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## Everything Lawyers Know About Polygamy is Wrong

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### Recommended Citation

16 Cornell J.L. & Pub. Pol'y 101 (2006-2007)

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# EVERYTHING LAWYERS KNOW ABOUT POLYGAMY IS WRONG

*Shayna M. Sigman\**

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\* Associate Professor of Law, University of Minnesota Law School. I would like to thank the following people for their helpful comments and suggestions: Brian Bix, Dale Carpenter, Guy Charles, Jim Chen, Dan Farber, Mary Lou Fellows, Jill Hasday, Miranda McGowan, Richard Painter, Michael Stokes Paulsen, Gregg Polsky, and David Weissbrodt. I benefited from the superb research support of the University of Minnesota law librarians, especially the one-of-a-kind Mary Rumsey. I also would like to thank Kelsey Lestor and Stephanie Seidl for excellent research assistance.

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## INTRODUCTION

Everything judges, legislators, policymakers, and legal scholars think they know about polygamy is based on faulty assumptions and presumptions, conceptions and misconceptions. To put it more succinctly: everything lawyers know about polygamy is wrong. As a result, American legal policy regulating polygamy has led to prohibitions and prosecutions when they were otherwise unwarranted, failures of enforcement when it most certainly would have been warranted, and the imposition of a one-size-fits-none behemoth that has left a trail of collateral damage for over one hundred and fifty years.

During a federal campaign to stamp out the practice of polygamy over one century ago, polygamy was dubbed, along with slavery, as "one of the twin relics of barbarism."<sup>1</sup> American presidents, beginning with James Buchanan in 1857, railed against the practice.<sup>2</sup> Congress enacted

<sup>1</sup> REPUBLICAN PLATFORM OF 1856, *reprinted in* NATIONAL PARTY PLATFORMS, 1840-1956, at 27 (Kirk H. Porter & Donald Bruce Johnson eds., Univ. of Ill. Press 1956); *see also* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 129 (1988).

<sup>2</sup> *See infra* notes 66-100 and accompanying text (discussing the 1857 raid and Mormon War). *See generally* Richard D. Poll & Ralph W. Hansen, "Buchanan's Blunder": *The Utah War, 1857-1858*, 25 MIL. AFF. 121, 121 (1961). Ulysses Grant called polygamy "a remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States." VII A

legislation criminalizing polygamists, disenfranchising them, and, ultimately, toppling the financial holdings of the Church of Jesus Christ of Latter-Day Saints ("LDS Church" or "LDS") due to its support of the practice of polygamy.<sup>3</sup> And the Supreme Court upheld every one of these efforts.<sup>4</sup> Notably, in its 1878 *Reynolds* decision,<sup>5</sup> the Court laid the foundation for over one hundred years of rulings against the claims of practicing polygamists,<sup>6</sup> characterizing polygamy as an "odious" practice<sup>7</sup> appropriately "treated as an offence against society."<sup>8</sup>

During the nineteenth century, the anti-polygamy movement found its footing in many of the ongoing legal and political battles of the era. The overarching debates that ensnared the discussion of polygamy include abolition, federalism, and states' rights; women's suffrage; the idealization and foundations of marriage; and the role of religion and theocratic rule versus the separation of church and the democratic liberal state. The more polygamy became a facet of these debates, the less the anti-polygamy movement concerned itself with the actual causes and effects of polygamous practice—or with criminalization efforts and government regulation that might actually prevent the specific harms of

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COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 151 (James D. Richardson ed., Bureau of Nat'l Literature 1908 (1897)). Rutherford Hayes stated that "[i]t is the recognized duty and purpose of the people of the United States to suppress polygamy." *Id.* at 60. Chester Arthur referred to polygamy as "this odious crime, so revolting to the moral and religious sense of Christendom." VIII A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1908, at 57 (James D. Richardson ed., Bureau of Nat'l Literature 1908) (1897). Grover Cleveland said "[t]here is no feature of this practice [polygamy] or the system which sanctions it which is not opposed to all that is of value in our institutions." *Id.* at 362. Condemnation continued into the twentieth century; for example, Theodore Roosevelt advocated giving Congress the power to regulate marriage, arguing that "it would be good because it would confer on the Congress the power at once to deal radically and efficiently with polygamy." XIV A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 7428 (James D. Richardson ed., Bureau of Nat'l Literature 1914) (1911).

<sup>3</sup> See *infra* notes 101–251 and accompanying text.

<sup>4</sup> See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>5</sup> 98 U.S. 145 (1878) (rejecting the petitioner's First Amendment claim that the Morrill Anti-Bigamy Act infringed upon religious liberty).

<sup>6</sup> See, e.g., *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005) (affirming denial of marriage license to married man and his fiancée); *State v. