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THREE'S COMPANY, TOO: THE EMERGENCE  
OF POLYAMOROUS PARTNERSHIP ORDINANCES

In the summer of 2020, the city of Somerville, Massachusetts, passed the first multiple-partner domestic partnership ordinance in the country.<sup>1</sup> Spurred by the pandemic, the city council acknowledged residents' inability to access their partners' health insurance without legal recognition of their relationships.<sup>2</sup> Its members voted unanimously to adopt a domestic partnership law.<sup>3</sup> The novel ordinance defined "domestic partnership" as "the entity formed by people," fulfilling six criteria — including that they "are in a relationship of mutual support, caring and commitment and intend to remain in such a relationship," "reside together," and "consider themselves to be a family."<sup>4</sup> Now, Somerville "afford[s] persons in domestic partnerships all the same rights and privileges afforded to those who are married" and interprets "spouse," "marriage," and "family" to encompass domestic partnerships in other city ordinances.<sup>5</sup>

The adjacent city of Cambridge followed suit, passing its own multiple-partner domestic partnership ordinance in 2021.<sup>6</sup> To reinforce community-driven efforts, research and advocacy organizations formed the Polyamory Legal Advocacy Coalition<sup>7</sup> (PLAC). PLAC lawyers worked closely with city officials to make the Cambridge registration process accessible by omitting the cost-prohibitive requirement that all

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<sup>1</sup> Jeremy C. Fox, *Somerville Recognizes Polyamorous Relationships in New Domestic Partnership Ordinance*, BOS. GLOBE (July 1, 2020, 11:21 PM), <https://www.bostonglobe.com/2020/07/01/metro/somerville-recognizes-polyamorous-relationships-new-domestic-partnership-ordinance> [<https://perma.cc/D6BM-F4RM>].

<sup>2</sup> City Council of Somerville, Mass., Regular Meeting Minutes at 5 (Apr. 7, 2020, 7:00 PM), <http://somervillecityma.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=2450&Inline=True> [<https://perma.cc/6UKN-7XGT>]; see also Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> [<https://perma.cc/BXV9-54T9>].

<sup>3</sup> Elinor Aspegren, *A US First? Massachusetts City Votes to Recognize Polyamorous Relationships in Domestic Partnership Policy*, USA TODAY (July 3, 2020, 12:36 AM), <https://www.usatoday.com/story/news/nation/2020/07/02/polyamory-massachusetts-city-somerville-relationships-us/5370718002> [<https://perma.cc/4399-3C62>].

<sup>4</sup> SOMERVILLE, MASS., ORDINANCES ch. 2, art. IX, § 2-502(c) (2020). The other three requirements are that they "are not married," "are not related by blood closer than would bar marriage in the Commonwealth of Massachusetts," and "are competent to contract." *Id.*

<sup>5</sup> *Id.* § 2-505.

<sup>6</sup> See *Cambridge Becomes 2nd US City to Legalize Polyamorous Domestic Partnerships*, POLYAMORY LEGAL ADVOC. COAL. (Mar. 9, 2021), <https://static1.squarespace.com/static/602abeboede5cc16ae72cc3a/t/604747971135b1744e8a4002/1615284120965/2021-03-08+PLAC+Press+Release.pdf> [<https://perma.cc/UD8N-NNWW>].

<sup>7</sup> *Id.*

persons in the partnership live together.<sup>8</sup> Under PLAC's advisement, the Council also eliminated the provision demanding detailed evidence of applicants' relationships, which did not apply to monogamous couples.<sup>9</sup> As a result, residents are registering under the ordinances.<sup>10</sup> And interest in passing similar laws is growing in other municipalities.<sup>11</sup> Recently, a meeting bylaw from Arlington, Massachusetts, recognized domestic partnerships of two or more people.<sup>12</sup> The state's Attorney General approved it, determining that "the limited scope of the . . . bylaw does not conflict with state law" on marriage.<sup>13</sup> There has also been momentum in consensually non-monogamous (CNM) communities — who engage in multiple relationships with the consent of all partners involved — and structurally diverse families across the country to organize locally and pursue legal recognition of their relationships.<sup>14</sup>

With these untested ordinances come new questions. A "domestic partnership" typically refers to a legal status acknowledging an unmarried couple and their children as family for limited purposes, such as employee benefits.<sup>15</sup> All domestic partnerships lack federal protections granted to civil marriages.<sup>16</sup> But states and other local jurisdictions define these partnerships, so domestic partners' rights vary and may mirror

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<sup>8</sup> Zoom Interview with Professor Alexander Chen, Founding Dir., Harv. L. Sch. LGBTQ+ Advoc. Clinic (Oct. 28, 2021).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Currently, neither city publishes the number of groups registered under the ordinances.

<sup>11</sup> See Daniel Villarreal, *Polyamorous Relationships Granted Legal Rights in Massachusetts*, LGBTQ NATION (July 5, 2020), <https://www.lgbtqnation.com/2020/07/massachusetts-city-begins-legally-recognizing-polyamorous-relationships> [<https://perma.cc/KM75-NMSG>].

<sup>12</sup> Jesse Collings, *Town Meeting Approves Domestic Partnership for Relationships with More than Two People*, ARLINGTON ADVOC. (Apr. 30, 2021, 3:52 PM), <https://www.wickedlocal.com/story/arlington-advocate/2021/04/30/arlington-approves-domestic-partnerships-polyamorous-relationships/7410640002> [<https://perma.cc/S8B4-52P2>]. City ordinances like those in Somerville and Cambridge can only be overturned if appealed by private residents, but because Arlington is a town, its motions are subject to review and approval by the Massachusetts Attorney General. See *id.*

<sup>13</sup> Letter from Maura Healey, Mass. Att'y Gen., to Juliana H. Brazile, Town Clerk (Dec. 23, 2021) (on file with the Harvard Law School Library).

<sup>14</sup> See Elaine McArdle, *Polyamory and the Law*, HARV. L. TODAY (Aug. 3, 2021), <https://today.law.harvard.edu/polyamory-and-the-law> [<https://perma.cc/9YU3-KL7N>].

<sup>15</sup> *Marriage & Relationships | Domestic Partnerships & Civil Unions | Massachusetts*, GLBTQ LEGAL ADVOCS. & DEFS., <https://www.glad.org/overview/domestic-partnerships-civil-unions/massachusetts> [<https://perma.cc/7YMY-Q395>].

<sup>16</sup> See GLBTQ LEGAL ADVOCS. & DEFS., DOMESTIC PARTNERSHIP BENEFITS OVERVIEW 5–6 (2014). Such benefits, accessible only to married partners, might include those in the Consolidated Omnibus Budget Reconciliation Act, Family Medical Leave Act, and Employee Retirement Income Security Act, as well as Flexible Spending Accounts, and Health Savings Accounts. *Federal Laws Impacting Domestic Partner Benefits*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/federal-laws-impacting-domestic-partner-benefits> [<https://perma.cc/2TCN-ZSQR>].

marital rights in some places.<sup>17</sup> However, municipalities instituting ordinances may confront state preemption of “marriage-like” domestic partnerships. Additionally, the criminalization of multiple-partner relationships through antibigamy and antipolygamy statutes may represent a roadblock to ordinances.<sup>18</sup> All fifty states and Washington, D.C., prohibit polygamy or bigamy in their statutes or constitutions.<sup>19</sup> California, Colorado, Washington, and Washington, D.C., added domestic partnerships or civil unions to their definitions of statutory bigamy.<sup>20</sup> Forty-eight states do not discuss domestic partners in their antipolygamy laws,<sup>21</sup> but multiple-partner ordinances may clash with these statutes if the rights they create are not sufficiently distinguishable from marriage. Nonetheless, there may be unexplored constitutional protections for legally recognizing multiple-partner domestic partnerships.

This Note examines potential legal challenges to multiple-partner domestic partnership ordinances. Part I describes communities that the ordinances serve, characterizes the discrimination and harassment that communities face, and explains what CNM people will gain from the passage of these ordinances. Part II surveys the complex legal questions that these ordinances generate, such as local government’s authority to pass them, state preemption through civil and criminal statutes, criminalization through antibigamy laws, and the application of comity doctrine in other cities and states. Part III evaluates approaches for addressing challenges that the ordinances may face at the municipal, state, and federal levels, such as legislative advocacy and litigation based on gay rights precedents. Ultimately, the ordinances likely will survive challenges and show that, legally speaking, “three is company, too.”

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<sup>17</sup> See *Civil Unions and Domestic Partnership Statutes*, NAT’L CONF. OF STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [<https://perma.cc/WT46-9ML5>] (comparing the benefits of marriages, civil unions, and domestic partnerships in each state).

<sup>18</sup> “Bigamy” is “entering into a marriage with one person while still legally married to another.” *Bigamy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bigamy> [<https://perma.cc/GH6T-R7JC>]. “Polygamy” is a “marriage in which a spouse of either sex may have more than one mate at the same time.” *Polygamy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/polygamy> [<https://perma.cc/83FH-UJJ5>].

