women to make decisions about terminating pregnancies in *Roe v. Wade*,²⁵ and the potentially more expansive articulation of the privacy right to freedom from state interference in private sexual behavior between two consenting adults in *Lawrence v. Texas*.²⁶ The Court in *Lawrence* draws these connections, saying “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education” and noting that such decisions are central to both “personal dignity and autonomy” and “the liberty protected by the Fourteenth Amendment.”²⁷ According to the Court, the protection afforded by such decisions extends to the private, consensual sex that had occurred between the two men challenging the Texas sodomy statute before the court.²⁸

Perhaps more explicit than the links that legal doctrine makes between these strains of sex rights is the rhetoric and coalition building of sex-rights advocates. While this kind of cross-issue organizing is not universal,²⁹ many activists see both conceptual links and the potential for strategic alliances in the intersections of feminism, reproductive freedom, the LGBT movement, and other claims for sex rights.³⁰ These links are made both by proponents of sex rights and those who would oppose such rights. Lisa Duggan describes the “Sex Wars” of the 1980s as

a series of bitter political and cultural battles over issues of sexuality [that] convulsed the nation—battles over the regulation of pornography, the scope of legal protections for gay people, the funding of allegedly “obscene” art, the content of safe-sex education, the scope of reproductive freedom for women, the extent of sexual abuse of children in day care centers, the sexual content of public school curricula, and more.³¹

24. 381 U.S. 479 (1965).

25. 410 U.S. 113 (1973).

26. 539 U.S. 558 (2003).

27. *Id.* at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

28. *Id.*

29. See, e.g., Robin Morgan, Keynote Address at the West Coast Lesbian Feminist Conference: Lesbianism and Feminism: Synonyms or Contradictions? (Apr. 14, 1973), reprinted in *SPEAKING FOR OUR LIVES: HISTORIC SPEECHES AND RHETORIC FOR GAY AND LESBIAN RIGHTS (1892–2000)* 198–200 (Robert B. Ridinger ed., 2004) (discussing some heterosexual feminists’ suspicion and rejection of lesbians during the 1960s and 1970s, including Betty Friedan’s accusations that lesbians in the feminist movement were CIA infiltrators).

30. For example, one pro-choice activist responding to a pro-life lesbian and gay group remarked, “I really feel the issue is control over my own body. . . . If a woman’s right to choose is limited, what’s next, queers? We all have a stake in the full right to control our bodies.” Kevin Davis, *Gay Pro-Life Group to Have Presence at Pride*, BAY AREA REP., June 22, 2006, at 22.

31. LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 1 (1995); see also ANN SCALES, *LEGAL FEMINISM* (2006).

Similarly, Nancy Polikoff argues that both proponents and opponents of lesbian and gay rights have viewed such rights as “intertwined with advocacy for diverse family and relationship forms, freedom of sexual expression, and elimination of male supremacy.”³² While the boundaries of what fits within a sex rights framework may be permeable and contested, this Comment posits a certain set of core, shared values. These values include, but are not limited to, the right to make decisions about one’s body and sexual behavior; equality and freedom from discrimination based on gender, sexual identity, or sexual practices; freedom from sexuality- or gender-based violence and abuse; the right to sexuality-related information and health care; and respect for a diversity of sexual and relationship choices. This Comment will consider the claims of the *Bronson* plaintiffs within this broader framework.

The invocation of sex rights principles and legal reasoning by the *Bronson* plaintiffs and other polygamy activists is not without controversy or ambivalence. This juxtaposition of sex rights rhetoric with fundamentalist Mormonism may be jarring for some because sex right arguments are typically advanced by those on the liberal end of the political spectrum, while fundamentalist practitioners of plural marriage hold many traditionally conservative values. In addition, fundamentalist Mormon polygamists are often perceived as being abusive toward women and children, and intolerant of deviations from their heterosexual, patriarchal family structure.³³ Critics of polygamy argue that women are coerced into polygamous relationships by religious and social pressure and that physical, psychological, and sexual abuse are endemic in polygamous communities.³⁴ These critics cite particular concerns about young girls being forced into marriages with much older men.³⁵ If these claims are accurate, polygamous practices conflict with sex rights principles of autonomy, freedom from abuse, and gender equality, and raise questions about polygamists’ relationships to sex rights. The *Bronson* plaintiffs themselves demonstrated considerable ambivalence about relying exclusively on sex rights arguments by deploying rhetoric emphasizing the religious, and hence, presumably morally superior, basis for their variant marriage practices.³⁶

At first glance, fundamentalist Mormons’ appeal to LGBT rights rhetoric may strike many as particularly startling in the aftermath of California’s Proposition 8, which the Mormon Church strongly supported; the Church received extensive and vehement criticism for its role in stripping same-sex

32. POLIKOFF, *supra* note 22, at 49.

33. See, e.g., ANDREA MOORE-EMMETT, *GOD’S BROTHEL* 36–38 (2004); Dan Frosch, *Texas Reports Further Signs of Abuse at Sect’s Ranch*, N.Y. TIMES, May 1, 2008, at A16; Marci Hamilton, *Prosecuting Polygamy in El Dorado*, HUFFINGTON POST, Apr. 8, 2008, http://www.huffingtonpost.com/marci-hamilton/prosecuting-polygamy-in-e_b_95674.html.

34. See Hamilton, *supra* note 33; MOORE-EMMETT, *supra* note 33, at 36–38.

35. See, e.g., MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 73 (2005).

36. See *infra* Section II.C.

couples of the right to marry.³⁷ The use of the LGBT legal victory in *Lawrence* may thus seem ironic, opportunistic, or disingenuous. It is important to note, however, that the LDS Church that encouraged its members to contribute millions to pass Proposition 8 also disavows and actively distances itself from fundamentalist Mormons practicing plural marriage. Although the two groups share underlying religious doctrine about plural marriage in the afterlife, the mainline LDS Church opposes the earthly practice of polygamy much as it opposes same-sex marriage (though the disapproval of the latter is not limited to this life).³⁸ Fundamentalist Mormons do believe that homosexuality is a sin,³⁹ but some polygamy activists have come to be ambivalent about state prohibitions on same-sex marriage.⁴⁰ Polygamy activist Mary Batchelor, for example, has come to the conclusion that it would be wrong to deny gay people the same legal protections she seeks for herself.⁴¹ In addition, the polygamy activist group Principle Voices publicly opposes the Federal Defense of Marriage Act (“DOMA”), which defines marriage as a union of one man and one woman for federal purposes, and stipulates that states may refuse to recognize other types of marriages from other jurisdictions.⁴² This opposition, however, may be more about DOMA’s numerical restraints on marriage than about its constraints regarding sexual orientation.⁴³ The relationship between polygamy activism, Mormon homophobia, and same-sex marriage is thus quite complicated.

These multiple layers of contradiction and ambivalence raise the question of how the *Bronson* plaintiffs and other polygamy activists fit within traditions of sex rights claiming and rhetoric. Is their use of these arguments a hypocritical appeal to principles to which they do not subscribe in order to defend a practice that is, at its core, contrary to sex rights values? Does their use of sex rights rhetoric undermine the integrity of the broader principles articulated by LGBT and feminist activists? Part II will lay the groundwork for an in-depth exploration of these questions by outlining the history of Mormon

37. See Associated Press, *Mormon Church Draws Protest over Marriage Act*, N.Y. TIMES, Nov. 8, 2008, at A34.

38. The Church of Jesus Christ of Latter-day Saints, Polygamy, <http://mormon.org/mormonorg/eng/basic-beliefs/glossary/glossary-definition/polygamy> (last visited Jan. 20, 2010).

39. Principle Voices, Positions on Current Issues, <http://principlevoices.org/about/positions-on-current-issues> (last visited Jan. 20, 2010).

40. Telephone Interview with Mary Batchelor (Oct. 27, 2008); Principle Voices, *supra* note 39.

41. Telephone Interview with Mary Batchelor (Oct. 27, 2008). While this perspective is probably far from universal in fundamentalist Mormon communities, interestingly it is held by at least some of the more vocal advocates for the right of consenting adults to choose plural marriage.

42. Principle Voices, *supra* note 39 (“We oppose legislation or Constitutional amendments (especially defining marriage) which restrict rather than protect individual freedoms and rights. We believe that marriage, ideally, is a private contract which should not be regulated by the state.”).

43. *Id.*

and fundamentalist Mormon polygamy and by outlining the facts and plaintiffs' arguments found in *Bronson*.

II

HISTORICAL CONTEXT AND A NEW POLYGAMIST CHALLENGE

A. Nineteenth-Century Mormon Polygamy and Early Legal Challenges

The laws challenged in *Bronson* have a history that traces to Utah's days as a federal territory. Starting in 1847, large numbers of individuals belonging to the LDS Church immigrated to the Salt Lake Valley under the leadership of Brigham Young, the nascent religion's second president and prophet.⁴⁴ They fled the eastern United States to escape the persecution that had resulted in the murder of their founding prophet, Joseph Smith.⁴⁵ The hostility of mainstream Americans to the new religion had many sources, but rumors of the practice of polygamy among its adherents fueled anti-Mormon sentiment. These rumors were later confirmed by an official church announcement of the doctrine of plural marriage in 1852.⁴⁶ The 1856 Republican presidential platform, which decried polygamy and slavery as the "twin relics of barbarism,"⁴⁷ reflected the scope and severity of national concern with polygamy in the Utah Territory. Various federal laws were passed to outlaw the practice of polygamy (which previously had been prohibited on a state rather than federal level)⁴⁸ and limit the power of the LDS Church in the Utah Territory.⁴⁹ One such law, the 1862 Morrill Anti-Bigamy Act, was challenged by George Reynolds, a practicing polygamist who had been convicted under the act.⁵⁰ Reynolds argued that the act violated his First Amendment rights because it criminalized the practice of his religious belief in plural marriage.⁵¹ In 1878, the United States Supreme Court rejected this argument in *Reynolds v. United States*.⁵² The Court held that the First Amendment protects freedom of religious belief but not freedom of religious conduct—to interpret it otherwise "would be to make the professed doctrines of religious belief superior to the law of the land."⁵³ *Reynolds* has subsequently been followed in a number of cases involving religious challenges

44. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 25 (2002).

45. *Id.*

46. LAWRENCE FOSTER, *RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 199–200* (Oxford University Press 1981).

47. *Id.* at 221.

48. *Reynolds v. United States*, 98 U.S. 145, 165–66 (1879); GORDON, *supra* note 44, at 164–68.

49. FOSTER, *supra* note 46, at 222–23 (discussing the Edmunds Act and the Edmunds-Tucker Act).

50. GORDON, *supra* note 44, at 114–16.

51. *See Reynolds*, 98 U.S. at 162.

52. *Id.*

53. *Id.* at 167.

to antipolygamy laws.⁵⁴ Notably, in 1985, the Tenth Circuit affirmed that *Reynolds* was still good law in *Potter v. Murray City*, holding that the state had a compelling interest in promoting monogamy because it is “the bedrock upon which our culture is built.”⁵⁵

In the aftermath of *Reynolds*, Congress continued to pass laws attempting to control what it saw as the most offensive aspects of the Mormon religion in Utah.⁵⁶ In 1894, the Utah Enabling Act stipulated that Utah could be admitted as a state only under the condition that “polygamous or plural marriages are forever prohibited,” language that was directly incorporated into the Utah State Constitution.⁵⁷ It was this clause in the Utah Constitution, along with the Utah criminal antibigamy statute, that the *Bronson* plaintiffs sought to invalidate as unconstitutional.⁵⁸

B. Contemporary Polygamy Prosecutions and Bronson’s Unusual Factual Basis

Though the facts of the *Bronson* case concern the application for and denial of a marriage license, the plaintiffs focused their legal arguments primarily on invalidating the criminal laws forbidding polygamy.⁵⁹ They used this indirect civil route to challenge the criminal statute because a contentious history of enforcing antibigamy laws has led some modern law enforcement officials to adopt policies against prosecuting consenting adult polygamists.⁶⁰ Though the mainstream LDS Church repudiated plural marriage starting in 1890 as a condition of Utah’s admission to the Union, splinter sects of fundamentalist Mormons continued to practice polygamy throughout Mexico, Canada, and the western United States.⁶¹ In the first half of the twentieth century, Utah and Arizona state officials periodically mounted raids on fundamentalist Mormon communities and arrested practicing polygamists.⁶² This enforcement pattern came to a dramatic culmination in the 1953 raid on Short Creek, Arizona, that ended in the arrest of dozens of adults in the largely

54. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1068, 1070 (10th Cir. 1985); *State v. Holm*, 137 P.3d 726, 757–58 (Utah 2006) (Nehring, J., concurring).

55. *Potter*, 760 F.2d at 1070.