<sup>19</sup> See Stephanie Kramer, *Polygamy Is Rare Around the World and Mostly Confined to a Few Regions*, PEW RSCH. CTR. (Dec. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions> [<https://perma.cc/9VZ9-XPFC>]. The Arizona, Idaho, New Mexico, Oklahoma, and Utah constitutions have antipolygamy or antibigamy provisions. ARIZ. CONST. art. XX, ordinance 2; IDAHO CONST. art. I, § 4; N.M. CONST. art. XXI, § 1; OKLA. CONST. art. I, § 2; UTAH CONST. art. III, ordinance 1.

<sup>20</sup> CAL. PENAL CODE § 281 (West 2021); D.C. CODE ANN. § 22-501 (West 2021); WASH. REV. CODE § 26.04.020(1)(a) (2021); see also COLO. REV. STAT. ANN. § 18-6-201 (West 2021) (discussing civil unions instead of domestic partnerships).

<sup>21</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 272, § 15 (West 2021) (“Whoever, having a former husband or wife living, marries another person or continues to cohabit with a second husband or wife in the commonwealth shall be guilty of polygamy . . .”).

## I. THE NEED FOR MULTIPLE-PARTNER DOMESTIC PARTNERSHIP ORDINANCES

This Part clarifies who the CNM community is, how its members suffer from discrimination, and why CNM — in particular, polyamorous — individuals will benefit from multiple-partner domestic partnership ordinances.

### A. *The CNM Community*

Somerville, Cambridge, and Arlington passed ordinances when structurally diverse families called attention to the discrimination that they face.<sup>22</sup> Amos Meeks, an Arlington resident who lives with his two life partners, proposed the amended domestic partnership language in his town.<sup>23</sup> His motivation was to combat prejudice, create co-parenting rights, and reduce healthcare barriers for people with multiple partners.<sup>24</sup> “We are a family by any reasonable sense of the word, but not in the eyes of the town or the state,” Meeks reflected.<sup>25</sup>

Polyamory involves intimacy with more than one person with the consent and knowledge of all parties.<sup>26</sup> The CNM community includes people who “practice polyamory, open relationships, swinging, relationship anarchy[,] and other types of ethical, non-monogamous relationships” that involve romantic, physical, or emotional intimacy of which all partners are aware.<sup>27</sup> According to some estimates, approximately four-to-five percent of the U.S. population is currently in CNM relationships, which is slightly larger than the size of the lesbian, gay, and bisexual (LGB) population.<sup>28</sup> LGB adults tend to have more experience with CNM relationships, and bisexual individuals have higher levels of CNM

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<sup>22</sup> See, e.g., Collings, *supra* note 12 (describing advocacy of town member).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Neel Burton, *Polyamory: A New Way of Loving?*, PSYCH. TODAY (Mar. 19, 2020), <https://www.psychologytoday.com/us/blog/hidden-and-look-for/201704/polyamory-new-way-loving> [<https://perma.cc/25NU-W23Z>].

<sup>27</sup> *Consensual Non-monogamy Task Force*, SOC’Y FOR PSYCH. OF SEXUAL ORIENTATION & GENDER DIVERSITY, <https://www.apadivisions.org/division-44/leadership/task-forces> [<https://perma.cc/N2GP-E9HY>].

<sup>28</sup> Zachary Zane, *Who Really Practices Polyamory?*, ROLLING STONE (Nov. 12, 2018, 3:55 PM), <https://www.rollingstone.com/culture/culture-features/polyamory-bisexual-study-pansexual-754696> [<https://perma.cc/62HT-MGQQ>] (according to estimates, one-fifth of the U.S. population has engaged in CNM relationships); see also Elisabeth A. Sheff, *Updated Estimate of Number of Non-monogamous People in U.S.*, PSYCH. TODAY (May 27, 2019), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201905/updated-estimate-number-non-monogamous-people-in-us> [<https://perma.cc/9LZH-XA3B>] (noting that two studies found the four-to-five percent figure in the United States, and another study found the same ratio in Canada).

involvement than gay and lesbian individuals.<sup>29</sup> The rate of CNM participation is “roughly constant across age, education level, income status, religion, region, political affiliation, and race.”<sup>30</sup> And it is becoming more visible.<sup>31</sup>

### B. Discrimination Against the CNM Community

With that visibility comes hardship. Over half of people in the CNM community have reported workplace, housing, and other forms of discrimination.<sup>32</sup> Employers have fired employees who were polyamorous based on morality clauses in their contracts.<sup>33</sup> Some housing laws restrict residents to those related by blood, adoption, or marriage, preventing polyamorous people from living together.<sup>34</sup> Beyond exclusion from these legal protections, CNM individuals encounter discrimination in court.<sup>35</sup> During custody battles, ex-spouses have weaponized their partners' CNM relationship statuses to assert parental unfitness.<sup>36</sup> Several multiple-partner groups have won triple-parent custody,<sup>37</sup> but most

<sup>29</sup> Richard A. Sprott & Heath Schechinger, *Consensual Non-monogamy: A Brief Summary of Key Findings and Recent Advancements*, AM. PSYCH. ASS'N: FAM. PSYCH. (Apr. 2019), <https://www.apadivisions.org/division-43/publications/newsletters/2019/04/non-monogamy> [<https://perma.cc/L7T2-DZAG>].

<sup>30</sup> M. L. Haupt et al., *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 436 (2017).

<sup>31</sup> See, e.g., Janica Kaneshiro, *Polyamorous Relationships Become More Visible*, USA TODAY (Aug. 10, 2015, 8:36 PM), <https://www.usatoday.com/story/news/nation/2015/08/10/polyamorous-relationships-become-more-visible/31439123> [<https://perma.cc/A5MU-8ZGE>].

<sup>32</sup> See *Frequently Asked Questions*, POLYAMORY LEGAL ADVOC. COAL., <https://polyamorylegal.org/faqs> [<https://perma.cc/QD4L-UQY8>]; see also Ryan G. Witherspoon & Peter S. Theodore, *Exploring Minority Stress and Resilience in a Polyamorous Sample*, 50 ARCHIVES OF SEXUAL BEHAV. 1367, 1381 (2021) (“Slightly less than two-thirds of this sample (61.6%) reported experiencing at least one form of anti-CNM discrimination in their lives to-date, and almost half (44.5%) reported experiencing two or more forms.”).

<sup>33</sup> Cf., e.g., Elisabeth A. Sheff, *Polyphobia*, PSYCH. TODAY (July 14, 2017), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201707/polyphobia> [<https://perma.cc/4YV8-NNVD>] (describing how a polyamorous person was fired for sexual harassment due to admitting to their coworker that they had a polyamorous family, even though the coworker had repeatedly asked for this information).

<sup>34</sup> See Elizabeth Cannon Leshner, Comment, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 TUL. J.L. & SEXUALITY 127, 143–44 (2013).

<sup>35</sup> See, e.g., Dawn M. v. Michael M., 47 N.Y.S.3d 898, 903 (N.Y. 2017) (criticizing divorcing parents' co-parenting relationship with their polyamorous partner, but allowing legal tricustody for the best interests of the child).

<sup>36</sup> See, e.g., Christian Klesse, *Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance*, 24 SOCIO. RSCH. ONLINE 625, 625 (2019) (“Research documents the exclusions of poly families (and individuals) from access to legal provisions and protections and their common discrimination in the courts, namely, in custody cases.”).

<sup>37</sup> See, e.g., Riepe v. Riepe, 91 P.3d 312, 318 (Ariz. Ct. App. 2004) (recognizing a former stepmother's potential as a third parent despite child's relationships with both parents); V.B. v. J.E.B., 55 A.3d 1193, 1200–01 (Pa. Super. Ct. 2012) (holding trial court erred by using father's polyamory to refuse him legal custody of child); Christina Cauterucci, *New York Court Affirms*

courts have not recognized third parents.<sup>38</sup> A lawyer representing polyamorous families, Diana Adams, observes: “Many people are trying to create families in different kinds of ways. And a lot of people see that as dangerous.”<sup>39</sup> Studies finding that children with parents in CNM relationships can thrive — and even gain access to additional benefits like greater financial resources and childcare — have not shifted this perception.<sup>40</sup> In light of these consequences, CNM individuals may be reluctant to “come out” with their relationship status.<sup>41</sup>

### *C. Protections Provided by Multiple-Partner Domestic Partnership Ordinances*

By recognizing multiple partners, ordinances like Somerville’s have the potential to reshape how the law deals with diverse family structures. First, multiple-partner domestic partnership ordinances may soften stigma.<sup>42</sup> Massachusetts was the first state to recognize same-sex marriage in 2004.<sup>43</sup> Since then, legalization has correlated with reduced implicit and explicit antigay bias.<sup>44</sup> The ordinances may have compa-

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*Poly Parenthood with Three-Way Custody Ruling*, SLATE (Mar. 13, 2017, 5:55 PM), <https://slate.com/human-interest/2017/03/new-york-court-affirms-poly-parenthood-with-three-way-custody-ruling.html> [<https://perma.cc/PNQ8-5Q2F>].

<sup>38</sup> See, e.g., *Lanfear v. Ruggerio*, 254 A.3d 168, 174–76 (Vt. 2020) (finding partner in a polyamorous relationship with child’s biological father and mother was not the de facto parent of child); Cynthia McKelvey, *The Challenges of Polyamorous Parenting*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/parenting/polyamorous-parenting.html> [<https://perma.cc/E2BX-DJR7>] (noting that “at least 12 states” recognize “three or more parents in some capacity”).

<sup>39</sup> Jessica Kegu & Jason Silverstein, *Not Just “One Big Orgy”: Fighting the Stigma of Consensual Non-monogamy*, CBS NEWS (Oct. 24, 2019, 2:03 PM), <https://www.cbsnews.com/news/polyamory-relationships-not-just-one-big-orgy-stigma-of-consensual-non-monogamy-cbsn-originals> [<https://perma.cc/R6VQ-8HGL>].

<sup>40</sup> See Elisabeth Sheff, *Strategies in Polyamorous Parenting*, in UNDERSTANDING NON-MONOGAMIES 169, 171 (Meg Barker & Darren Langdridge eds., 2010); see also Terri D. Conley et al., *Investigation of Consensually Nonmonogamous Relationships: Theories, Methods, and New Directions*, 12 PERSPS. ON PSYCH. SCI. 205, 224 (2017).

<sup>41</sup> See Heath A. Schechinger et al., *Harmful and Helpful Therapy Practices with Consensually Non-monogamous Clients: Toward an Inclusive Framework*, 86 J. CONSULTING & CLINICAL PSYCH. 879, 888 (2018) (explaining that similar stigma faced by the LGBTQ+ and CNM communities includes the “experience coming out/visibility management, marital/adoption/custody/parental participation issues, moral ground discrimination, extended family consequences, negative internalizations from minority stress, difficulty finding community/fitting in, and housing/workplace discrimination”).

<sup>42</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000) (theorizing state action “must express a collective understanding of all citizens as equal members” (emphasis omitted)).

<sup>43</sup> Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), <https://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html> [<https://perma.cc/Z9CW-8VA9>].

<sup>44</sup> See Eugene K. Ofose et al., *Same-Sex Marriage Legalization Associated with Reduced Implicit and Explicit Antigay Bias*, 116 PROC. NAT’L ACAD. SCI. 8846, 8846 (2019) (“While antigay bias had been decreasing over time, following local same-sex marriage legalization[,] antigay bias decreased at roughly double the rate, indicating that government legislation can inform attitudes even on religiously and politically entrenched positions.”).

rable effects on discrimination against the CNM community. As Meeks observed, the ordinances may be valuable simply for affirming one's relationship status: "I think a really important part of laws like this is just recognition and external validation."<sup>45</sup> While obtaining domestic partnership rights may not eliminate discrimination against CNM families, it can cultivate greater acknowledgment of and respect for them.<sup>46</sup>

The rights enshrined in multiple-partner domestic partnerships preserve the dignity of structurally diverse families while tangibly improving their lives. The ordinances not only can support CNM individuals but also can protect other families, such as couples co-parenting with sperm or egg donors.<sup>47</sup> A partner may need to be covered by their non-legal partner's employer-sponsored health insurance or want to be with their loved ones in the hospital.<sup>48</sup> Those registered under the Cambridge and Somerville ordinances will no longer face barriers to visitation rights in those places.<sup>49</sup> City employees can extend insurance coverage to registered partners and will receive bereavement leave if one of their partners passes away.<sup>50</sup> Partners may have trouble picking up their children at school if they are not legal or biological relations, but registration under the ordinance addresses this problem by providing legal

<sup>45</sup> Collings, *supra* note 12.

<sup>46</sup> Julia Taliesin, *Somerville Recognizes Polyamorous Domestic Partnerships*, MILFORD DAILY NEWS (July 1, 2020, 2:49 PM), <https://www.milforddailynews.com/story/news/state/2020/07/01/somerville-votes-to-recognize-polyamorous-domestic-partnerships-it-is-one-of-first-in-nation/113911468> [<https://perma.cc/E9HQ-CKHG>]. Andy Izenon, senior legal director and vice president of the Chosen Family Law Center in New York, reflected on how these ordinances might change the legal landscape: "[S]trategies like this are the best chance we have of moving towards a legal understanding of family that's as comprehensive as it needs to be to serve all families." *Id.*

<sup>47</sup> Diana Adams, *What Polyamorous & Multi-parent Families Should Do to Protect Their Rights*, LGBTQ+ BAR: PRIMA FACIE (Dec. 11, 2018), <https://lgbtqbar.org/bar-news/what-polyamorous-multi-parent-families-should-do-to-protect-their-rights> [<https://perma.cc/2T3S-RJ3P>]; see also Barry, *supra* note 2 ("Under the ordinance, domestic partners, whether in groupings of two or more, would not necessarily be romantic partners. . . . The status would allow [platonic life partners] to . . . share benefits, like health insurance, but also to have outside romantic partners . . . if they wished.")

<sup>48</sup> See Simon Davis, *Death Is Way More Complicated When You're Polyamorous*, VICE (Nov. 9, 2015, 3:23 PM), <https://www.vice.com/en/article/3bj4d5/death-is-way-more-complicated-when-youre-polyamorous-511> [<https://perma.cc/8DA7-H5H6>] (noting that "poly partners [sometimes] get muscled out of hospital visits and hospice by family members who refused to recognize a poly partner as a legitimate partner").

<sup>49</sup> CAMBRIDGE, MASS., ORDINANCES tit. 2, ch. 2.119, § 2.119.060(A)(1) (2021) ("A domestic partner shall have the same visitation rights as a spouse or parent of a patient at the Cambridge City Hospital and all other health care facilities in the City."); Barry, *supra* note 2.

<sup>50</sup> CAMBRIDGE, MASS., ORDINANCES tit. 2, ch. 2.119, § 2.119.070(F) (2021) ("Employees shall be granted a leave of absence, with pay, for the death of a domestic partner or family member of a domestic partner to the same extent as for a spouse or family member of a spouse."); Barry, *supra* note 2 ("Under its new domestic partnership ordinance, the city of Somerville now grants polyamorous groups . . . the right to confer health insurance benefits . . .").

recognition of the relationships.<sup>51</sup> Proof of relationship status may facilitate travel, immigration, and naturalization for CNM partners with different citizenship statuses.<sup>52</sup> These examples illustrate just a few advantages that domestic partnerships can offer.

## II. THE CHALLENGES TO PASSING THESE ORDINANCES

This Part first identifies which local governments can institute multiple-partner domestic partnership ordinances. It then anticipates legal challenges to such ordinances. Finally, it assesses the rights of people registered in places like Cambridge and Somerville when they move elsewhere.

### A. Local Governments that Can Pass These Ordinances

Most states, including Massachusetts, have enacted “home rule” amendments or statutes,<sup>53</sup> granting local government subunits the power to initiate legislation not specifically authorized by the state legislature.<sup>54</sup> In contrast, some states have Dillon’s Rule, which requires the state legislature’s express permission as a prerequisite to local action like passing domestic partnership ordinances.<sup>55</sup> Although local governments in home rule states have greater autonomy, their authority varies across and within those states based on unique home rule provisions. Consequently, determining if a local government can enact an ordinance requires checking the specific statute for that entity’s power in relation to the state.

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<sup>51</sup> See McArdle, *supra* note 14.

<sup>52</sup> Cf. Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 321–22 (2015).

<sup>53</sup> See, e.g., MASS. GEN. LAWS ch. 43B, § 13 (2021) (“Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . and which is not denied, either expressly or by clear implication, to the city or town by its charter.”); see also DAVID J. BARRON ET AL., RAPPAPORT INST. FOR GREATER BOS., *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 1–3 (2004) (“The increasing demand upon municipal governments in Massachusetts [in the 1960s] . . . prompted the Massachusetts legislature to adopt — with important restrictive modifications — the Model Constitutional Provisions for Municipal Home Rule . . .” *Id.* at 1. “[M]any local officials regard home rule in Massachusetts as weak.” *Id.* at 3.).

<sup>54</sup> Cf. Jennifer L. Pomeranz, *Challenging and Preventing Policies that Prohibit Local Civil Rights Protections for Lesbian, Gay, Bisexual, Transgender, and Queer People*, 108 AM. J. PUB. HEALTH 67, 68 (2018) (“Local governments subject to similar preemptive laws should research their own home rule authority, which refers to the power by local governments to self-rule and enact their own laws, and locales should challenge state laws if they violate localities’ right to self-govern.”).

<sup>55</sup> JON D. RUSSELL & AARON BOSTROM, AM. CITY CNTY. EXCH., *FEDERALISM, DILLON RULE AND HOME RULE* 5 (2016) (naming states having Dillon’s Rule exclusively and states with a combination of Home and Dillon’s Rule); *Cities 101: Delegation of Power*, NAT’L LEAGUE OF CITIES, <https://www.nlc.org/resource/cities-101-delegation-of-power> [https://perma.cc/DUC6-ZUU5].