56. FOSTER, *supra* note 46, at 222–23.

57. UTAH CONST. art. III, § 1; Utah Enabling Act, ch. 138, § 3, 28 Stat. 107, 108 (1894).

58. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 14, § I.

59. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) [hereinafter *Bronson II*]; Memorandum in Support of Plaintiff’s Motion for Summary Judgment, *supra* note 14, at 2.

60. Doug Robinson, *Mark Shurtleff: Attorney General Tackles Utah’s Toughest Issues*, DESERET NEWS, Dec. 10, 2006, <http://deseretnews.com/dn/view/0,1249,650213864,00.html>.

61. RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 200–217 (2d ed. 1992); Carrie Moore & Elaine Jarvik, *Plural Lives: The Diversity of Fundamentalism*, DESERET NEWS, Sept. 9, 2006, <http://www.deseretnews.com/dn/view/0,1249,645199994,00.html>.

62. IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 46 (1996).

fundamentalist community of about 400 residents.⁶³ The raid was a public relations fiasco that resulted in charges that the Arizona authorities had violated the due process rights of the arrested polygamists. The raid also roused public sympathies against state abuse of polygamists rather than generating outrage at the polygamists' unconventional marriage practices.⁶⁴ Since that time, law enforcement officials have changed their approach to polygamous sects dramatically, with one Arizona official even apologizing for the Short Creek raid in recent years.⁶⁵ Currently, the Utah attorney general has a stated policy of actively prosecuting cases of abuse and statutory rape in polygamous communities, but declining to enforce the antibigamy statute against consenting adults.⁶⁶

While there have been at least two high-profile cases in the past five years involving the prosecution of polygamists for marrying teenage girls, challenges to Utah's antibigamy statute have been unsuccessful in these cases.⁶⁷ The fact that Rodney Holm's and Tom Green's plural wives were underage foreclosed arguments about consenting adults that would have allowed more direct analogies to the privacy right recognized in *Lawrence*.⁶⁸ Counsel in one of the cases noted that in order for a constitutional challenge of these laws to have a chance at success, there would need to be "a test case that doesn't involve a minor," though such a case would be unlikely because of the Utah attorney general's policy against charging consenting adults under the laws.⁶⁹ In contrast, the attorney for the *Bronson* plaintiffs called his clients' case "a clean-cut legal issue" that raised the question: "Can consenting adults with full knowledge practicing deeply held religious beliefs practice polygamy?"⁷⁰ To get this "clean-cut" case involving only consenting adults, however, the plaintiffs had to challenge Utah's criminal antibigamy statute through means other than an appeal from a criminal conviction.

This unusual factual basis for the challenge was not an obstacle in the district court, where the judge held that the plaintiffs had standing because the county clerk's refusal to issue a marriage license was based on the challenged

63. *Id.* at 50.

64. *Id.*

65. Ben Winslow, *Forum Focuses on Polygamy Woes*, DESERET NEWS, Apr. 25, 2007, <http://deseretnews.com/dn/view/0,1249,660214924,00.html> [hereinafter Winslow, *Forum*]; see also Jennifer Dobner, *Utah Using New Approach on Polygamy*, DESERET NEWS, July 29, 2005, <http://deseretnews.com/dn/view/0,1249,600152308,00.html> (reporting that the Utah Attorney General's Office described the Short Creek raids as a mistake).

66. Dobner, *supra* note 65; Robinson, *supra* note 60.

67. *State v. Holm*, 137 P.3d 726, 744–45 (Utah 2006); *State v. Green*, 99 P.3d 820, 834 (Utah 2003).

68. *Holm*, 137 P.3d at 744–45; *Green*, 99 P.3d at 830 n.13.

69. Ben Winslow, *Top Court Rejects Case on Polygamy*, DESERET NEWS, Feb. 27, 2007, <http://www.deseretnews.com/dn/view/1,5143,660199009,00.html>.

70. Angie Welling, *Polygamy Ban Contested*, DESERET NEWS, Jan. 12, 2004, <http://www.deseretnews.com/article/1,5143,585037355,00.html>. The legal and rhetorical implications of this focus on consenting adults are further explored *infra* Section III.A.

criminal statutes.⁷¹ The district court granted summary judgment to the defendants, however, with regard to the challenges to both the civil law prohibiting polygamous marriage and the criminal law penalizing bigamy.⁷² The court held that since the Supreme Court in *Lawrence v. Texas* specifically noted that its holding did not mean that the state had to recognize same-sex marriage, there was no legal basis for using the case to argue that the state had to grant multiple marriage licenses to polygamists.⁷³ The court did admit that it was “likely to be true” that *Lawrence* called into question the criminalization of polygamy, but deferred to Tenth Circuit precedent holding the laws valid because of Utah’s “compelling state interest in protecting monogamous marriage.”⁷⁴

On appeal to the Tenth Circuit, the disjunction between the facts of the case and the challenged laws became an issue. The court declined to consider the plaintiffs’ challenge to the state’s marriage laws because of inadequate briefing on the issue.⁷⁵ The court noted that the plaintiffs did not ask for injunctive relief ordering the defendant to issue a marriage license, and that they conceded that the *Lawrence* decision did not mandate a change in marriage laws.⁷⁶ The challenge to the criminal law was dismissed due to lack of standing.⁷⁷ Citing the fact that even the plaintiffs’ briefs acknowledged that Utah’s antibigamy statute was not enforced against consenting adults, the court held that the plaintiffs did not have a “credible threat of prosecution” and thus had not suffered an injury-in-fact.⁷⁸ Furthermore, the court ruled that the causation and redressability requirements for standing were absent because the denial of a marriage license did not increase the plaintiffs’ risk of criminal prosecution, and the county clerk named as the defendant in the lawsuit was not charged with enforcing criminal laws.⁷⁹

C. Religion and Ambivalence in the Defense of Plural Marriage

Historically, most Mormon and fundamentalist Mormon challenges to antipolygamy laws have been based on freedom of religion, and *Bronson* did not entirely break with this tradition. In advancing the theory that the challenged laws violate the First Amendment’s Free Exercise Clause, the plaintiffs specifically asked the court to overturn the holding in *Reynolds* upholding the constitutionality of laws prohibiting polygamy.⁸⁰ Despite recent case law

71. *Bronson I*, 394 F. Supp. 2d 1329, 1332 (D. Utah 2005), *vacated*, 500 F.3d 1099 (10th Cir. 2007).

72. *Id.* at 1334.

73. *Id.*

74. *Id.* at 1333–34 (citing *Potter v. Murray City*, 760 F.2d 1065, 1070–71 (10th Cir. 1985)).

75. *Bronson II*, 500 F.3d 1099, 1104–05 (10th Cir. 2007).

76. *Id.* at 1104.

77. *Id.* at 1107–09.

78. *Id.*

79. *Id.* at 1109–13.

80. Complaint, *supra* note 9, at 7.

affirming the continuing validity of *Reynolds*,⁸¹ the *Bronson* plaintiffs nonetheless cited two recent Supreme Court cases they believed called the validity of *Reynolds* into question.⁸² These cases, the *Bronson* plaintiffs argued, require strict scrutiny of a law burdening religion when the law targets a specific religious group⁸³ or involves other fundamental rights in addition to freedom of religion.⁸⁴ However, both the district court and the Tenth Circuit were quick to reject the plaintiffs' challenge to the continuing validity of *Reynolds*, noting that both of the cases in question cited *Reynolds* with approval, affirming its precedential value and distinguishing the facts before them from polygamy.⁸⁵ Furthermore, both courts cited a long and ongoing history of firm rejection of all religious freedom challenges to bigamy laws.⁸⁶ The weight of precedent was very much against the plaintiffs, amounting to what the district court called an "insurmountable hurdle."⁸⁷

Given the weight of precedent against them, why did the *Bronson* plaintiffs attempt to challenge the law with a tenuous religious freedom argument? Part of the reason behind the plaintiffs' use of the religious freedom argument may have been that they harbored some hope of succeeding on these grounds, despite the precedent rejecting this argument. Their attorney, Brian Barnard, told one reporter that "[i]n the last hundred years, the United States Supreme Court's analysis of religious issues has changed . . . [a]nd under the current analysis, we believe we have a chance of getting *Reynolds* overturned."⁸⁸ Ironically, while courts have resoundingly rejected arguments about religious freedom in challenges to bigamy laws, the fact that such arguments have some salience with the attorneys general of Arizona and Utah gave rise to the standing issue that ultimately prevented the Tenth Circuit from reaching the substantive issue of the bigamy law's constitutionality.⁸⁹ The attorneys general have expressed reluctance to bring criminal bigamy charges in cases involving consenting adults, specifically citing concerns about religious freedom.⁹⁰ This reluctance meant that the *Bronson* plaintiffs had no credible fear of prosecution,

81. See, e.g., *Potter v. Murray City*, 760 F.2d 1065, 1068, 1070 (10th Cir. 1985); *State v. Holm*, 137 P.3d 726, 757 (Utah 2006).

82. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 14, §§ II–III (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) and *Employment Division v. Smith*, 494 U.S. 872, 881 (1990)).

83. Brief of Appellants at 12, *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007) (No. 05-4161); see also *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32.

84. Brief of Appellants, *supra* note 83, at 49–50; see also *Employment Division*, 494 U.S. at 881.

85. *Bronson II*, 500 F.3d at 1105–06; *Bronson I*, 394 F. Supp. 2d 1329, 1333 (D. Utah 2005), *vacated*, 500 F.3d 1099 (10th Cir. 2007).

86. *Bronson II*, 500 F.3d at 1105–06; *Bronson I*, 394 F. Supp. 2d at 1332–33.

87. *Bronson I*, 394 F. Supp. 2d at 1332–33.

88. Welling, *supra* note 70.

89. See *supra* text accompanying note 66.

90. Dobner, *supra* note 65; Winslow, *Forum*, *supra* note 65.

and thus lacked standing to challenge the criminal bigamy laws.⁹¹

However, continued use of the legally questionable religious freedom argument is better understood as resulting from the fact that, for the *Bronson* plaintiffs, the practice of polygamy is fundamentally one of religious doctrine.⁹² Though they made use of the rhetoric of sex rights, their values and motivation were firmly rooted in the religious nature of their marital practices. Their use of sex rights arguments about privacy and liberty were, therefore, in many ways a means to a desired goal, rather than an end in themselves. This continued commitment to the religious nature of polygamous relationships may be seen even in the way in which they framed their request for relief. Though in some places they framed their plea simply as a request to have the relevant laws declared unconstitutional, in their Memorandum in Support of Summary Judgment, they specifically ask for an “end to the criminalization of the practice of *religious* polygamy.”⁹³ The specificity of this request is interesting given that their strongest argument for the decriminalization of polygamy, Fourteenth Amendment liberty and privacy rights, would not differentiate between religious and nonreligious polygamy. Though the plaintiffs may have had strategic reasons for this potentially conflicting language in the context of advancing multiple constitutional challenges, the continued emphasis on the plaintiffs’ practice of polygamy for religious reasons may also indicate a reluctance to embrace sex rights reasoning for its own sake.

Ambivalence about sex rights and religion can also be seen in comparisons the plaintiffs make between their practice of plural marriage and other forms of nonmonogamous behavior. On the one hand, they draw analogies between their marriage practices and types of nonreligious nonmonogamy that are not prosecuted under bigamy laws in order to emphasize that the laws are motivated by religious and moral animus and do not treat similar behaviors similarly.⁹⁴ This point, however, takes on a distancing and even disparaging tone when they compare men who are polygamous to men who have children with multiple women in a nonreligious context and take little responsibility for the women or children:

A man who concurrently has children by two different women and takes little responsibility for the women’s and children’s welfare is guilty of no crime. However, the man who begets children by multiple women, publically declares the women to be his wives, maintains a formal relationship supporting the women and children living in the same home, is a criminal guilty of polygamy. The polygamist who seeks a formal relationship, acknowledges paternity and takes social

91. *Bronson II*, 500 F.3d 1099, 1107–09 (10th Cir. 2007).

92. Moore, *supra* note 1.

93. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 14, at 2 (emphasis added).

94. *See id.* at 21–22.

responsibility is branded a criminal and is punished for his greater social and moral awareness.⁹⁵

Here, the plaintiffs use a combination of analogizing and distancing to point out a legal and social hypocrisy: the polygamists have “greater social and moral awareness” in how they conduct their intimate relationships but face more legal and social sanctions for their behavior.

The idea that polygamy carries a kind of moral superiority over other sorts of sexual variation indicates some ambivalence about embracing sex rights discourse, a hesitation also seen in the way the plaintiffs repeatedly cite the religious basis for their marital practices. By asking for the decriminalization of “religious polygamy,”⁹⁶ emphasizing the lack of legitimate state interest in prohibiting polygamy “especially when practiced for religious reasons,”⁹⁷ and decrying the persecution of individuals because of a “religious based choice of marital relationship,”⁹⁸ the *Bronson* plaintiffs suggested that the religious nature of their behavior makes it distinct from other forms of sexual and relationship variation, and thus more deserving of protection from state interference. While this tension could well result from a conscious choice in litigation tactics, this repeated emphasis on the religious nature of their marital practices indicates perhaps that the plaintiffs may not be entirely comfortable with an argument defending polygamy from a purely sex rights perspective.