Beginning in the 1990s, Massachusetts cities began enacting domestic partnership ordinances.<sup>56</sup> Although elements of these statutes have been challenged, there has never been a legal challenge to a local government's ability to enact them in the state.<sup>57</sup> But other state governments have resisted home rule local governments' decisions to recognize relationship statuses in the past. In 2004, Multnomah County, Oregon, decided to issue almost 3,000 marriage licenses to same-sex couples, but the state refused to register the marriages.<sup>58</sup> The Oregon Supreme Court sided with the state.<sup>59</sup> It held that the county lacked the authority to issue the licenses because state law "place[d] the regulation of marriage exclusively within the province of the state's legislative power."<sup>60</sup> After the county's decision, citizens around the state banded together to pass a ban on same-sex marriage.<sup>61</sup> This cautionary tale suggests there may be similar opposition to passing a multiple-partner nondiscrimination ordinance even in home rule states with powerful progressive localities.

### B. Challenges to Jurisdictions Adopting Similar Ordinances

In places where local government can enact multiple-partner domestic partnership ordinances, the two largest challenges are state criminal and civil statutes that might preempt the ordinances and antibigamy and antipolygamy statutes that states may apply to the ordinances. These hurdles are not insurmountable but merit careful consideration.

1. *States' Preemption of Multiple-Partner Domestic Partnership Ordinances.* — Municipalities seeking to pass multiple-partner domestic partnership ordinances will have to navigate state preemption by criminal and civil statutes. For instance, California authorizes local governments to regulate domestic partnerships.<sup>62</sup> But in *In re Lane*,<sup>63</sup> the California Supreme Court held that an ordinance regulating sexual activity in public places between unmarried individuals conflicted with state law because "[t]he Penal Code sections covering the criminal aspects of sexual activity [including bigamy] are so extensive in their scope that they clearly show an intention by the Legislature to adopt a general

<sup>56</sup> Jennifer L. Levi, *Massachusetts' Domestic Partnership Challenge: Hope for a Better Future*, 9 TUL. J.L. & SEXUALITY 137, 138–39 (1999).

<sup>57</sup> See, e.g., *Connors v. City of Boston*, 714 N.E.2d 335, 335–36 (Mass. 1999) (holding some benefits were preempted by state law but not questioning city's ability to designate domestic partnership status).

<sup>58</sup> *Li and Kennedy v. State of Oregon*, ACLU OR., <https://www.aclu-or.org/en/cases/li-and-kennedy-v-state-oregon> [<https://perma.cc/U2R8-DLUE>].

<sup>59</sup> *Id.*

<sup>60</sup> *Li v. Oregon*, 110 P.3d 91, 100 (Or. 2005), *abrogated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>61</sup> Eliza Canty-Jones, *Same-Sex Marriage*, OR. HIST. PROJECT (Mar. 17, 2018), <https://www.oregonhistoryproject.org/articles/historical-records/same-sex-marriage> [<https://perma.cc/L3U4-76T2>].

<sup>62</sup> See CAL. FAM. CODE § 297.5(h) (West 2021).

<sup>63</sup> 372 P.2d 897 (Cal. 1962).

scheme for the regulation of this subject.”<sup>64</sup> Given that California statutorily outlaws multiple domestic partners,<sup>65</sup> a court likely would invalidate, due to preemption, any multiple-partner domestic partnership ordinance passed by a California city or town.<sup>66</sup>

State preemption of local laws is on the rise, particularly in conservative states with progressive local governments that might consider passing multiple-partner domestic partnership ordinances.<sup>67</sup> Such states have enacted targeted preemption laws overturning LGBTQ+ rights ordinances or blanket preemption measures for all local laws.<sup>68</sup> After the legalization of same-sex marriage, Arkansas passed the Intrastate Commerce Improvement Act<sup>69</sup> requiring state uniformity for civil rights laws.<sup>70</sup> Since Arkansas does not recognize sexual orientation in these laws, local governments are powerless to pass ordinances protecting LGBTQ+ individuals from discrimination.<sup>71</sup> A state similarly may preempt domestic partnership ordinances by requiring uniform domestic partnership laws across municipalities.

2. *Criminalization of Multiple-Partner Relationships.* — Before municipalities pass polyamorous ordinances in D.C. and the three states that make multiple-partner domestic partnerships a felony, decriminalization may be necessary.<sup>72</sup> In the forty-seven states that do not name domestic partnerships or civil unions in their antibigamy statutes,<sup>73</sup> these ordinances can survive challenges brought under antibigamy statutes so long as multiple-partner domestic partnerships are distinguishable from marriage. In *Elia-Warnken v. Elia*,<sup>74</sup> the Supreme Judicial Court of Massachusetts held that an in-state marriage was void ab initio under the state’s antipolygamy statute because one same-sex spouse had an undissolved civil union in Vermont.<sup>75</sup> The Vermont legislature had created civil unions that conferred on same-sex couples “all the same benefits, protections, and responsibilities under law . . . as are granted

<sup>64</sup> *Id.* at 899.

<sup>65</sup> CAL. PENAL CODE § 281 (West 2021).

<sup>66</sup> See *In re Lane*, 372 P.2d at 903 (Gibson, C.J., concurring) (“In order to hold that the field has been occupied, it is not necessary that the Legislature has specifically declared the scheme or policy . . . and the general intent may be found in a multiplicity of statutes taken together.”).

<sup>67</sup> See, e.g., Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403, 403 (2017).

<sup>68</sup> See *id.* at 416–18. “Blanket preemption laws are generally written with the intent to bar localities from enforcing any type of local regulation or legislation that does not exactly conform to state law.” *Id.* at 418.

<sup>69</sup> ARK. CODE ANN. §§ 14-1-401 to -403 (2021).

<sup>70</sup> Pomeranz, *supra* note 54, at 67.

<sup>71</sup> *Id.*

<sup>72</sup> See sources cited *supra* note 20.

<sup>73</sup> E.g., FLA. STAT. ANN. § 826.01 (West 2021); 11 R.I. GEN. LAWS ANN. § 11-6-1 (West 2021); TEX. PENAL CODE ANN. § 25.01 (West 2021); see also sources cited *supra* note 19.

<sup>74</sup> 972 N.E.2d 17 (Mass. 2012).

<sup>75</sup> *Id.* at 21–22.

to spouses in a civil marriage.”<sup>76</sup> The court applied comity principles to conclude that the Vermont civil union was equivalent to a marriage in Massachusetts.<sup>77</sup> Unlike the civil union at issue in *Elia-Warnken*, the Somerville and Cambridge ordinances establish limited rights distinct from marriage, so they do not conflict with the state statute.<sup>78</sup>

Although the Supreme Judicial Court of Massachusetts likely will uphold the current ordinance, it may invalidate one from another state that guarantees all the benefits of marriage. In *Elia-Warnken*, the court noted that it would not extend recognition to an out-of-state marriage under the principles of comity if it “violates Massachusetts public policy, including polygamy.”<sup>79</sup> Oregon and California have domestic partnership laws that parallel civil marriage in Massachusetts.<sup>80</sup> So, Massachusetts may not recognize a multiple-partner domestic partnership ordinance passed in Oregon unless it specified fewer rights than marriage. Even state courts analyzing similar legislative histories may come to different conclusions about whether or not the intent of “domestic partnership” was for it to be like “marriage.” A New York court reviewing the same Vermont civil union statute in *Elia-Warnken* determined that a “civil union” did not equate to “marriage” in New York because the Vermont legislature displayed hesitance to extend the right to marry to same-sex couples.<sup>81</sup> But a Pennsylvania court held that under comity, a Vermont civil union was the legal equivalent of marriage for dissolution under the Pennsylvania Divorce Code.<sup>82</sup>

### C. *The Legal Rights of People Registered in Cambridge and Somerville when They Move Elsewhere*

It is unknown how comity doctrine will affect the rights of people participating in multiple-partner domestic partnerships. Nonuniform

<sup>76</sup> *Id.* at 19 (quoting VT. STAT. ANN. tit. 15, § 1204(a) (West 2021)).

<sup>77</sup> *See id.* at 19–21.

<sup>78</sup> *See* Adriana Loya, *This Massachusetts City Is Recognizing Polyamorous Relationships*, NBC BOS. (July 4, 2020, 8:08 AM), <https://www.nbcboston.com/news/local/this-massachusetts-city-is-recognizing-polyamorous-relationships/2153761> [<https://perma.cc/8SCU-EYUA>]. There are still key differences between domestic partnerships and marriage in Massachusetts — domestic partners are not considered legal family and cannot claim a loss of consortium, for example. *Cf.* Charron v. Amaral, 889 N.E.2d 946, 948 (Mass. 2008) (“This court consistently has rejected the idea that cohabitating adults, even those who could demonstrate a commitment to each other, could recover [for loss of consortium].”).

<sup>79</sup> *Elia-Warnken*, 972 N.E.2d at 20.

<sup>80</sup> *Thinking of Getting Married in Massachusetts?*, ACLU, <https://www.aclu.org/other/thinking-getting-married-massachusetts> [<https://perma.cc/54G2-SKUN>]; *see also* Hunter v. Rose, 975 N.E.2d 857, 861 (Mass. 2012) (using *Elia-Warnken* to find a registered domestic partnership in California equivalent to marriage in Massachusetts).