D. Bronson’s Privacy Challenge

Despite the plaintiffs’ apparent ambivalence towards sex rights, the other main argument in the *Bronson* challenge was that state and federal laws prohibiting polygamy violated their right to privacy in their intimate relationships. This argument invokes the line of Supreme Court cases, including *Griswold v. Connecticut*,⁹⁹ *Eisenstadt v. Baird*,¹⁰⁰ *Roe v. Wade*,¹⁰¹ and *Lawrence v. Texas*,¹⁰² that recognizes a constitutional right to privacy that bars the state from interfering with certain types of protected decisions involving the family, procreation, and sexuality.¹⁰³ In framing the plight of consenting, adult polygamists within this line of cases, the *Bronson* plaintiffs supplemented the traditional religious defense of their family structure with arguments invoking sex-rights-based notions of privacy and autonomy in matters of relationships and sexuality. They rely heavily on *Lawrence*’s holding that because Texas sodomy laws interfered with private sexual conduct between consenting adults,

95. *Id.* at 8–9.

96. *Id.* at 2.

97. *Id.* at 9.

98. *Id.* at 11.

99. 381 U.S. 479 (1965).

100. 405 U.S. 438 (1972).

101. 410 U.S. 113 (1973).

102. 539 U.S. 558 (2003).

103. Brief of Appellants, *supra* note 83, at 19.

it invoked questions of substantive due process and violated constitutionally protected liberty interests.¹⁰⁴

The exact scope of the right recognized in *Lawrence* is still being debated and interpreted by legal scholars and courts. However, the notion of protected liberty and privacy rights to make decisions about consensual, private sexual behavior between adults taps into the powerful sex rights notions of autonomy, freedom from state intervention, and sexual self-determination. Furthermore, the expansive language in *Lawrence* invokes a far-reaching vision of these rights, saying that the decisions they protect

involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, . . . central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁰⁵

The *Bronson* plaintiffs argued that *Lawrence*'s recognition of the privacy and liberty interests of consenting adult gays and lesbians must be extended to cover consenting adult polygamists.¹⁰⁶ They read *Lawrence* in a broad sense as recognizing constitutional protection from state interference with *any* private sexual behavior between consenting adults: "*Lawrence* declares that the Constitution protects the liberty interests of all consenting adults to engage in private sexual conduct. The same protection must include polygamy."¹⁰⁷ This reading of *Lawrence* may be broader than those endorsed by some lower courts to date, but it is consistent with a wider principle of sexual autonomy that some would argue *Lawrence* represents.¹⁰⁸ Despite their complex relationship with other types of sex rights claims, the *Bronson* plaintiffs used this sex rights notion of autonomy to make the argument for the decriminalization of polygamy.

Another aspect of *Lawrence* asserted by the *Bronson* plaintiffs is the notion that majority moral disapproval alone is not enough to provide a rational basis for a statute.¹⁰⁹ Throughout the history of fundamentalist Mormon polygamy, the practice has been subject to fierce moral disapproval from those

104. *Id.* at 11; *see also Lawrence*, 539 U.S. at 578.

105. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

106. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 14, at 6.

107. *Id.*

108. *See, e.g.*, Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955, 1945–51 (2004) (noting that *Lawrence*'s "unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships" but acknowledging that "[t]he values heralded by *Lawrence* may not reach certain pockets of the nation any time soon.").

109. Brief of Appellants, *supra* note 83, at 45.

outside the religion.¹¹⁰ The *Bronson* plaintiffs argued that while there might be a legitimate state interest in preventing fraudulent marriages, the Utah antibigamy statute is both over- and under-inclusive on this front, and thus can only be explained by animus toward polygamist groups.¹¹¹ They argued that a “statute criminalizing adult consensual private noncommercial cohabitation and polygamy (especially when practiced for religious reasons) has no conceivable legitimate state purpose” and that the bigamy law “stigmatizes as criminals substantial numbers of otherwise law abiding persons.”¹¹² While the aside about the religious nature of polygamy may indicate some ambivalence about an unqualified embrace of sex rights reasoning, the claim that the state’s bigamy laws are motivated solely by moral disapproval directly analogized their case to the sodomy laws challenged in *Lawrence*.

The analogy to the case in *Lawrence* continued as the *Bronson* plaintiffs made use of the discussion in Justice O’Connor’s concurrence of how even infrequently enforced laws can still have the effect of perpetuating social stigma, thus causing palpable harm even in the absence of criminal prosecutions.¹¹³ In her concurrence, O’Connor argued that the existence of criminal sodomy laws legitimates discrimination against gays and lesbians in employment, family, and housing law, and encourages their unequal treatment in society.¹¹⁴ Similar to the Texas sodomy laws, the *Bronson* plaintiffs argued, “Utah’s criminalization of religious polygamy, even if the crime is rarely prosecuted, brands plaintiffs as criminals and sanctions public and private discrimination based on plaintiffs’ religious based choice of marital relationship.”¹¹⁵ They even suggested that the state may be fully aware and approve of this secondary purpose to rarely enforced criminal laws. Utah, they noted, filed an amicus brief in *Lawrence*, where it “extolled the benefits of having unenforced symbolic criminal laws” for “pedagogical” purposes of teaching citizens about acceptable and unacceptable behavior and traditional morals.¹¹⁶

The *Bronson* plaintiffs’ use of *Lawrence* and other appeals to sex rights rhetoric raises questions about how their arguments fit with the larger world of sex rights claiming. The plaintiffs’ use of sex rights rhetoric seems ambivalent at times, and others have questioned whether their deployment of such rhetoric

110. See MARY BATCHELOR ET AL., VOICES IN HARMONY: CONTEMPORARY WOMEN CELEBRATE PLURAL MARRIAGE 10–44 (2000) (discussing historical and contemporary disapproval of fundamentalist Mormon polygamy from the LDS Church and non-Mormons).

111. Brief of Appellants, *supra* note 83, at 32–36.

112. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 14, at 9.

113. *Id.* § I(C) (citing *Lawrence v. Texas*, 539 U.S. 558, 581–82 (2003) (O’Connor, J., concurring)).

114. *Lawrence*, 539 U.S. at 581–82.

115. Memorandum in Support of Plaintiff’s Motion for Summary Judgment, *supra* note 14, at 11.

116. Brief of Appellants, *supra* note 83, at 16 n.3.

is disingenuous or contradictory given the patriarchal values of fundamentalist Mormonism and the allegations of sexual abuse within those communities.¹¹⁷ While the increased visibility of polygamy activism could carry the risk of increasing backlash against LGBT rights and same-sex marriage activism,¹¹⁸ the next Part argues that the use of sex rights arguments to defend polygamy is not ideologically inconsistent or out of place in a complex and at times contradictory tradition of sex rights claiming.

III

BRONSON'S RHETORICAL STRATEGIES AND PARALLELS IN SEX RIGHTS CLAIMING

The tensions that arise from the *Bronson* plaintiffs' ambivalent and at times conflicting relationship to sex rights rhetoric and ideology may be rooted partly in their religion-based grounds for the practice of plural marriage; this tension, however, is not unique to polygamy activists. This Part will situate some of the tactics, rhetoric, and tensions in polygamy activism within a wider sex rights context by examining analogous ambiguities in other types of sex rights claims. These comparisons will call attention to the striking parallels between polygamy activism, feminism, and LGBT activism. In so doing, I aim to illustrate both the degree to which polygamy activists borrow from the feminist and LGBT movements, and the fact that their contradictions do not necessarily put them outside the wider realm of sex rights claiming.

A. Rhetoric and Tactics

1. Marriage License Applications and Protest

At the simplest level, the factual basis for the *Bronson* challenge was strikingly similar to ongoing activism around same-sex marriage.¹¹⁹ The plaintiffs would have known that they would not be granted a marriage license; they sought the license to make a political statement about what they perceived to be injustice in the law, and to create grounds for a legal challenge.¹²⁰ This is parallel to actions where same-sex couples have made well-publicized applications for marriage licenses to raise public awareness in the context of ongoing

117. See *supra* notes 33–43 and accompanying text.

118. See Elizabeth Larcano, Comment, *A "Pink" Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065 (2006). Interestingly, were polygamy activists to succeed in gaining recognition for a religious exemption to bigamy laws, this precedent has the potential to be far more threatening for LGBT rights by lending support to the argument that there should be religious exemptions to laws banning discrimination on the basis of sexual orientation. Cf. *N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008).

119. See *supra* text accompanying notes 9–15.

120. Moore, *supra* note 1.

challenges to state marriage laws.¹²¹ One organization, Marriage Equality USA, has organized annual Valentine's Day protests where same-sex couples across the nation present themselves to their local county clerk's office to apply for marriage licenses they know will be denied.¹²² The purpose of the event, organizers say, is to "put a local face on marriage discrimination around the country" and to gain public support to change laws prohibiting same-sex marriage.¹²³ This motivation is not dissimilar to the motivations of the *Bronson* plaintiffs, though they focused more on the desire to create a direct legal challenge to the bigamy law than on public political protest. Both groups sought to bring attention to what they perceived as restrictive marriage regulations with the ultimate goal of legal change.

2. Challenging Presumptions of Victimization

Though the arguments of the *Bronson* plaintiffs did not highlight this fact, most of the leaders of the larger pro-polygamy movement are women.¹²⁴ Some of the reasons for this are practical: men's incomes are often more critical to the financial wellbeing of plural families, and fundamentalist Mormon men fear losing their jobs if they are publicly identified as polygamists.¹²⁵ This gendered leadership, however, is also strategic. Women, as the purported victims of polygamy, are better able to diffuse notions that all plural wives are submissive, cloistered, and abused.¹²⁶ Polygamist men may be less credible delivering this message if they are perceived to be perpetrators of the abuse being denied.¹²⁷

Such instances of alleged victims organizing to speak out against the criminalization of institutions presumed to oppress them can also be seen in the activism of sex workers to decriminalize prostitution. In November 2008, San Franciscans voted on Proposition K, an initiative that would have defunded enforcement and effectively decriminalized prostitution within the city of San Francisco.¹²⁸ Prominent among the advocates for Proposition K were sex workers and sex worker organizations.¹²⁹ Sex workers who supported the initiative argued that it would allow prostitutes who were victims of physical or sexual assault to seek the assistance of police without fear of retribution, and called the tactics of the measure's opponents "sex-negative" and "shame-

121. See, e.g., Roger Brigham, *Marriage Actions Mark Valentine's Day*, BAY AREA REP., Feb. 16, 2006, <http://www.ebar.com/news/article.php?sec=news&article=583>.

122. Dennis McMillan, *Activists Protest for Freedom to Marry on Valentine's Day*, S.F. BAY TIMES, Feb. 8, 2007, http://www.sfbaytimes.com/index.php?sec=article&article_id=6068.

123. *Id.*

124. Hayes, *supra* note 19, at 108–09.

125. Batchelor, *supra* note 40.

126. *Id.*

127. *Id.*

128. John Coté, *Prop. K Calls for Decriminalizing Prostitution in S.F.*, S.F. CHRON., Oct. 6, 2008, at B2.

129. *Id.*

based.”¹³⁰ Like the women at the forefront of polygamy activism, the sex workers sought to defuse notions that the criminal law protected them more than it oppressed them.

3. *Borrowing Language*

As another example of the parallels between the polygamy movement and other sex-rights-based movements, the language of the pro-polygamy movement is also directly reminiscent of terminology used in LGBT organizing. Polygamy activists speak of “coming out” as polygamists.¹³¹ In a 2006 rally of youth from plural families, teens held homemade signs reading, “I love all my moms.”¹³² This slogan is reminiscent of children of lesbian parents in gay pride parades holding similar signs declaring, “I love my two moms.”

The rally’s speakers debunked stereotypes about their families and communities and spoke of what they liked about growing up in polygamist families. One young woman declared that she and her siblings “are not brainwashed, mistreated, neglected, malnourished, illiterate, defective or dysfunctional. We are useful, responsible, productive members of society. I have in my life come into contact with several mental health professionals, and they all said I . . . [am] a perfectly healthy, well-adjusted teenager.”¹³³ Another protested that, “I never felt that my opportunities or choices were limited by the lifestyle I was raised in, but rather by the prejudices of others towards my family.”¹³⁴ Words like these, reflecting the experience of children growing up in polygamist households, could with little alteration have been spoken by the children of gay or lesbian parents.