<sup>81</sup> *B.S. v. F.B.*, 883 N.Y.S.2d 458, 466 (N.Y. Sup. Ct. 2009).

<sup>82</sup> *See* Neyman v. Buckley, 153 A.3d 1010, 1019 (Pa. Super. Ct. 2016) (citing *Elia-Warnken*, 972 N.E.2d at 20).

marriage laws — and in the past decades, domestic partnership laws — across cities, counties, and states have always presented quagmires for courts.<sup>83</sup> Historically, there was a general presumption of marriage recognition.<sup>84</sup> “Those rules dictated that states should generally recognize marriages that were valid where celebrated — the so-called ‘place of celebration’ rule — unless doing so interfered with an important public policy or interest of the destination state.”<sup>85</sup> With the advent of same-sex marriage, states began eschewing this traditional rule to assert their public policy values.<sup>86</sup> Determining whether the entities registered under local domestic partnership ordinances will receive the same rights in other jurisdictions requires navigating statutes, court rulings, and specific private and government policies. Comity might impact those registered under such ordinances via (1) the receipt or nonreceipt of benefits afforded to those in legally recognized relationships in other cities or states and (2) the potential invalidation of relationships recognized under the law in another city or state.

Some states have specified by statute whether they recognize other state and local jurisdictions’ domestic partnerships.<sup>87</sup> New Jersey’s statute confers all the benefits of the domestic partnership from the place it was formed.<sup>88</sup> Presumably, the Cambridge and Somerville ordinances would continue to confer benefits there.<sup>89</sup> New York law recognizes limited rights like hospital visitation.<sup>90</sup> Other states require out-of-state domestic partnerships to be “substantially equivalent” to their domestic partnership definition.<sup>91</sup> Domestic partners registered under the ordinances would receive recognition there only if their municipal benefits aligned with marital ones.

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<sup>83</sup> Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-uniform Marriage Laws*, 84 OR. L. REV. 433, 433–35 (2005).

<sup>84</sup> *Id.* at 488.

<sup>85</sup> *Id.* at 435.

<sup>86</sup> *Id.* at 488.

<sup>87</sup> See, e.g., CAL. FAM. CODE § 299.2 (West 2021) (“A legal union of two persons, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership . . . shall be recognized as a valid domestic partnership . . .”).

<sup>88</sup> N.J. STAT. ANN. § 26:8A-2(D) (West 2021); see *id.* § 26:8A-6(c) (“A domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State.”).

<sup>89</sup> *But cf.* Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 182–84 (N.J.T.C. 2005) (interpreting § 26:8A-6(c) to preclude recognition of out-of-state same-sex marriages, based on the “public policy of this state,” *id.* at 184, against such partnerships at the time of the statute’s enactment).

<sup>90</sup> See N.Y. PUB. HEALTH LAW § 2805-q(2)(a) (McKinney 2021) (acknowledging “domestic partnership or similar relationship . . . entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction, or registered as the domestic partner of the other person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction” for hospital visitation).

<sup>91</sup> See, e.g., CAL. FAM. CODE § 299.2.

For states that have not explicitly outlined their policies, court holdings may reveal what rights registered polyamorous partners may have in certain jurisdictions. Although case law is scarce, several child custody precedents suggest that some state appellate courts will recognize domestic partners registered in another jurisdiction as the legal parents of their nonbiological children.<sup>92</sup> Nevertheless, at least one court noted that such a finding under the principle of comity was a sign of goodwill and a grant of a privilege rather than a right.<sup>93</sup> If the relationship went against the forum state's public policy, the court would have not applied the sister state's law.<sup>94</sup> Because of antibigamy statutes, other states may claim that multiple-partner parenting controverts public policy and may not recognize these domestic partnerships. However, the nonenforcement of bigamy statutes in a jurisdiction may mean that public policy no longer leans against multiple-partner relationships.<sup>95</sup>

The Cambridge and Somerville ordinances require that municipal employers provide health insurance and other employee benefits to multiple partners.<sup>96</sup> But, private and state employers are under no obligation to provide these goods to individuals that register.<sup>97</sup> Some private employers have domestic partner plans that provide leave, parenting, travel, and relocation benefits.<sup>98</sup> These were written for a single partner, so CNM domestic partners may have to choose which one the policy will cover. The ordinances cannot require private employers to offer insurance to domestic partners because the Home Rule Amendment prohibits local governments from enacting "private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power."<sup>99</sup> The Supreme Judicial Court of Massachusetts confirmed that cities do not have the power to extend state insurance laws due to the Amendment.<sup>100</sup> Because the state does not give unmarried employees' partners equal access to health insurance or permit employees to name unmarried partners as pension beneficiaries,<sup>101</sup> those registered under

<sup>92</sup> See, e.g., *Gardenour v. Bondelie*, 60 N.E.3d 1109, 1116–18 (Ind. Ct. App. 2016) (recognizing a domestic partnership registered in California in a child custody proceeding).

<sup>93</sup> *Id.* at 1117.

<sup>94</sup> See *id.*

<sup>95</sup> See Ashley E. Morin, Note, *Use It or Lose It: The Enforcement of Polygamy Laws in America*, 66 RUTGERS L. REV. 497, 522 (2014).

<sup>96</sup> Other states' courts have confirmed that extending employee benefits to domestic partners is within the scope of home-rule counties and that a local ordinance doing so did not infringe on the state's ability to regulate marriage. See, e.g., *Tyma v. Montgomery County*, 801 A.2d 148, 150, 156 (Md. 2002).

<sup>97</sup> See CAMBRIDGE, MASS., ORDINANCES tit. 2, ch. 2.119, § 2.119.070 (2021); Elisabeth A. Sheff, *Legal Protections for People in Polyamorous Relationships*, PSYCH. TODAY (July 23, 2020), <https://www.psychologytoday.com/ca/blog/the-polyamorists-next-door/202007/legal-protections-people-in-polyamorous-relationships> [<https://perma.cc/6Z6W-QTNF>].

<sup>98</sup> GLBTQ LEGAL ADVOCS. & DEFS., *supra* note 16, at 2.

<sup>99</sup> MASS. CONST. amend. LXXXIX, § 7, cl. 5 (1966).

<sup>100</sup> *Connors v. City of Boston*, 714 N.E.2d 335, 335–36 (Mass. 1999).

<sup>101</sup> See *id.* at 336 n.8.

the ordinance will not be able to secure these benefits through state insurance and will have to rely on city-provided benefits. To achieve widespread access to health insurance for multiple partners, advocates will need to enact change at the state or federal level.

### III. STRATEGIES FOR NEXT STEPS

This Part evaluates advocates' likely arguments to pass multiple-partner domestic partnership ordinances. Initially, advocates may take steps at the municipal level to protect these partnerships. Simultaneously, advocates may pursue decriminalization of bigamy through legislation or litigation. They might protect the ordinances by reducing criminal penalties for polygamy, asking state attorneys general to adopt a nonprosecution policy, or seeking the repeal of state antibigamy statutes. In the courtroom, they might pursue constitutional litigation to invalidate the statutes and protect the rights of CNM and other adults. First, they can cite the fundamental right to choose one's partners, established in gay rights cases. Then, they can use the dissents in these cases to persuade courts that diverse family structures fall under these protections.

#### A. Municipal Strategies

To avoid multiple-partner domestic partnership ordinances being labeled as "marriage-like" and therefore bigamous, advocates must ensure that legal recognition does not overlap with a state's marriage laws. To minimize confusion, they can note a desire not to equate domestic partnerships with marriage in the legislative history.<sup>102</sup> They might review marriage laws not only in the state where they are passing the ordinances but also in other states to maximize the application of comity doctrine to the ordinance's language. Finally, to protect those who register, advocates will have to ensure that passed ordinances are not repealed.

Municipal-level advocacy might focus on passing nondiscrimination ordinances to complement the multiple-partner domestic partnership ordinances. Individuals listed in a domestic partnership registry risk losing jobs, housing, or custody because they have no protection from discrimination.<sup>103</sup> A relationship-status nondiscrimination ordinance would be a logical first piece of legislation to address that problem. Scholars and CNM individuals have argued that it may be preferable

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<sup>102</sup> See Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1112 n.280 (2009) ("In addition, in rare circumstances, the court may determine that constitutional or public policy considerations provide sufficiently strong support for retroactive application to permit retroactive application even in the absence of evidence of legislative intent on that question.").

<sup>103</sup> See McArdle, *supra* note 14.

to emphasize solutions like hospital visitation registries to improve the lives of unmarried people,<sup>104</sup> without an explicit focus on the legal recognition of CNM relationships. But approaches such as this may not destigmatize CNM partnerships as the multiple-partner or nondiscrimination ordinances would.<sup>105</sup>

Beyond ordinances, multiple partners may legally solidify their relationships through contracting.<sup>106</sup> Power of attorney decisions, end-of-life planning, and co-parenting can be coordinated in advance to prevent disputes. Multiple-partner families are already using contracting as an alternative to domestic partnerships.<sup>107</sup> In Massachusetts and other states that allow three-parent families (usually to assist divorced couples and their new married partners),<sup>108</sup> partners in CNM relationships may seek to adopt their nonbiological children to facilitate co-parenting.<sup>109</sup> Nonetheless, not all benefits of marriage, such as healthcare and tax deductions, can be contracted, and courts may not always enforce contracts of multiple-partner entities. Advocates must pursue legislative and litigation strategies to secure rights for multiple-partner groups, as well.