In other polygamy activism, the phrase “consenting adults,” emphasized so heavily by the *Bronson* plaintiffs, harkens back to discussions about the decriminalization of sodomy. Rhetorically, the plaintiffs’ repeated emphasis that all three of them were consenting adults did three things to bolster their sex rights claims. First, it echoed the use of the phrase “consenting adults” in the *Lawrence* decision and in LGBT activist arguments for the decriminalization of sodomy, strengthening the link between these different sex rights claims.¹³⁵ Second, it simplified the legal questions a court would have to address by minimizing the criminal statutes involved.¹³⁶ As adults who all consented to the

130. *Id.*

131. Hayes, *supra* note 19, at 110.

132. Rally of youth from polygamist communities (Aug. 19, 2006). The sign is visible in one of the videos of the rally available at <http://principlevoices.org/youth-rally> (Christian’s speech).

133. Jessica [no last name given], Remarks at Polygamist Youth Rally (Aug. 19, 2006), *video available at* <http://principlevoices.org/youth-rally>.

134. Catherine [no last name given], Remarks at Polygamist Youth Rally (Aug. 19, 2006), *video available at* <http://principlevoices.org/youth-rally>.

135. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring).

136. In the *Holm* and *Green* cases, polygamists were prosecuted for marrying girls under

polygamous relationship, the *Bronson* plaintiffs took the question of statutory rape and the sexual abuse of children out of the equation, allowing the challenge to the bigamy statute to proceed while eliminating one of the grounds on which *Lawrence* could be distinguished. The third effect of the phrase “consenting adults” was to distance the *Bronson* plaintiffs from instances of child abuse in plural families to gain legitimacy as sex rights claimants. While this effect is closely related to the simplification of the legal questions mentioned above, it is also distinct, and is discussed further in Section III.D below.

B. Sex Rights Claimant or Sex Rights Violator?

The perception that polygamist communities are rampant with child abuse and domestic violence is one of the obstacles that polygamy activists face in positioning themselves as persecuted sex rights claimants. As seen in the April 2008 raid on the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) community in Eldorado, Texas, fundamentalist Mormon polygamists are often seen as sex rights violators rather than as sex rights defenders. In that case, Texas authorities received a phone call from a sixteen-year-old who reported that she was being physically and sexually abused by her forty-nine-year-old husband. They subsequently removed 462 FLDS children from the custody of their parents, citing concerns about physical and sexual abuse and forced marriages of underage girls.¹³⁷ Though a Texas judge later ordered the children returned for lack of evidence that they were at risk of abuse, and there was speculation that the original call was a hoax, this extreme reaction shows the intense public and state anxiety about abuse in these communities.¹³⁸

As this example shows, critics of polygamy charge that the practice is inherently abusive to women and children and that child abuse, sexual exploitation, and domestic violence are endemic in polygamous communities.¹³⁹

the age of eighteen. There the defendants were charged with the crimes of unlawful sexual conduct with a minor and rape of a child, respectively. *State v. Holm*, 137 P.3d 726, 730 (Utah 2006); *State v. Green*, 108 P.3d 710, 713 (Utah 2005). The court in *Holm* rejected the defendant’s argument that the bigamy statute violated his constitutionally protected liberty interests, and noted that the *Lawrence* court limited its holding, specifically noting that the conduct at issue in that case did not involve minors. *Holm*, 137 P.3d at 743.

137. Frosch, *supra* note 33. It is worth noting that the FLDS sect does not necessarily represent, nor is accepted by, all fundamentalist Mormon polygamists. See Kirk Johnson & John Dougherty, *Raid on Sect in Texas Rattles Polygamist Faithful Elsewhere*, N.Y. TIMES, May 8, 2008, at A1 (discussing other polygamist groups that disapprove and distance themselves from the FLDS’s practices around underage brides).

138. Gretel C. Kovach, *A Sect’s Families Reunite, and Start to Come Home*, N.Y. TIMES, June 6, 2008, at A17. For more information about recent laws enacted in response to fears about coercive and underage marriages in fundamentalist Mormon communities, see Rosanne Piatt, *Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger than Sixteen and Criminalizes Parental Consent*, 37 ST. MARY’S L.J. 753 (2006); David MacArthur, *Recent Developments in Utah Law: Performing Unlawful Marriages*, 2001 UTAH L. REV. 1132 (2001).

139. See, e.g., Hamilton, *supra* note 33; Maura Strassberg, *The Crime of Polygamy*, 12

Constitutional law scholar Marci Hamilton has even asserted that the law cannot protect polygamy without also protecting “the child and spousal abuse that inevitably follow.”¹⁴⁰ Charges like these would seem to run directly afoul of sex rights principles like the right to self-determination in matters relating to sexuality, gender equality, and freedom from gender- or sexuality-based violence and abuse.

Perhaps as a result of these allegations, polygamy activists are careful to distinguish themselves from the reports of abusive practices within their communities. They acknowledge that abuse happens in some polygamous families and communities, but denounce such practices and argue that polygamy itself is not to blame for the abuse.¹⁴¹ Child abuse and domestic violence exist in all communities, they argue, and the fact that they happen in polygamous communities simply means that these communities are not immune from wider societal problems.¹⁴² These activists are quick to distinguish their practice of polygamy from sects where there is underage or coerced marriage.¹⁴³ Indeed, they argue that decriminalization of polygamy may be instrumental in fighting abuse in polygamous communities by decreasing stigmatization and isolation.¹⁴⁴

In addition to defending against accusations that the practice of polygamy inherently or frequently violates sex rights, polygamy activists are positioning themselves as rights claimants who should be permitted to live by their beliefs about plural marriage without state interference. They argue that the government does not have a right to interfere in polygamous relationships between consenting adults.¹⁴⁵ As discussed above, the prominence of women in leadership positions in the polygamy movement is not accidental; these women aim to refute notions that wives in polygamous families are uniformly coerced and abused.¹⁴⁶ These women emphasize that they are competent adults, and

TEMP. POL. & CIV. RTS. L. REV. 353, 366–81 (2003); Tapestry Against Polygamy, www.polygamy.org (last visited Jan. 23, 2010).

140. Hamilton, *supra* note 33.

141. See, e.g., Johnson & Dougherty, *supra* note 137; Nancy Perkins, *Plural Wives Plead Case: Make Polygamy Legal in Utah, Shurtleff is Told*, DESERET NEWS, Sept. 27, 2003, <http://deseretnews.com/dn/view/0,1249,515034946,00.html>.

142. See, e.g., Johnson & Dougherty, *supra* note 137 (quoting plural wife Marlene Hammon responding to allegations of underage brides in some polygamous sects: “Polygamy is not the problem. . . . This is about human error, not polygamy.”); Principle Voices, *supra* note 39 (“We abhor abuse wherever it happens. We do not believe abuse is inherent in polygamy. Abuse crosses all socio-economic lines and does exist anywhere human beings gather.”).

143. See, e.g., Principle Voices, *supra* note 142; Ben Winslow, *Pro-Polygamy Rally Planned for Next Week*, DESERET NEWS, Aug. 9, 2006, <http://deseretnews.com/dn/view/0,1249,645191802,00.html>.

144. Ben Winslow, *State Urged to Scrap Its Law Against Polygamy*, DESERET NEWS, May 10, 2006, <http://deseretnews.com/dn/view/0,1249,635188693,00.html>. Interestingly, those advocating the legalization of sex work also make parallel arguments.

145. See Hayes, *supra* note 19, at 110–11.

146. See *id.* at 108–09.

question why the government should be permitted to interfere with relationships that they freely choose.¹⁴⁷ This type of rhetoric makes direct appeals to sex rights values of autonomy, self-determination, and freedom from government intervention in private, intimate relationships, while also refuting notions that women in these communities are denied the right to make decisions about relationships and sexuality.

The complicated line polygamy activists walk between making sex rights claims and defusing critiques that rights violations are rampant in their communities is not unprecedented. Similar tensions exist in feminist debates about pornography. Feminist antipornography activists in the 1980s positioned themselves as defenders of the rights of women against sexual exploitation and violence.¹⁴⁸ Not only did pornography harm the women who were involved in its making, they argued, it also contributed to a culture that objectified women and their sexuality and that encouraged rape and domestic violence.¹⁴⁹ In an emerging movement, sex-positive feminists challenged this position and argued that women's freedom had to include freedom to explore all aspects of their sexuality, including the right to watch or make pornography. For sex-positive feminists, affirmatively claiming positive women's sexuality and transgressing sexual norms were seen as tactics that would ultimately advance the cause of women's liberation.¹⁵⁰

In the heated debates that resulted from these clashing ideologies, the antipornography activists accused the sex-positive feminists of perpetuating systems of sexual violence in their pursuit of sexual freedom. Antipornography feminists were accused in turn of collaborating in the repression of women's autonomous sexual expression in their quest to stamp out sex-based oppression. This complex relationship between advocating some types of sex rights while facing accusations of violating others demonstrates that similar tensions surrounding polygamy activism have precedent in the work of prior sex rights claimants. While it is unclear that the pro-polygamy position staked out by the *Bronson* plaintiffs and their contemporaries would have found much sympathy on either side of the feminist pornography debates, it shares with those debates a struggle over how to balance competing claims for autonomy and freedom from abuse.

C. Claims Simultaneously Conservative and Progressive

While fundamentalist Mormon polygamy activists may embrace some aspects of sex rights—such as autonomy and rejection of abuse—they also

147. *Id.* at 110.

148. See LILLIAN FADERMAN, *Lesbian Sex Wars in the 1980s*, in *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 246, 250–52 (1991).

149. *Id.*

150. *Id.*

have a more ambiguous relationship with other sex rights values like egalitarian gender relations. While claimants often emphasize that the women in polygamous marriages are in the relationship because of their own free choice, polygamous communities remain, for the most part, committed to highly traditional gender roles.¹⁵¹ Men in the communities are permitted to have multiple wives, while each woman has only one husband. For both theological and cultural reasons, the husband is seen as the head of the family, and is expected to govern his wives and children both in this world and in the afterlife.¹⁵²

This position of making sex rights claims of autonomy while continuing to embrace traditional patriarchal gender roles seems contradictory. This sort of contradiction, however, is not foreign to other types of sex rights claims. Some observers of the feminist pornography debates, for example, have argued that the activism of antipornography feminists appealed to and reinforced patriarchal notions of women's relationships with sexuality.¹⁵³ Sex-positive feminist Lisa Duggan notes that by focusing exclusively on pornography's harm to women, the antiporn feminists have played into traditional gender roles by casting pornography as a location where women who would refuse sex are instead overcome and violated by men giving in to bestial sexual urges.¹⁵⁴ She writes of alliances between antiporn feminists and social conservatives where they shared "a convergence of binary gender categories and melodramatic narratives of female innocence and male villainy."¹⁵⁵

This parallel may be imperfect because Duggan is an opponent accusing antipornography feminists of conservatism, while many fundamentalist Mormons openly profess their commitment to traditional gender roles. Some fundamentalist women, however, have a more complicated analysis of the gender roles in plural families. Plural wife Elizabeth Joseph, for example, argues that polygamy can be seen as a feminist institution because the support of multiple wives and large families allows women to pursue careers while ensuring their children are well cared for.¹⁵⁶

This tension between progressive and conservative sex rights claiming is also evident in same-sex marriage activism. Advocates for same-sex marriage, for instance, are making sex rights claims based on sexual orientation equality and the freedom to marry the person of one's choice. Some critics of marriage activism, however, point out that arguments for same-sex marriage often reinscribe monogamous dyads as the ideal form of sexual and romantic relationship, and thus advocate a relationship structure that mimics traditional

151. ALTMAN & GINAT, *supra* note 62, at 366.

152. *Id.*

153. DUGGAN & HUNTER, *supra* note 31, at 8.

154. *Id.*

155. *Id.*

156. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 314–17 (2004).

heterosexual marriage.¹⁵⁷ These critics feel that same-sex marriage activism is often conservative and fails to take on a broader sex rights project of equally valuing all relationships.¹⁵⁸ Some more conservative same-sex marriage activists have even argued that encouraging same-sex couples to form relationships that closely mirror monogamous heterosexual marriage is preferable to allowing them to form other less traditional kinds of relationships and families.¹⁵⁹ Polygamy activists share with some same-sex marriage advocates an embrace of certain aspects of sex rights and a commitment to some traditional norms around gender, sexuality, and relationships that can be seen as conservative.

D. Stopping the Slippery Slope

As discussed above in Sections II.D and III.A.3, the *Bronson* plaintiffs' arguments focused on the fact that they are consenting adults, and claimed that as such they should have the right to enter polygamist relationships without fear of prosecution. One of the effects of this emphasis on consenting adults was to distance themselves from the public perception of polygamous communities as the site of child sexual abuse and from the accompanying moral opprobrium, thereby gaining legitimacy as sex rights claimants. This strategy served to negate accusations that polygamists are violators of the sex rights of children that would undermine the validity of the plaintiffs' claims. The plaintiffs further distanced themselves from abusive practices by opining that "[p]olygamist [sic] that engage in incest, statutory rape, child abuse . . . or other crimes should be punished to the full extent of the law."¹⁶⁰ By denouncing those who take underage brides as "bad" polygamists and illegitimate rights claimants, the plaintiffs thus position themselves as "good" polygamists with legitimate sex rights claims.