### B. State and Federal Strategies

There are both legislative and litigation-based solutions to state preemption, criminalization, or comity challenges to the ordinances.

1. *Legislative Solutions.* — To eliminate the threat of criminal penalties, organizers might push to repeal state antibigamy and antipolygamy statutes.<sup>110</sup> In addition to paving the way for multiple-partner

<sup>104</sup> Aviram & Leachman, *supra* note 52, at 305–06, 320.

<sup>105</sup> See Sheff, *supra* note 97 (discussing a California nondiscrimination ordinance for CNM individuals, but noting the ordinance “has floundered in implementation and remains unenforced”).

<sup>106</sup> See, e.g., Deborah Zalesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 BUFF. L. REV. 909, 919 (2018) (proposing “a shift from marriage as a status to household as a contract”).

<sup>107</sup> See Roc Morin, *Up for Polyamory? Creating Alternatives to Marriage*, THE ATLANTIC (Feb. 19, 2014), <https://www.theatlantic.com/health/archive/2014/02/up-for-polyamory-creating-alternatives-to-marriage/283920> [<https://perma.cc/WH8N-RHQW>].

<sup>108</sup> See Gabrielle Emanuel, *Three (Parents) Can Be a Crowd, But for Some It's a Family*, NPR (Mar. 30, 2014, 6:08 PM), <https://www.npr.org/2014/03/30/296851662/three-parents-can-be-a-crowd-but-for-some-its-a-family> [<https://perma.cc/DW3H-8GFF>].

<sup>109</sup> See Angela Chen, *The Rise of the 3-Parent Family*, THE ATLANTIC (Sept. 24, 2020, 12:40 PM), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421> [<https://perma.cc/92XD-D5SC>] (profiling three-parent family recognized by California). The states recognizing three-parent families are Alaska, California, Delaware, Louisiana, Massachusetts, Oregon, Pennsylvania, Washington, and Vermont. Washington, D.C., also allows three-parent families. *Id.*

<sup>110</sup> There were also several antibigamy statutes that outlawed polygamy at a federal level, but they were mainly used to target The Church of Jesus Christ of Latter-day Saints in the late nineteenth century. See Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 118–30 (2006). They were repealed in the late twentieth century. Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (repealed 1983); Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978).

ordinances, these efforts may decrease stigma through public education campaigns about diverse family structures. According to a Gallup poll, since 2006, there has been a fourfold increase in the number of Americans reporting that polygamy is morally acceptable — from five to twenty percent.<sup>111</sup> Thirty-four percent of younger Americans found it was morally acceptable.<sup>112</sup> It may be possible to build on this momentum to decriminalize it.

Repealing antibigamy and antipolygamy statutes can also prevent harassment. This morals legislation echoes antisodomy laws, which were often secondary charges in criminal cases and not commonly levied as a sole charge against a defendant.<sup>113</sup> Like with antisodomy laws, antibigamy laws can be used to deny equal treatment to CNM community members, to discredit them, to justify firing them, to limit their ability to raise children, and to argue against relationship-status nondiscrimination ordinances.<sup>114</sup> Even if litigation deems these laws unconstitutional, people can use them to intimidate CNM individuals if they remain on the books. As recently as 2015, men having consensual sex were arrested under Louisiana's antisodomy law long after the Supreme Court ruled such laws to be unconstitutional.<sup>115</sup>

Although improbable, groups recognized as legal domestic partners in Somerville or Cambridge may face criminal sentencing and jail time in another city or state if courts find their partnerships to be equivalent to marriage in that jurisdiction.<sup>116</sup> This risk remains in states that define bigamy as not only marriage to a second person but alternatively cohabitation with that person.<sup>117</sup> For instance, Colorado denotes bigamy as

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<sup>111</sup> Frank Newport, *Understanding the Increase in Moral Acceptability of Polygamy*, GALLUP (June 26, 2020), <https://news.gallup.com/opinion/polling-matters/313112/understanding-increase-moral-acceptability-polygamy.aspx> [<https://perma.cc/U7PK-SQ76>].

<sup>112</sup> *Id.*

<sup>113</sup> Similarly, in California, bigamy charges have only coincided with more serious crimes. *See, e.g., Fletcher v. Dobson-Davis*, No. CV 09-9107, 2013 WL 5591940, at \*1 (C.D. Cal. Oct. 10, 2013) (noting the state court conviction of the petitioner's husband for first-degree murder, conspiracy, fraud, and bigamy); *People v. Kennedy*, No. B203345, 2009 WL 866462, at \*1 (Cal. Ct. App. Apr. 2, 2009) (affirming the conviction of a man for torture, kidnapping for the purposes of rape, making a criminal threat, dissuading a witness by force or threat, assault by means of force likely to produce great bodily injury, and bigamy).

<sup>114</sup> *Why Sodomy Laws Matter*, ACLU, <https://www.aclu.org/other/why-sodomy-laws-matter> [<https://perma.cc/9KDW-7FZU>] (describing impacts of morals legislation on lesbian, gay, and bisexual people's access to rights).

<sup>115</sup> Lily Wakefield, *There Are 16 States in the US that Still Have Sodomy Laws Against "Perverted Sexual Practice."* *It's 2020*, PINKNEWS (Jan. 24, 2020), <https://www.pinknews.co.uk/2020/01/24/sodomy-laws-us-states-perverted-sexual-practice-lawrence-texas-louisiana-maryland-bestiality> [<https://perma.cc/8XK9-C4UC>].

<sup>116</sup> *See, e.g., People v. Dunn*, 19 Cal. Rptr. 835, 837 (Dist. Ct. App. 1962) (holding that the state could punish someone for a bigamous marriage solemnized outside of the state if followed by cohabitation in the state).

<sup>117</sup> *See Edwards v. State*, 374 S.E.2d 97, 99 (Ga. Ct. App. 1988) ("A person commits the offense of bigamy when he, being married and knowing that his lawful spouse is living, marries another

“[a]ny married person who, while still married, marries, enters into a civil union, or cohabits in this state with another person.”<sup>118</sup> It is highly unlikely that the several states with these cohabitation laws both will view a domestic partnership with limited rights from another state as equivalent to marriage and will charge registered partners using unenforced antibigamy statutes.<sup>119</sup> Nonetheless, drafters of ordinances should carefully review the language of these cohabitation requirements from other jurisdictions when crafting their domestic partnership laws.

Decriminalization may also help achieve justice for victims of non-consensual relationships. Opponents of decriminalization may argue that antibigamy statutes are necessary to protect people, particularly underage women, from abuse.<sup>120</sup> Supporters of antisodomy statutes made parallel arguments about protecting young boys from pedophiles.<sup>121</sup> But like sodomy, bigamy is rarely the only charge brought against offenders.<sup>122</sup> The criminalization of bigamy may even deter those in such a relationship from disclosing abuse because they face felony charges.<sup>123</sup> Furthermore, there are more effective means to target harmful, nonconsensual behavior that do not punish consensual relationships like polyamory in the process.<sup>124</sup>

Other measures could curtail antipolygamy policies while advocates wait for the courts to vindicate multiple-partner domestic partnership ordinances. States may reduce criminal penalties for polygamy or ask state attorneys general to announce that they will not prosecute it. In

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person *or* carries on a bigamous cohabitation with another person.” (quoting GA. CODE ANN. § 16-6-20). The court found that Georgia state court was a proper venue for a defendant who married his second wife in South Carolina and returned to Georgia to sleep with her, though the defendant argued venue was only proper in South Carolina. *Id.* at 99–100.

<sup>118</sup> COLO. REV. STAT. ANN. § 18-6-201 (West 2021).

<sup>119</sup> As of this writing, no one has been charged with violating an antibigamy statute with their domestic partnership.

<sup>120</sup> Kristyn Decker, *Sound Choices Coalition Statement*, SOUND CHOICES COAL., <https://www.soundchoicescoalition.org/scc-statement> [<https://perma.cc/9HD4-2KVL>] (supporting victims of abuse in polygamous communities and advocating against decriminalization of polygamy).

<sup>121</sup> See Marie-Amelie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 225, 226–27 (2015).

<sup>122</sup> See *Why Sodomy Laws Matter*, *supra* note 114 (“For most of the 19<sup>th</sup> and 20<sup>th</sup> centuries, sodomy laws were used as secondary charges in cases of sexual assault, sex with children, public sex[,] and sex with animals.”).

<sup>123</sup> Harmeet Kaur, *Bigamy Is No Longer a Felony in Utah*, CNN (May 12, 2020, 5:03 PM), <https://www.cnn.com/2020/05/12/us/bigamy-decriminalized-utah-trnd/index.html> [<https://perma.cc/UG4D-CUKX>].