Outside of the *Bronson* case, polygamy activists are working hard to distinguish plural marriage between consenting adults from child abuse and coerced marriage. One of the leading pro-polygamy groups, Principle Voices, works to break the connection between plural marriage and underage marriage on two fronts. First, like the *Bronson* plaintiffs, the group's spokespeople emphasize to the media and to law enforcement that consenting adult

157. See *id.* at 280–82; Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2688 (2008).

158. POLIKOFF, *supra* note 22, at 98–99; Franke, *supra* note 157.

159. E.g., Andrew Sullivan, *Here Comes the Groom*, *NEW REPUBLIC*, Aug. 28, 1989, available at <http://www.indogayforum.org/news/show/26935.html>; see also BRUCE BAWER, *A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY* (1993); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995).

160. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 14, at 25 n.23.

polygamists should be left alone, while conceding that abuse in polygamist communities needs to be addressed.¹⁶¹ Second, Principle Voices works with the different fundamentalist Mormon communities and educates them about the need to stop underage marriages.¹⁶² Mary Batchelor of Principle Voices notes that some fundamentalist communities had been confused about the laws concerning age of consent. Under Utah law, a girl may enter a monogamous marriage with her parents' consent at the age of sixteen.¹⁶³ Since polygamist marriages are not recognized by the state, however, a man religiously marrying a sixteen- or seventeen-year-old girl with her parents' approval may face criminal charges if she is not his first (legal) wife.¹⁶⁴ The efforts of Principle Voices have met with some success; Batchelor reports that the majority of fundamentalist communities with whom they communicated agreed to disallow marriages for anyone under the age of eighteen.¹⁶⁵

This strategy of casting one's cause as deserving and reasonable by setting it off against those whose rights claims are unworthy and invalid is commonly employed in other areas of sex rights claiming as well. Just months before the Supreme Court handed down the *Lawrence* decision, Yale Law professor Kenji Yoshino wrote an editorial in the *Boston Globe* criticizing the Court's decision to uphold sodomy laws in *Bowers v. Hardwick*.¹⁶⁶ He dismissed the Court's concern that prohibiting sodomy laws would undermine the state's ability to criminalize sadomasochism, adultery, incest, or prostitution.¹⁶⁷ These acts, he argued, were unlike sex between consenting gay adults because they violated principles around harm, consent, and the commercialization of sex.¹⁶⁸ In this act of rhetorical distancing, Professor Yoshino argued for the judicial recognition of gay and lesbian rights, while suggesting rationales that would permit the continued prosecution of more "extreme" forms of sexual deviation.

Both Professor Yoshino and the *Bronson* plaintiffs had to grapple with the fear among legal decision makers and social commentators that recognizing their sex rights claims would open the door to more extreme or threatening sexual behaviors. In order to increase their chances of success, the plaintiffs then distinguished and distanced themselves from those acts that invoke even more social disapproval than their own. Ironically, one of the most culturally salient acts of distancing in recent years has been the argument of LGBT activists that same-sex marriage will not inevitably lead to legalized

161. Batchelor, *supra* note 40.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Kenji Yoshino, *Law of the Bedroom: When It Comes to Protecting Sexual Privacy, Why Does America Lag So Far Behind?*, BOSTON GLOBE, Mar. 23, 2003, at H4.

167. *Id.*

168. *Id.*

polygamy.¹⁶⁹

E. A Place in the Sex Rights Framework

Comparing polygamy activists' claims with other sex rights claims reveals that the contradictions and ambiguities of the *Bronson* plaintiffs and their allies do not place them outside the realm of recognizable sex rights claims. Many LGBT activists, feminists, and other sex rights claimants have a multifaceted and nuanced relationship with different sex rights values, such as autonomy, equality, and freedom from gender- or sexuality-related harm. The *Bronson* plaintiffs and other polygamy activists are thus not unique among sex rights claimants in their struggle to simultaneously assert some of these values, reject allegations that they violate other values, and come to a more ambiguous truce with still other values.

As claimants in the sex rights tradition, the *Bronson* plaintiffs and other polygamy activists offer many arguments that parallel those of LGBT activists and feminists, but the polygamy activists' claims also offer a unique perspective into some of the tensions in the sex rights framework. One of the major critiques leveled by opponents of polygamy is that women in polygamous relationships are coerced, brainwashed, or in some other way acting with compromised autonomy.¹⁷⁰ Polygamy activists often address these objections head on, arguing that the women in the polygamous relationships that the activists seek to protect are acting of their free will.¹⁷¹ Some polygamy activists have pointed out, however, that while women in polygamy may have some social, religious, or cultural pressures constraining their free choice, this concern with limitations on autonomy and imperfect consent is not unique to women in polygamous cultures. Further, they argue that such limits do not make the right to exercise that imperfect consent any less vital. The next Part will explore this issue and illuminate how the claims of polygamy activists both echo tensions in other sex rights claims and offer insight into how the law could better address sex rights claims involving imperfect consent.

IV

COMPLICATING AUTONOMY AND CONSENT

One major theme of the polygamy debate is the tension between autonomy and protection from harm. Defenders of plural marriage argue that consenting to adult polygamy is a matter of private choice, and that the state

169. See, e.g., Larcano, *supra* note 118, at 1073.

170. Strassberg, *supra* note 139, at 381–82.

171. Polygamy activists do, as noted above, acknowledge that coercion and abuse sometimes occur in polygamous relationships, but argue that they are not necessarily more prevalent than in monogamous relationships. They should be addressed, therefore, on their own terms rather than as inevitable byproducts of polygamy. See *supra* text accompanying notes 160–165.

should not interfere with such a personal decision.¹⁷² They perceive antibigamy laws to be paternalistic restrictions on their freedom to make decisions about intimate adult relationships.¹⁷³ Opponents of polygamy argue that the practice is inherently abusive and demeaning to women and children.¹⁷⁴ To them, antibigamy laws protect against this abusive family structure and should be vigorously enforced to protect women and children.¹⁷⁵ This argument involves a close linking of harm, consent, constraint, and autonomy. Polygamy opponents want to criminalize a practice that they perceive as harmful not just because of physical or sexual abuse, but because it also denies women choices. Relatedly, many opponents argue that coercion or lack of consent are necessarily present in polygamy because they believe polygamous families are so harmful to women that no woman would freely consent to such a relationship.

Evaluating the claims of these two camps requires engaging with nuanced questions of autonomy and consent: Can people consent to acts that the state (or others) has determined are harmful to them? When is consent really meaningful? Can protective measures be just one more form of restriction? These questions all concern the law's treatment of "imperfect consent." Imperfect consent is implicated in situations where religious, social, or cultural restraints complicate autonomy, or where some activities or options are treated as so harmful that they preclude the possibility of legitimate consent.

Courts considering the criminalization of polygamy have not, in the main, engaged with issues of imperfect consent. The *Reynolds* Court, in rejecting a Free Exercise challenge to the Morrill Anti-Bigamy Act, noted that prohibitions against polygamy stemmed from longstanding moral objections and from concerns that polygamy was incompatible with democratic government.¹⁷⁶ More recently, the Tenth Circuit in *Potter v. Murray City* defended the criminalization of polygamy by simply asserting that the state had a compelling interest in monogamy.¹⁷⁷ Other cases have been concerned with the harms to underage girls who are married into polygamy.¹⁷⁸ While the ability of minors to consent to marriage or sexual activity may implicate a kind of limitation on consent, this Comment is limited to a consideration of imperfect consent as exercised by adults. Neither the district court nor the Tenth Circuit in *Bronson* considered questions of consent: the district court was bound by the Tenth

172. See Hayes, *supra* note 19, at 110–11.

173. See *id.* at 110.

174. See Hamilton, *supra* note 33.

175. Telephone interview with Andrea Moore-Emmett, author of *GOD'S BROTHEL* (Nov. 26, 2008); see also Strassberg, *supra* note 139, at 381–82 (discussing whether broadly applicable antibigamy laws are justified as a way to protect teenage plural brides).

176. *Reynolds v. United States*, 98 U.S. 145, 164–66 (1878).

177. *Potter v. Murray City*, 760 F.2d 1065, 1068, 1070 (10th Cir. 1985).

178. See *State v. Holm*, 137 P.3d 726, 744–45 (Utah 2006); *State v. Green*, 108 P.3d 710 (Utah 2005).

Circuit precedent in *Potter*,¹⁷⁹ and the Tenth Circuit never reached the merits of the case.¹⁸⁰ As will be discussed below, part of the reason why courts have not engaged with issues of imperfect consent is that there is no statutory basis to do so, as the consent or nonconsent of the parties is not an element of the crime of bigamy.

Though courts considering challenges to bigamy laws have thus far largely ignored questions of imperfect consent, these questions have loomed large in political debates about polygamy.¹⁸¹ Furthermore, this Part argues, these are precisely the questions that courts should consider when determining if and when criminal sanctions are appropriate for polygamous relationships. The issue of imperfect consent should be in the foreground of legal and policy debates about the criminalization of bigamy because concerns about coercion and lack of valid consent are perhaps the only convincing rationales for criminal law's continuing interference in plural families.

The *Potter* court asserted that a compelling state interest in monogamy justifies criminalizing plural marriage.¹⁸² While the court failed to explain why this is so, there are two possible reasons: (1) society wishes to express moral disapproval of polygamy, or (2) polygamy is harmful to those who experience it.¹⁸³ The first reason is difficult to sustain in a pluralistic society that not only lacks a uniform moral code, but also is increasingly tolerant of a diversity of family and relationship structures.¹⁸⁴ Indeed, *Lawrence* admonished that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,” further undermining the morality rationale for criminalizing bigamy.¹⁸⁵

However, the question of whether criminalizing polygamy may be justified because the practice is harmful is less easily dismissed. Some critics have argued that polygamy is harmful because it leads to statutory rape, domestic violence, or child abuse.¹⁸⁶ While such abuses undoubtedly exist,¹⁸⁷ there are

179. *Bronson I*, 394 F. Supp. 2d 1329, 1333–34 (D. Utah 2005), *vacated*, 500 F.3d 1099 (10th Cir. 2007) (citing *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985)).

180. *Bronson II*, 500 F.3d at 1109–13.

181. See *infra* notes 198–213 and accompanying text.

182. *Potter*, 760 F.2d at 1068, 1070.

183. A few critics of polygamy have expressed concerns that the practice would harm society by leading to despotic governments. See *Reynolds v. United States*, 98 U.S. 145, 164–66 (1878); HAMILTON, *supra* note 35, at 74. A full analysis of this allegation is outside the scope of this Comment, though this author is skeptical as to whether such claims are empirically defensible.

184. See, e.g., Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19; Claire Trageser, *21 Couples Enroll Under Beneficiary Law*, DENVER POST, July 2, 2009, at B4 (discussing Colorado's recent law permitting unmarried couples of any gender or sexual orientation some of the legal rights of marriage).

185. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (Stevens, J., dissenting) (quoting *Bower v. Hardwick*, 478 U.S. 186, 216 (1986)).

186. See, e.g., HAMILTON, *supra* note 35, at 73.

also already laws to address these harms by treating them as distinct crimes.¹⁸⁸ One could argue that abuse is so rampant in polygamous communities as to justify outlawing the practice in all cases, but the lack of empirical data comparing abuse rates in polygamous and monogamous families makes this argument less than convincing.¹⁸⁹ Aside from harms that are covered by existing criminal laws, some critics of polygamy have expressed concerns about more subtle forms of harm that are rooted in coercion.¹⁹⁰ Whether plural marriage is harmful because participants are somehow coerced or otherwise incapable of giving meaningful consent is a serious question. It is on this question that the legal and policy debates about the criminalization of plural marriage should focus.

There may also be doctrinal reasons to grapple with complex questions of autonomy and consent in discussions of bigamy laws. *Lawrence*, the case on which the *Bronson* plaintiffs relied most heavily, discusses autonomy as something implicated by the Due Process Clause of the Fourteenth Amendment.¹⁹¹ “Liberty,” the *Lawrence* Court wrote, “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁹² The Court’s decision does not question the legitimacy of the consent of gay men and lesbians who engage in consensual sexual behavior prohibited by sodomy laws.¹⁹³ In seeking to restrict the holding of the case, however, the Court hints at limits to principles of autonomy and liberty. The Court specifically states that the case “does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”¹⁹⁴ If and when a *Lawrence*-based challenge to bigamy laws arises that can survive the procedural obstacles that were fatal in *Bronson*, a key question will be whether these words apply to polygamous relationships where all parties profess to consent to the marriages. Such a case could well turn on whether the social, cultural, and religious pressures encouraging individuals to engage in polygamy were so overwhelming as to constitute coercion or to interfere with the ability to express nonconsent.