<sup>124</sup> See Martha Bailey et al., *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada 19* (Sept. 23, 2005) (unpublished manuscript) (on file with the Harvard Law School Library) (“Decriminalization does not indicate endorsement of the practice of polygamy or plural unions. Criminalization is not the most effective way of dealing with gender inequality in polygamous relationships. Other criminal provisions address the problems of child and spousal abuse.”).

2020, Utah changed polygamy from a felony to a misdemeanor.<sup>125</sup> A married person may take more than one spouse, with a small fine or community service, if all parties voluntarily enter the union.<sup>126</sup> State legislators recognized that there are “otherwise law-abiding polygamists” who should not have to live in fear of being jailed or having their children removed.<sup>127</sup> The Utah Attorney General also favored reducing the penalty to a misdemeanor because it would allow members of polygamous families to provide information about crimes without fear of being charged with a felony themselves.<sup>128</sup> States could adopt this approach, which has the dual effect of preventing nonconsensual activity and not incarcerating those engaged in adult, consensual relationships.

2. *Pursuing Constitutional Litigation.* — Advocates for multiple-partner domestic partnerships can pursue constitutional avenues for legal recognition by following a path paved by LGBTQ+ advocates and using the language of dissents in major gay rights cases both in the U.S. Supreme Court and state supreme courts.

(a) *The Unconstitutionality of Antibigamy Laws.* — The 1862 Morrill Anti-Bigamy Act<sup>129</sup> was the first federal legislation to outlaw polygamy in U.S. territories.<sup>130</sup> Seventeen years later, the Supreme Court upheld the criminalization of polygamy in *Reynolds v. United States*,<sup>131</sup> deeming it “odious”<sup>132</sup> because it “fetters the people in stationary despotism.”<sup>133</sup> But the same rationale used to strike down past morals legislation suggests that antibigamy legislation should be invalidated. For example, *Bowers v. Hardwick*<sup>134</sup> — finding no constitutional protection for sodomy and allowing states to outlaw it<sup>135</sup> — was overturned by *Lawrence v. Texas*,<sup>136</sup> which held that a statute criminalizing sexual conduct between two people of the same sex was unconstitutional.<sup>137</sup> This case and same-sex marriage cases offer a roadmap to ending antibigamy statutes.

<sup>125</sup> See Christine Hauser, *Utah Lowers Penalty for Polygamy, No Longer a Felony*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/05/13/us/utah-bigamy-law.html> [https://perma.cc/9YBP-XGFB].

<sup>126</sup> *Id.* Nonconsensual polygamous marriage still carries a sentence of up to fifteen years. See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ch. 126, 12 Stat. 501 (1862) (amended 1882, 1887).

<sup>130</sup> See Sigman, *supra* note 110, at 118.

<sup>131</sup> 98 U.S. 145 (1879).

<sup>132</sup> *Id.* at 164.

<sup>133</sup> *Id.* at 166.

<sup>134</sup> 478 U.S. 186 (1986).

<sup>135</sup> *Id.* at 195–96.

<sup>136</sup> 539 U.S. 558 (2003).

<sup>137</sup> See *id.* at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

State antibigamy statutes may violate the Due Process Clause because individuals engaged in CNM are adults with the liberty to choose whom to form relationships with.<sup>138</sup> The opinion for the Supreme Court in *Lawrence*, written by Justice Kennedy, noted that it was demeaning to consider “homosexual conduct” as only the right to have intercourse.<sup>139</sup> Likewise, CNM relationships often revolve around intimacy rather than sex alone.<sup>140</sup> Antibigamy statutes, like sodomy statutes, “seek to control . . . personal relationship[s] that, whether or not entitled to formal recognition in the law, [are] within the liberty of persons to choose without being punished as criminals.”<sup>141</sup> *Obergefell v. Hodges*<sup>142</sup> further demonstrates that it may be a protected fundamental liberty for multiple people to pursue recognition through domestic partnerships.<sup>143</sup> The ruling announced that the right to choose one’s relationships is inherent in individual autonomy.<sup>144</sup> It emphasized that legal recognition encourages families to form and offers children greater resources, less stigma, and a more stable family life.<sup>145</sup> These are objectives sought by those advocating for legal recognition of multiple-partner relationships.

Antibigamy statutes’ nonenforcement further undermines their validity. In *Lawrence*, Justice Kennedy looked to “a pattern of nonenforcement [of sodomy statutes] with respect to consenting adults acting in private”<sup>146</sup> compared with the nontrivial stigma that the statutes imposed through criminal penalties on the few individuals charged.<sup>147</sup> The antibigamy statutes share a similar history of criminalization without significant enforcement,<sup>148</sup> particularly during the past half-century, the period that Justice Kennedy found to be most relevant to his analysis.<sup>149</sup> Empirical evidence has shown that types of consensual nonmonogamy have been present in the United States for more than fifty years.<sup>150</sup> This

<sup>138</sup> *Id.* at 567.

<sup>139</sup> *See id.* at 567–68.

<sup>140</sup> *See* Amy C. Moors et al., *Desire, Familiarity, and Engagement in Polyamory: Results from a National Sample of Single Adults in the United States*, FRONTIERS PSYCH., Mar. 2021, at 1, 2.

<sup>141</sup> *Lawrence*, 539 U.S. at 567.

<sup>142</sup> 576 U.S. 644 (2015).

<sup>143</sup> *See id.* at 664 (“When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”).

<sup>144</sup> *See id.* at 663 (“In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”).

<sup>145</sup> *Id.* at 668.

<sup>146</sup> *Lawrence*, 539 U.S. at 573.

<sup>147</sup> *Id.* at 575.

<sup>148</sup> *See, e.g.*, *Brown v. Buhman*, 822 F.3d 1151, 1170 (10th Cir. 2016) (noting there is no threat of prosecution for otherwise law-abiding polygamists in Utah).

<sup>149</sup> *Lawrence*, 539 U.S. at 571–72.

<sup>150</sup> Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), <https://www.newsweek.com/polyamory-next-sexual-revolution-82053> [<https://perma.cc/6ZQ2-5AJC>] (noting that the “free love” movement of the 1960s and 1970s increased nationwide participation in CNM).

history, combined with research on the stigma faced by the CNM community,<sup>151</sup> shows that these statutes no longer have value.

Lastly, antibigamy statutes do not further a “legitimate state interest which can justify [the state’s] intrusion into the personal and private life of the individual.”<sup>152</sup> Consent was important for Justice Kennedy in determining whether or not there was a legitimate state interest in criminalizing sodomy.<sup>153</sup> Emphasizing the consensual nature of these “relationship[s] of mutual support, caring[,] and commitment”<sup>154</sup> in the ordinances will assist arguments that there is no longer a legitimate state interest in maintaining antibigamy statutes.<sup>155</sup> Studies showing that CNM partners with high levels of mutual consent enjoy similar relationship quality as compared to monogamous partners<sup>156</sup> may help make the case, as well.

The analogy between same-sex relationships and multiple-domestic partnerships is not a perfect one. From a regulatory perspective, the state may insist that it has an interest in administrability that justifies denying legal recognition to multiple partners.<sup>157</sup> Legal infrastructures — such as property distribution in divorces or after deaths — are designed around two-partner families. Same-sex couples did not pose any challenge to this system.<sup>158</sup> Still, an interest in administrability alone should be insufficient to overcome the constitutional interests described above.<sup>159</sup> Sex-based discrimination arguments in same-sex marriage cases do not easily transfer to multiple-partner relationships, making equal protection claims more challenging. Scholars have observed

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<sup>151</sup> See, e.g., Amy C. Moors et al., *Stigma Toward Individuals Engaged in Consensual Nonmonogamy: Robust and Worthy of Additional Research*, 13 ANALYSES SOC. ISSUES & PUB. POL’Y 52, 53–56 (2013).

<sup>152</sup> *Lawrence*, 539 U.S. at 578.

<sup>153</sup> *Id.*

<sup>154</sup> SOMERVILLE, MASS., ORDINANCES ch. 2, art. IX, § 2-502(c)(1) (2020).

<sup>155</sup> See generally Forrest Hangen et al., *Delineating the Boundaries Between Nonmonogamy and Infidelity: Bringing Consent Back into Definitions of Consensual Nonmonogamy with Latent Profile Analysis*, 57 J. SEX RSCH. 438 (2020).

<sup>156</sup> *Id.* at 452 (finding that CNM relationships have “high levels of relationship functioning comparable to those [in] monogamous groups”).

<sup>157</sup> See, e.g., Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1986 (2010) (“Although compelling and provocative, the gay analogy is a miscue, a distraction from polygamy’s meaningful distinctiveness and the actual challenges it poses for law and its regulation of intimate relationships.”); McLaurine H. Zentner, Comment, *Keeping “I Do” Between Two: A Post-Obergefell Analysis of Bigamous Marriage and Its Implications for Louisiana’s Matrimonial Regime*, 78 LA. L. REV. 335, 337 (2017) (“A major concern surrounding the legal recognition of bigamous marriage is the effect such recognition would have on tax and community property laws — two areas of law shaped by the concept of marriage as a legal union between two individuals.”).

<sup>158</sup> See Zentner, *supra* note 157, at 337, 356.

<sup>159</sup> See, e.g., *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 102 & n.9 (1972) (holding “administrative convenience” is not a compelling interest); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 972 (Mass. 2003) (Greaney, J., concurring) (“Nor can the State’s wish to conserve resources be accomplished by invidious distinctions between classes of citizens.” (citing *Plyler v. Doe*, 457 U.S. 202, 216–17, 227 (1982))).

that polyamory might be considered a sexual orientation and thus a suspect classification for an equal protection claim.<sup>160</sup> If courts were to recognize CNM or polyamory as sexual orientations, they could provide protections against discrimination.<sup>161</sup> But not all polyamorous individuals define it as their identity — for some, it is a social movement.<sup>162</sup> Advocates may opt to sidestep this debate and focus on the aforementioned arguments about the fundamental right to choose one's life partners.

(b) *The Constitutional Right to Legal Recognition.* — CNM individuals have expressed a desire for relationships that embody more transformative visions of intimacy outside the confines of marriage, even as they hope to access practical rights, which domestic partnerships may provide.<sup>163</sup> Still, some CNM families may find it degrading to receive a lesser status under the law than monogamous peers.<sup>164</sup> But for both domestic partnerships and marriage, the argument that multiple-partner relationships should receive legal recognition and constitutional protections will face opposition.<sup>165</sup> Despite acknowledging parallels in the struggle for rights, same-sex marriage advocates explicitly avoided supporting the CNM community for fear that it would hurt same-sex marriage.<sup>166</sup> Concerns linger that legal recognition of multiple-partner relationships will derail hard-won progress, particularly in the context of a 6–3 conservative majority on the Supreme Court.<sup>167</sup> Nonetheless, using Justice Scalia's and Chief Justice Roberts's reasoning in their dissents

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<sup>160</sup> See, e.g., Aviram & Leachman, *supra* note 52, at 313 (noting that the argument that polyamory is itself a sexual orientation “could advance the goals of a more diverse population” and “address[] . . . the issue of marital exclusivity”). However, “[t]he Court’s recent LGBT rights jurisprudence has suggested that the Court may be moving away from hinging review on a formal finding that a classification falls within one of its traditional three tiers of scrutiny.” *Id.* at 314.

<sup>161</sup> Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1461 (2011).

<sup>162</sup> Elisabeth A. Sheff, *Is Polyamory a Form of Sexual Orientation?*, PSYCH. TODAY (Oct. 4, 2016), <https://www.psychologytoday.com/us/blog/the-polyamorists-next-door/201610/is-polyamory-form-sexual-orientation> [https://perma.cc/D2NG-MMWR].

<sup>163</sup> See Aviram & Leachman, *supra* note 52, at 330–31.

<sup>164</sup> A 2012 study found that 65.9% of 4,062 polyamorous people surveyed said that they would be open to marrying multiple people if it were legal. Jim Fleckenstein et al., *What Do Polys Want?: An Overview of the 2012 Loving More Survey*, LOVING MORE (June 21, 2013), <https://www.lovingmore-nonprofit.org/polyamory-articles/2012-lovingmore-polyamory-survey> [https://perma.cc/S6L9-BC6D].

<sup>165</sup> After *Obergefell*, there was widespread fear that the next battle for marriage would be over polygamy. See, e.g., Conor Friedersdorf, *The Case Against Encouraging Polygamy*, THE ATLANTIC (July 9, 2015), <https://www.theatlantic.com/politics/archive/2015/07/case-against-polygamy/397823> [https://perma.cc/TLP7-D3ZF].

<sup>166</sup> Jaime M. Gher, *Polygamy and Same-Sex Marriage — Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 559 (2008) (contending that because “polygamy and same-sex marriage may share some common ground, advocates should continue to distance same-sex marriage from plural marriage to avoid relinquishing the movement’s hard-earned cultural capital and societal support”).

<sup>167</sup> See Ian Jenkins, *Polyamory, the Gay “Conservative,” and “Where Does It Stop?”*, PSYCH. TODAY (Mar. 4, 2021), <https://www.psychologytoday.com/us/blog/better-or-worse/202103/polyamory-the-gay-conservative-where-does-it-stop> [https://perma.cc/H94U-ZFJT].

from Supreme Court opinions establishing gay rights may strengthen the case for groups of consenting adults to choose whom they want to love and plan their lives with. If advocates deem this route too risky, they might pursue litigation in state supreme courts.<sup>168</sup>

Justice Scalia invoked polygamy to advise against protections for gay people.<sup>169</sup> In *Romer v. Evans*,<sup>170</sup> he asserted that people married to multiple partners and gay people were analogous, except that “[p]olygamists” faced “much more severe treatment.”<sup>171</sup> His dissent contended that Colorado’s amendment banning antidiscrimination protections for sexual orientation — which the Court labeled as “impermissible targeting” of a class — was less harmful than a nineteenth-century law that deprived people engaged in polygamy of the right to vote.<sup>172</sup> For Justice Scalia, “[t]he Court’s disposition . . . suggest[ed] that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis.”<sup>173</sup> Advocates might point to this opinion to argue that multiple-partner relationships deserve legal recognition and that the local level is an appropriate place to begin this process. In his subsequent dissent in *Lawrence*, Justice Scalia claimed that the Court’s ruling necessitated declaring morals legislation like antipolygamy and antiadultery statutes unconstitutional.<sup>174</sup> He believed that the Court’s decision “effectively decrees the end of all morals legislation. If, as the Court assert[ed], the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.”<sup>175</sup> Thus, even if general approval for legal recognition of multiple-partner relationships remains low,<sup>176</sup> antibigamy statutes would be unconstitutional per Justice Scalia’s reasoning.

Chief Justice Roberts’s *Obergefell* dissent also analogized between the ruling’s application to same-sex couples and its application to polyamorous

<sup>168</sup> See William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599 (1999) (arguing that “gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts”); see also Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. (forthcoming 2022) (manuscript at 21) (on file with the Harvard Law School Library) (“[F]rom the death penalty to LGBTQ+ rights cases, the Court has consistently looked at state law . . . as a benchmark for societal changes.”).

<sup>169</sup> See Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 410–11 (2004).

<sup>170</sup> 517 U.S. 620 (1996).

<sup>171</sup> *Id.* at 648 (Scalia, J., dissenting).

<sup>172</sup> *Id.* at 649–51 (citing *Davis v. Beason*, 133 U.S. 333 (1890)).

<sup>173</sup> *Id.* at 648.

<sup>174</sup> *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

<sup>175</sup> *Id.*

<sup>176</sup> As discussed previously, although approval ratings for polygamy are increasing over time, they currently remain in the 20–35% range. Newport, *supra* note 111.

people.<sup>177</sup> Abandoning Justice Scalia's condemnation, the dissent probed the Court's unwillingness to extend the fundamental right to marry beyond same-sex partners when the Court's reasoning would apply with "equal force" to multiple partners.<sup>178</sup> The dissent noted that both forms of consensual relationship are subject to stigma.<sup>179</sup> And if one form deserves dignity, so does the other.<sup>180</sup> Polyamorous people seek out intimate bonds, strive to be caring parents, and must prove they are not lesser because of whom they love.<sup>181</sup> This portrayal, even when used as a counterpoint, suggests that courts ought to protect multiple-partner relationships.

Finally, state constitutional law may support these ordinances. For example, in *Kerrigan v. Commissioner of Public Health*,<sup>182</sup> the Supreme Court of Connecticut held that laws restricting marriage to heterosexual couples violated same-sex couples' equal protection rights under the state constitution.<sup>183</sup> One of the dissents argued that "if [the] consensual, loving commitment among adults is the essence of marriage, then the state has no basis for prohibiting polygamous marriage."<sup>184</sup> It rejected the plaintiffs' argument that same-sex marriage and multiple-partner marriage were substantively different because marrying more than one person would require restructuring civil marriage.<sup>185</sup> These logistical challenges — addressable by "minor changes" in the law — did not defeat the "fundamental right."<sup>186</sup> The Cambridge and Somerville ordinances further illustrate that such adjustments are possible.

## CONCLUSION

Although domestic partnership ordinances like those in Somerville and Cambridge by no means represent the only option to decrease discrimination and stigma against CNM partners, they advance these objectives. Ordinances recognizing diverse relationship statuses also serve practical purposes such as improving outcomes in family law and healthcare. In fighting for access to domestic partnerships, advocates may change the way that courts, legislatures, and the broader public understand CNM. By employing the arguments outlined in this Note, advocates have the opportunity to affirm that three's company, too.

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<sup>177</sup> *Obergefell v. Hodges*, 576 U.S. 644, 704 (2015) (Roberts, C.J., dissenting).

<sup>178</sup> *Id.* ("If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?" (internal citation omitted) (quoting *id.* at 666 (majority opinion))).

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> 957 A.2d 407 (Conn. 2008).

<sup>183</sup> *Id.* at 482.

<sup>184</sup> *Id.* at 523 n.14 (Zarella, J., dissenting).

<sup>185</sup> *See id.*

<sup>186</sup> *Id.*