Questions of harm, consent, and autonomy in polygamy have also arisen in policy discussions outside of the courtroom. The Utah attorney general’s

187. See generally MOORE-EMMETT, *supra* note 33.

188. See, e.g., UTAH CODE ANN. § 76-5-401 (2009) (unlawful sexual activity with a minor); UTAH CODE ANN. § 76-5-402 (rape); UTAH CODE ANN. § 77-36-1.1 (providing for enhanced sentences for crimes involving domestic violence).

189. See Nicholas Bala & Rebecca Jaremko Bromwich, *Context and Inclusivity in Canada’s Evolving Definition of the Family*, 16 INT’L J.L. POL’Y & FAM. 145, 168 (2002) (discussing the lack of data on abuse rates in plural families).

190. See *infra* notes 199–213 and accompanying text.

191. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (Stevens, J., dissenting) (quoting *Bower v. Hardwick*, 478 U.S. 186, 216 (1986)).

192. *Id.* at 562.

193. *Id.* at 574.

194. *Id.* at 578.

decision not to prosecute consenting adult polygamists, for instance, implicitly endorses the validity of women's consent in such relationships.¹⁹⁵ On the other hand, Professor Marci Hamilton argues that polygamy should only be legalized if its advocates "can persuade a legislature that opening the definition of marriage to include polygamy is consistent with the public good."¹⁹⁶ She argues that the central question in determining the legal status of polygamy should be "is the conduct harmful or beneficial?"¹⁹⁷ Engaging with questions of harm may initially appear straightforward enough. Closer examination, however, opens up questions of who gets to define the harm and what happens when the person being harmed consents to the behavior. Many of Hamilton's arguments about the harm of polygamy, for example, involve the ways in which polygamy limits women's options and hinders their ability to choose freely.¹⁹⁸

These questions about harm, consent, restraint, and autonomy raised by debates over polygamy are also present in other types of sex rights claiming. This Part will look at how this tension plays out in polygamy activism and then explore disparate types of sex rights claims that implicate these same questions. Examples concerning pornography, sadomasochism, and abortion will help to illuminate the issue of imperfect consent. Since courts considering these issues have not always dealt squarely with issues of imperfect consent, the discussion below also draws on discussions of harm, consent, and autonomy in related political debates. This Part closes with a consideration of whether the law has a coherent and principled way of accounting for these complicated questions of autonomy and consent. Here, I conclude that courts need a statutory basis for a more nuanced consideration of consent in the case of polygamy, and I propose some general principles for engaging with questions of imperfect consent in legal settings.

A. Choice and Restraint in Polygamist Communities

The *Bronson* plaintiffs argued that bigamy laws—and the moral codes that they enforce—violate the sex rights principle of autonomy in making one's own decisions about relationships. This notion of autonomy is complicated, however. Many adults who choose to enter polygamous marriages were raised in polygamous families and communities.¹⁹⁹ Some, though not all, polygamous communities are insular and suspicious of outsiders, which may limit their members' exposure to other relationship options.²⁰⁰ In addition, fundamentalist

195. See *supra* text accompanying notes 65–66.

196. HAMILTON, *supra* note 35, at 55.

197. *Id.* at 72.

198. *Id.* at 73.

199. BATCHELOR ET AL., *supra* note 110, at 238.

200. See Carrie Moore & Elaine Jarvik, *FLDS Raid in Texas: How Did This Happen?*, DESERET NEWS, Apr. 19, 2008, <http://www.deseretnews.com/article/1,5143,695271746,00.html>; Winslow, *Forum*, *supra* note 65 (quoting one woman who left an abusive polygamous relationship as saying that the isolation in her community made leaving her marriage "like jumping off a

Mormons have a spiritual motivation to enter plural marriage. Fundamentalist Mormon doctrine teaches that plural marriage is required in order to achieve the highest level of exaltation in the afterlife.²⁰¹ Some women who have chosen to leave polygamy report being told they would go to hell by those they left behind.²⁰² What does the choice to enter polygamy mean if one is surrounded by the practice in one's community and family of origin, and furthermore if one believes plural marriage is an essential religious institution?

The critiques of fundamentalist Mormon polygamy are fierce and center on concerns about women's inability to give meaningful consent to polygamous relationships and the practice's harm to women and children. Women in polygamous communities, critics argue, are treated like property and subjected to the abusive and patriarchal control of the men in their families.²⁰³ Particularly in isolated polygamist communities, women may have limited access to education or information about life outside the communities and are thus denied meaningful opportunities to be independent or self-supporting.²⁰⁴ Some argue that the basic numerical realities of polygamy create an inherent imbalance in gender relations: "At the very least, polygamy sends the message that only one man need satisfy multiple women, so that the women are not equal to the man."²⁰⁵ Many critics are concerned that child abuse and domestic violence are endemic in polygamist communities, and argue that young girls are frequently forced to marry older men in what amounts to sexual abuse and statutory rape.²⁰⁶ These critics claim that rampant abuse, combined with cultural and spiritual coercion and the lack of information about alternatives, creates concerns about a situation where women are denied meaningful choice.²⁰⁷

Polygamy activists acknowledge that abuse happens within polygamous communities, but argue that the problem of abuse is not specific to polygamy.²⁰⁸ Physical and sexual abuse, they contend, is not necessarily any more common in plural families than in monogamous families.²⁰⁹ With regards to accusations of more subtle coercion, they point out that fundamentalist

cliff").

201. BATCHELOR ET AL., *supra* note 110, at 45–54.

202. Winslow, *Forum*, *supra* note 65.

203. HAMILTON, *supra* note 35, at 73; *see also* MOORE-EMMETT, *supra* note 33.

204. HAMILTON, *supra* note 35, at 73.

205. *Id.* at 74.

206. Strassberg, *supra* note 139, at 377–78. In addition to the harms to women and children, some critics express concern about the effect of widespread polygamy on society, and argue that its hierarchical nature is incompatible with and tends to undermine constitutional democracy. *See* HAMILTON, *supra* note 35, at 74.

207. *See generally* MOORE-EMMETT, *supra* note 33 (presenting the stories of various women who suffered abuse in polygamous families and communities).

208. *See, e.g.*, Principle Voices, *supra* note 39 ("We abhor abuse wherever it happens. We do not believe abuse is inherent in polygamy. Abuse crosses all socio-economic lines and does exist anywhere human beings gather.").

209. *Id.*

Mormons are not a homogenous group. While some plural wives were raised surrounded by the practice and may have faced great pressure to enter into such a marriage, others have converted to the faith, sometimes at great personal cost.²¹⁰ In addition, certain features of polygamy as practiced by fundamentalist Mormons limit the potential for spiritual coercion—for instance, the idea that it is important to receive one’s own “testimony” for polygamy through prayer and soul searching before entering plural marriage and the acknowledgement that polygamy is not the right choice for everyone.²¹¹

The polygamy activist group Principle Voices is taking affirmative steps to combat the realities and perception of coercion in polygamist communities by promoting support groups for women in polygamous families.²¹² Though Principle Voices is not running the groups itself, the organization works with the social service agency that provides the support groups to ensure that the groups constitute a space where polygamous women can discuss

human rights, parenting challenges, extended family issues, dealing with conflict, unhealthy relationships, self-care, boundaries, assertiveness, self-esteem, identity, roles, and the unique challenges of being a woman in the Fundamentalist Culture

without being pressured either to remain in or leave polygamy.²¹³

Unfortunately, there is little in the way of empirical data on rates of abuse, coercive behavior, or the wellbeing of women and children in polygamous communities, so it is difficult to determine whether polygamy activists or their opponents are more accurate in their claims.²¹⁴ This lack of empirical evidence makes policy decisions premised primarily on high abuse rates within polygamous communities suspect and would seem to counsel a more individualized and nuanced inquiry into questions of harm, consent, and autonomy.

B. Meaningful Consent to Pornography and Sex Work

A return to the feminist pornography debates discussed in Section III.C provides a useful comparison to the complexities of autonomy and choice in *Bronson* and other polygamy activism. While legal debates over pornography have largely ignored questions of imperfect consent and have generally focused on the First Amendment,²¹⁵ feminist debates over pornography and sex work

210. BATCHELOR ET AL., *supra* note 110, at 131–36, 238 (providing statistics about how many plural wives are converts from other religions and telling the stories of plural wives who were expelled from university, excommunicated, or rejected by their natal families when they converted).

211. *Id.* at 45–54.

212. Principle Voices, *Women’s Support & Trauma Groups Starting in October*, <http://principlevoices.org/archives/129>; Batchelor Interview, *supra* note 40.

213. Principle Voices, *supra* note 212; Batchelor Interview, *supra* note 40.

214. *See* Bala & Bromwich, *supra* note 189, at 168.

215. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973). While this case does use a set of rights-based arguments, the rights being protected are those of the producers and consumers of

have addressed the issue head on. One of the major critiques that antipornography feminists had of the sex-positive feminist position was that it overestimated the degree to which women had a truly meaningful choice about whether to participate in the pornography industry, and thus had an overly simplistic analysis of consent and autonomy.²¹⁶ Women, they argued, were not able to choose from a full field of options because they were constrained by the social, economic, relational, and political limitations of living in a patriarchal society.²¹⁷ What did choice really mean, they asked, when picking between such limited options?²¹⁸

Sex-positive feminists countered that an imperfect choice was preferable to no choice at all, and that the protective measures advocated by the antiporn feminists were merely one more form of restriction on women's lives. They acknowledged that women acting in or consuming pornography faced the same limits of a patriarchal society that constrained all women, but argued that depriving them of the ability to choose whether and how to engage with pornography was not the answer.²¹⁹ Reflecting on the pro-sex position in feminist debates about the autonomy of women acting in pornography or doing other forms of sex work, Lisa Duggan asserts:

[W]e did not argue that sex workers have "free choice" of occupations, but emphasized that, within a limited range of very constrained choices in a sexist, capitalist economy, sex work is not always the worst option. And though we recognized that "consent" is socially constructed, we nonetheless argued that it remains a centrally important concept to retain in sex law.²²⁰

The answer to constraints on autonomy, then, was not the denial of choice, but rather a recognition of the constrained options and a commitment to expand rather than contract women's choices. The discussions of constraint and consent here suggest that the existence of some limitations on the exercise of autonomy does not render meaningful consent impossible.

C. Is Consent a Defense to Assault? The Law's Treatment of Consensual Sadomasochism

While the pornography debates were one of the most visible battles in the

pornographic speech. There is little concern for the women who are allegedly harmed by pornography, either because they appear in pornographic materials or because they are victims of a sexist and sexually violent culture promoted by pornography. On exception to this was Indianapolis' 1984 ordinance prohibiting pornography as a form of discrimination against women. The ordinance, however, was quickly struck down as unconstitutional in *American Booksellers Association v. Hudnut*, because it violated the First Amendment. *Id.*

216. FADERMAN, *supra* note 148, at 250–52.

217. *Id.*

218. *Id.*

219. *Id.*

220. DUGGAN & HUNTER, *supra* note 31, at 8–9.

feminist sex wars of the 1980s, they were not the only one. The issue of consensual sadomasochism (“SM”), particularly in lesbian communities, was also the subject of heated debates that raised issues of autonomy, consent, and protection from harm.²²¹ The early lesbian-feminist SM group Samois argued that consensual SM was a legitimate form of sexual expression that was not incompatible with a commitment to ending the oppression of women.²²² Feminists opposed to SM, however, claimed that the practice was just another form of sexualized violence against women and that lesbians who participated in SM were ascribing to patriarchal values that served to oppress women.²²³ Some anti-SM feminists claimed that women who expressed interest in SM were mentally ill or antifeminist.²²⁴

Quite apart from these debates over the proper feminist position on SM, the law has its own way of resolving the questions of harm and choice raised by consensual SM. While many cases involving SM that have reached the courts involve situations where consent was questionable,²²⁵ the courts are generally quite clear that consent is not a defense to assault.²²⁶ While many cases do not articulate the reasoning behind this rule, *People v. Samuels*, a much-cited 1967 case from California, explains:

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim [of a sadomasochistic scene] did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant’s conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another. It follows that . . . consent [is] not a defense to the aggravated assault charge.²²⁷

While the court’s holding is partly based on the language of the assault statute, its reasoning suggests that consent is not a defense to assault, at least in part because a willing masochist is, by definition, not in “full possession of his mental faculties” and is therefore unable to give genuine consent. This somewhat circular reasoning raises the possibility that certain things are outside the realm of possible consent, because the very act of consenting demonstrates the unfitness of the consenting party to be making such decisions.

221. *Id.*

222. *See, e.g.,* Samois, *Samois: Who We Are*, in *COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN SM* 288 (Members of Samois eds., 1981) [hereinafter *COMING TO POWER*].

223. *See, e.g.,* Jesse Meredith, *A Response to Samois*, in *AGAINST SADMASOCHISM: A RADICAL FEMINIST ANALYSIS* 96–98 (Robin Ruth Linden et al., eds.1982).

224. Katherine Davis, *Introduction*, *COMING TO POWER*, *supra* note 222.

225. *See, e.g.,* Commonwealth v. Appleby, 402 N.E.2d 1051 (Mass. 1980); State v. Van, 688 N.W.2d 600 (Neb. 2004); People v. Jovanovic, 700 N.Y.S.2d 156 (App. Div. 1999).

226. *See, e.g.,* Van, 688 N.W.2d at 614.

227. People v. Samuels, 58 Cal. Rptr. 439, 447 (Ct. App. 1967).

State v. Collier, a 1985 case from Iowa, gave a somewhat different rationale for declining to permit a consent defense to assault charges:

Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare. A state unquestionably has the power to protect its vital interest in the preservation of public peace and tranquility, and may prohibit such conduct when it poses a threat thereto.²²⁸

Under this reasoning, it is not a flaw in the consent of the "victim" that justifies keeping the consensual activity illegal, but a higher state interest that trumps the agreement between the two parties.²²⁹ The state's interest in preventing harm to its citizens allows it to enforce assault laws against practitioners of SM regardless of the consent of the parties. Indeed, the *Collier* court explains that the state has an interest in preventing not just physical but also moral harm.²³⁰

The invocation of moral harm raises obvious questions of what constitutes such harm and who gets to decide; one could easily imagine ways for a law based on this kind of reasoning to run afoul of *Lawrence's* declaration that "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review."²³¹ The question of what constitutes physical harm, while perhaps clear-cut on its surface, contains ambiguities when examined more closely. In the *Collier* case, for example, the court held that SM did not fall within an exception to the Iowa assault law for "voluntary participants in a sport, social or other activity, not in itself criminal" where the activity "does not create an unreasonable risk of serious injury or breach of the peace."²³² Thus, the Iowa law did allow space for consensual activities that posed some (reasonable) risk of injury, though the court found that SM did not fall within that allowance. The distinction between permissible sports and impermissible SM may rest largely on questionable differences in the moral value of activities or other judicial assumptions.

Compared with courts that have dealt with these questions, subcultures of SM practitioners have developed a more nuanced understanding of consent. Discussions on the meaning of consent in SM communities have different

228. *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985) (internal citations omitted).

229. *Id.*

230. *Id.*

231. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003). While *Lawrence* speaks of moral disapproval of a group rather than of actions, the distinction between actions and group identities that are linked to those actions is far from clear. This can be seen in the way the *Bowers* Court focuses on the action of "homosexual sodomy" whereas the *Lawrence* Court is more concerned with moral disapproval of gay and lesbian people as a group. This different framing of the issues suggests that the activity/identity split is both arbitrary and subject to results-oriented manipulation.

232. *Collier*, 372 N.W.2d at 305-06.

schools of thought that have evolved over time. In the early 1980s the phrase “safe, sane, and consensual” became a popular way for SM practitioners to explain to nonpractitioners the difference between SM and abuse.²³³ In recent years, others critical of this tagline began using the expression “Risk Aware Consensual Kink.”²³⁴ Proponents of the latter model argue that “safe” and “sane” are both highly subjective and value-loaded.²³⁵ This focus on risk awareness acknowledges that what may feel unsafe to person A may feel safe to person B, and makes the case that A’s feeling of nonsafety should not be permitted to trump B’s feeling of safety, so long as B is aware of all of the risks of the behavior. While the two models share the word “consensual,” the context for the word—and the different underlying philosophies about safety and mental capacity—gives different shades of meaning to the understanding of consent.

D. Protecting Women from the Harms of Abortion

The question of what constitutes harm and whether the state may prevent harm against the will of the purported victim also shows up in the “woman protective” arguments against abortion. In the decades of struggle over the legal status of abortion since *Roe v. Wade*, arguments about protecting fetal life have been at the forefront of the antiabortion movement.²³⁶ Over time, however, many antiabortion activists began using rhetoric that adapted the concerns of the pro-choice movement for their own ends: they began to argue that abortion must be stopped in order to protect women.²³⁷ Starting in the early 1990s, antiabortion leaders, discouraged by setbacks and seeking a new strategy for winning the support of moderates, began arguing that restrictions on abortion were necessary to prevent physical and emotional harm to women.²³⁸ They advocated “informed consent” policies mandating that women be told about the great physical and emotional risks abortion carried for them.²³⁹ They promoted research that documented “post-abortion syndrome,” melding a public health framework with Christian morality to articulate the ways in which they believed abortion created mental health risks and spiritual devastation for women.²⁴⁰ Women seeking abortions, they argued, were more often than not coerced into abortions they did not really want and misled about the true effects

233. slave david stein, *Safe Sane Consensual*, LEATHER LEADERSHIP CONFERENCE PROGRAM (2000), <http://www.leatherleadership.com/library/safesanestein.htm>.

234. Lisa Downing, *Beyond Safety: Erotic Asphyxiation and the Limits of SM Discourse*, in *SAFE, SANE, AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM* 119, 126–27 (Darren Langdridge & Meg Barker eds. 2007).

235. *Id.*

236. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1713 (2008).

237. *Id.*

238. *Id.* at 1715.

239. *Id.* at 1699–1700 (citing S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), (e) (2007)).

240. *Id.* at 1719–21.

of those procedures for their fetuses and themselves.²⁴¹

This line of antiabortion arguments figured prominently in debates over the Federal Partial-Birth Abortion Ban Act of 2003 and in *Gonzalez v. Carhart*, the Supreme Court case upholding the constitutionality of that law.²⁴² While the Court in *Carhart* did not rely exclusively on a woman-protective rationale to uphold the Partial-Birth Abortion Act, it included a lengthy passage paying homage to this line of reasoning. In examining legitimate government rationales for restricting one type of late-term abortion, Justice Kennedy's opinion for the Court held that

[t]he State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.²⁴³

While prior abortion cases had recognized a state interest in protecting both potential fetal life after viability and the health of the mother,²⁴⁴ this declaration of the state's interest in protecting women from ill-informed decisions that may have negative emotional repercussions was novel and alarmed pro-choice activists.²⁴⁵ Justice Ginsberg, in her *Carhart* dissent, raised many concerns about this line of reasoning, including that it is unsupported by the social scientific research on women's abortion experiences.²⁴⁶ The Court's holding in *Carhart* suggests that the state may legitimately conclude that some abortion procedures are so psychologically damaging to women that no woman should be permitted to undergo them.

E. Can the Law Grapple with Imperfect Consent?

As seen through the above examples, the law's record for dealing with complex questions of autonomy, consent, and restraint is mixed. Effectively side-stepping vigorous feminist debates about imperfect consent in the area of pornography, the law has instead focused on First Amendment protections on speech to justify a relatively permissive approach to pornography.²⁴⁷ While this

241. *Id.* at 1722–23.

242. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006); *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

243. *Carhart*, 550 U.S. at 159–60.

244. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 162–65 (1973).

245. *See, e.g.*, Siegel, *supra* note 236.

246. *Carhart*, 550 U.S. at 183 n.7 (Ginsburg, J., dissenting) (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, GUTTMACHER POL'Y REV., Summer 2006, at 8, 8).

247. *See supra* note 215 and accompanying text.

in some ways may invoke notions of freedom from state interference, the freedom in this analysis is that of the producers and consumers of pornography (who are often assumed male in the feminist debates) to speak and hear rather than the freedom of the (assumed female) actors and models to choose to work in pornography. Sadomasochism is also the subject of both feminist and legal debates, but unlike in the case of pornography, the legal and feminist conversations regarding SM have more common ground. Anti-SM feminists and courts rejecting the idea that consent can be a defense to assault both question the validity of the consent given by masochists in an SM encounter. Regardless of the apparently consensual nature of these interactions, they argue, SM creates a harm with which society and the state are justifiably concerned.²⁴⁸ In the case of so-called “partial-birth abortion,”²⁴⁹ the *Carhart* Court adopted quasi-feminist arguments advanced by pro-life activists about the harm that abortion causes women and the law’s obligation to protect women from the traumatizing effects of their choices.²⁵⁰

None of the legal resolutions in these examples provide a truly satisfying mode of analyzing the questions of imperfect consent raised by polygamy. The law’s treatment of pornography declines to grapple with the question of autonomy in any serious way, deferring instead to First Amendment concerns that do not apply in the case of polygamy. The treatments of sadomasochism and late-term abortion, though different in many ways, share a common flaw. Both analyses take the action targeted by their regulation to be so potentially harmful to the alleged victims—masochists and women, respectively—that the consent of the victim is considered illegitimate or irrelevant. For the *Samuels* court, the consent of a presumably mentally disturbed masochist has no bearing on the underlying charge of assault. In the case of late-term abortion, Justice Kennedy’s opinion in *Carhart* adopts the argument of pro-life advocates that abortion is so contrary to women’s natural mothering impulse that women could only seek abortions as a result of coercion on the part of partners, family members, or others and obviously do not understand the full implications of the procedure for the fetus. The woman’s consent, therefore, must be of dubious nature. Such reasoning creates a category of actions that are essentially “unconsentable” because the state has decided that the harm of the actions indicate that individuals choosing them must be uninformed or mentally ill.

In some senses, the term “imperfect consent” may be misleading because it implies that there exists such a thing as “perfect consent,” a choice made with complete freedom and no external pressure or coercion. Perhaps any consideration of constrained consent and autonomy must account for the fact

248. See *supra* Section IV.C.

249. Though this is the term used in both the Act challenged in *Carhart* and in antiabortion rhetoric, I will use the term “late-term abortion” for the discussion here because it lacks some of the politicized connotations of the term “partial-birth abortion.”

250. See *supra* Section VI.D.

that people generally do not work with a truly complete set of options or in settings that are untainted by potentially coercive power inequalities. This fact alone, however, does not make the right to choose any less vital. Sex rights claimants, like those on both sides of the feminist pornography debates, have long struggled with the question of when options are so constrained that choice is rendered meaningless.²⁵¹ The arguments of the sex-positive feminists remind us, however, that the existence of constraints does not always mean that it is best to seek the route that seems to most protect people from sexual harm.²⁵² Such protection, they argue, can often amount to just one more form of constraint.²⁵³ Similarly, polygamy activists argue that the “protection” that antibigamy laws offer against abuse in polygamous relationships is not worth the sacrifice in freedom for consenting adults to enter into plural marriage.²⁵⁴

It is worth emphasizing that those choosing to engage in polygamy, pornography, sadomasochism, or other similar behaviors are not the only people making choices that involve imperfect consent. Polygamy activist Mary Batchelor also notes that most children are born into families that have certain expectations and pressures about what kind of relationships those children should form, whether those pressures favor monogamy or polygamy.²⁵⁵ Similarly, some feminists have argued that all opposite-sex sexual relationships take place in the context of pervasive and coercive cultural patriarchy and heterosexism that undermines a simplistic invocation of unrestrained choice.²⁵⁶ Few would argue, however, that the choice of children from heterosexual monogamous families to enter heterosexual monogamous relationships is so shaped by familial or societal coercion as to call into question the consensual nature of the relationships. These examples suggest that few, if any, decisions we make in our lives are completely free from the pressure of the expectations of others that we behave in particular ways, or from more or less subtle coercion pushing us to follow a certain path. Carlos Ball argues:

“[A]utonomy is a matter of degree and requires agents simply to harbor the capacities for certain sorts of reflection and agency, however these were acquired or are interconnected with the agency of others.” The fact that a person’s wants, values, concerns, and commitments may not be entirely her own does not prevent her from, at least some of the time, using her capacity to reflect on them and to

251. See *supra* text accompanying notes 215–220.

252. *Id.*

253. *Id.*

254. See Hayes, *supra* note 19, at 110 (discussing the perception of some polygamy activists that state prohibitions on plural marriage are paternalistic restraints on their freedom to chose relationships without state interference).

255. Batchelor, *supra* note 40.

256. See, e.g., ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD, AND POETRY 23 (1986).

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make choices and take actions that are the result of that reflection.²⁵⁷

257. Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 352 (2005) (quoting MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 37 (2003)).

Ball emphasizes that people always face an array of direct or indirect limitations on autonomy, whether these come from overt pressures or threats, or more subtle cultural or familial expectations.²⁵⁸ The fact that many choices are made with less free, unconstrained consent does not mean that the right to choose is unimportant.²⁵⁹ The fact that coercion may be present in a wide variety of decisions begs the question of how to determine when it is so extreme as to render choice meaningless.

Courts' failures to consider nuanced questions of imperfect consent may have many roots, but one of them is the lack of any statute directing them to engage with this issue directly. Having a statutory basis for inquiring into the validity of consent in plural marriage would allow courts to consider the most salient question relating to the harm of polygamy. Such a statutory basis could take various forms. It could mean amending the criminal bigamy statute to permit an affirmative defense that would allow the defendant to prove meaningful consent. Alternatively, it could involve repealing bigamy laws and introducing a new crime of forced or coerced marriage.

As a strategy, creating a statutory basis for courts to inquire into issues of imperfect consent in plural marriage is not without its risks. As demonstrated above, courts have a less than outstanding record for dealing with nuanced questions of consent in the arena of sex rights. A law focusing on the issue of consent, however, may be preferable to many of the alternatives. Ignoring concerns about coercion and forced consent in polygamy by rescinding all criminal laws may leave women unprotected when the harm they experience in plural marriage does not fit within any existing statutes. On the other hand, blanket criminal prohibitions against polygamy may sweep too broadly and penalize truly consensual behavior because of moral disapproval or unproven empirical assumptions about the prevalence of abuse in plural families. Furthermore, as discussed above, the lack of true consent is itself the most concerning source of harm in plural marriage, other than abusive behaviors that are already covered under other criminal laws. A law focusing on consent would send the message that the harm society wishes to prevent is not unconventional sexual or marital practices, but relationships that involve coercion and abuse. It is important, therefore, for courts to deal with the question of imperfect consent head on.²⁶⁰ Since courts have not always successfully dealt with questions of imperfect consent in the context of sex rights, the next sections offer some guiding principles and factors that courts should consider when dealing with questions

258. *Id.*

259. *Id.*

260. Introducing the element of consent into criminal bigamy laws in some ways echoes the importance of consent in rape law. While the law's treatment of consent in the context of rape has been far from perfect, there is a vibrant literature critiquing and exploring the proper consideration of consent in rape. While exploring that literature is outside the scope of this Comment, it offers an additional resource for thinking about consent in the context of plural marriage.

of imperfect consent.

1. Principles for Dealing With Imperfect Consent

As noted above, judgments about situations involving imperfect consent may be as much about the biases of the observer as about the level of coercion experienced by the individual making the choice. This points to a danger in using decision-making rubrics that allow legal decision makers to make assumptions about the experience of the individual expressing imperfect consent. While not dealing with the issue of imperfect consent directly, Janet Halley points to the dangers of judicial assumptions in her critique of Justice Scalia's suggestion that juries use "common sense" to distinguish between genuine same-sex sexual harassment and mere teasing.²⁶¹ "*Common sense*," she writes, "is precisely what I am afraid judges and juries *will* use," because of how it allows for decisions based on bias.²⁶² After all, for many, "homophobia and homosexual panic are common sense."²⁶³ For all of the limits of the concept of judicial or legal objectivity, in situations involving imperfect consent to plural marriage or other stigmatized sexual or relationship choices there may be a danger in giving too much leeway to judicial assumptions about gender, sexuality, and relationships. Courts' ideas about what constitutes "common sense" with respect to what kinds of sexual relationships people do or ought to enter may be too tied to judges' own subjective experiences and may not reflect the lived experience of people engaging in minority sexual or relationship practices. These concerns may outweigh the drawbacks of perpetuating a myth of judicial objectivity. Thus decision-making rubrics for situations of imperfect consent should strive to force the decisionmaker to consider the "objective" circumstances and discourage unfounded speculation about the motivations or emotions of the individual exercising imperfect consent. Suggestions for such objective factors are addressed in Section IV.E.ii below.

The danger of such speculation can be seen in judicial reasoning about "unconsentable" activities in the areas of sadomasochism and abortion. Courts in these cases have reasoned that some activities are beyond the realm of legitimate consent precisely because individuals consenting to the activity must be uninformed or mentally ill. This reasoning is not only circular in many ways, it is also alarming because of its dependency on the subjective and idiosyncratic limits of judicial imagination. In the woman-protective passage in *Carhart*, Justice Kennedy indulges in unsubstantiated speculation about the feelings and motivations of women seeking late-term abortions.²⁶⁴ To him, "it is self-evident that a mother who comes to regret her choice to abort must struggle with grief

261. Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM, LEFT CRITIQUE 80, 80–81 (Wendy Brown & Janet E. Halley, eds. 2002).

262. *Id.*

263. *Id.*

264. See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

more anguished and sorrow more profound” when she learns the details of the banned late-term abortion procedures.²⁶⁵ Here the judicial imagination is used to create a narrative of a grieving mother—for the subject here is above all considered a mother—who has been duped into a tragic decision. The alternative narrative—that of a woman facing dire health or personal circumstances being thwarted in her search for the safest procedure to terminate a pregnancy she cannot carry to term—is left relatively unexamined.

This emotionally charged speculation about the “self-evident” reactions and feelings of women says more about the biases and assumptions of the judges in question than any empirical basis for the decision. Indeed, as Justice Ginsburg points out in her dissent:

“neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman’s long-term mental health than delivering and parenting a child that she did not intend to have”²⁶⁶

The *Samuels* court resorts to similarly conclusory statements of things taken to be self-evident, calling it “common knowledge” that sane people do not consent to sadomasochism, without providing any evidence or additional reasoning.²⁶⁷ It is unclear whether the assumptions of judges—who may or may not have ever participated in sadomasochism or had an abortion—are useful in determining when the extent of harm is so extreme as to justify a legal overriding of individual consent. The appeal to common knowledge and the self-evident in cases of imperfect consent is too imprecise and subject to bias to bring us to a principled way of determining when consent is meaningful. Refusal to accept decisions made with imperfect consent may be less about a genuine desire to protect the individual from their own bad decision and more about anxiety about permitting non-normative options. These examples caution against creating categories of activities to which there can be no legal consent.

As an alternative to unfounded speculation about the experience of an individual giving imperfect consent, it may be a useful exercise to consider whether a person making a different but analogous decision (e.g., to enter a monogamous relationship) would be held to the same level of scrutiny. This alternative use of the judicial imagination would force legal decisionmakers to consider the coercion they perceive in polygamy in the context of a baseline of coercion that exists in all relationship decisions. This type of analysis has the advantage of separating out concerns about levels of coercion in a particular choice from concerns that the option chosen is itself harmful. While the latter may certainly be a legitimate subject of inquiry, such inquiries should refrain

265. *Id.*

266. *Id.* at 183 n.7 (Ginsburg, J., dissenting) (quoting Cohen, *supra* note 246, at 8).

267. *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Ct. App. 1967).

from circular reasoning about “unconsentable” activities,²⁶⁸ and should be wary of substituting the state’s conception of harm for that of the victim.²⁶⁹

2. *Factors to Consider in Evaluating Situations of Imperfect Consent*

An awareness of the complexity of coercion and restraint in decision-making suggests not only general principles but also concrete factors decisionmakers should consider. First, a court dealing with a situation involving imperfect consent should examine not just the forces coercing a person to make a certain choice, but also the factors coercing them not to make it. In the case of polygamy, religious belief, family and community expectations, and any lack of meaningful information about alternatives could be balanced against potential repercussions that could flow from the negative attitudes of wider society. The factors weighed in this analysis would be quite different for an adult whose chosen activities were not encouraged by the individual’s family of origin, such as pornography or sadomasochism. A consideration of the autonomy of pornography actors, for example, might account for economic need and cultural objectification of women on the one hand and moral condemnation of sex work by family and society on the other. For sadomasochism, this analysis might balance any potential coercion in the individual relationship with pressures of societal disapproval.

A second key factor to consider is whether the individual giving imperfect consent is reasonably informed of alternative options. Concerns about the isolation of women in polygamous communities could be addressed by evaluating whether the experiences of individual women provided them with sufficient information about their options for forming other kinds of relationships or leaving polygamous communities. This analysis could vary considerably on an individual basis, as a woman who has lived her whole life in the FLDS community of Colorado City, Arizona, may have different access to information about alternatives than an independent fundamentalist woman who converted after being raised in a monogamous family. The latter situation may be more analogous to a choice made by an adult to engage in sadomasochism when the parents who raised them were silent or negative about the practice. Both individuals would be amply aware of other relationship or sexual possibilities and may be making their choice despite familial or societal disapproval.

The way issues of access to information have played out in the abortion context, however, counsels caution about the way in which information is presented. Many antiabortion activists have supported laws mandating that women seeking abortions be given graphic information about details of the abortion procedure, and that this information be phrased in such a way to

268. See *supra* text accompanying notes 225–227, 264–267.

269. See *supra* text accompanying notes 229–231.

equate abortion with killing an infant.²⁷⁰ The pro-choice movement has argued that such information is biased and coercive.²⁷¹ Similarly, some polygamy activists have expressed concerns that women living in plural marriage cannot access certain social services without receiving messages condemning polygamy by service providers who are eager to convince the women that they have other (better) options. These scenarios suggest that information must be presented in a way that minimizes bias and coercion to be conducive to the exercise of autonomy and true consent.

Information about alternative choices, moreover, is useless without a social structure in which a person may express meaningful nonconsent without undue social stigma. Legal decisionmakers, therefore, should consider a third factor: whether individuals exercising imperfect consent have such opportunities. Polygamy activists and their critics argue about the degree to which women in polygamist marriages have meaningful opportunities to opt out of plural marriage.²⁷² Inquiries into the specifics of community and family decisionmaking structures may be appropriate here. The existence of support groups like those promoted by Principle Voices may also indicate a space for some women to consider their options in an arguably neutral environment and to gain support for whatever decisions they make.²⁷³ As with the availability of information, the ability to express nonconsent may be highly dependant on individual circumstances.

In addition to these factors that focus on the individual, a legal decisionmaker should also consider factors that touch on participation in a subculture or wider society. Prominent in *Bronson* were arguments that the plaintiffs' constitutional rights were violated. Issues of religious freedom, privacy, or other constitutional rights may counsel caution on the part of a decisionmaker before deeming a person's consent invalid or irrelevant. On the other hand, a decisionmaker may consider whether the target activity impairs the individual's ability to function as a citizen in society. Are women in polygamous communities, for example, prevented from voting or meaningful civic participation? Finally, the question of whether the target activity is essential to a subcultural or community identity may be relevant. If it is, there may be concerns about state efforts to persecute unpopular minority groups.

CONCLUSION

While the *Bronson* plaintiffs were unable to get the relief they sought, their challenge raised a host of socially, rhetorically, and legally significant issues. The nonprosecution policies of the Utah and Arizona attorneys general mean that a bigamy law challenge that could survive the standing requirement

270. See Siegel, *supra* note 236, at 1699–1700.

271. *Id.*

272. See *supra* Section IV.A.

273. See *supra* text accompanying notes 212–213.

set out by the Tenth Circuit in *Bronson* is unlikely in the near future. Were such a challenge to arise, it is unlikely that a court would have the political will to strike down bigamy laws in a *Lawrence*-based ruling. This does not mean, however, that the *Bronson* plaintiffs' legal arguments are necessarily without merit.

The social and political implications of the plaintiffs' arguments are perhaps more interesting, and certainly more likely to have a meaningful impact in the near future, than the legal implications. By basing their challenge on *Lawrence* and using other arguments that echo progressive claims for sex rights, the *Bronson* plaintiffs position polygamy activism within the tradition of struggle for LGBT rights, feminism, and sexual freedom. This alliance is initially surprising because fundamentalist Mormons are frequently accused of behaviors that violate sex rights principles about gender equality and freedom from coercion and abuse, and because their relationships often reflect traditional or patriarchal gender roles. An investigation of areas of ambiguity or contradiction in other sex rights claiming demonstrates, however, that similar tensions are common in sex rights debates.

Tensions concerning autonomy and imperfect consent are prominent in polygamy activism, and also appear in political and legal debates about pornography, sadomasochism, and abortion. A comparative analysis of these four areas yields common themes that suggest guidelines for legal approaches to imperfect consent. If a woman professing consent to a plural marriage is not facing undue coercion to enter the relationship compared to the social factors discouraging her from polygamy, she is reasonably aware of alternatives, and she is able to express meaningful nonconsent, then legal decisionmakers should treat arguments that her consent is invalid or irrelevant with skepticism. This decisionmaking rubric may also have applicability beyond polygamy. A careful examination of the factors outlined in Section VI.E could be useful in evaluating other contexts where there is concern about the validity of consent given in situations where there are various social pressures or sources of coercion at work. Only through this nuanced consideration of issues of imperfect consent can we take seriously *Lawrence*'s guarantees of personal autonomy and freedom from state interference with consensual adult sexuality, while still balancing such liberty with sex rights concerns about preventing abuse and coercion.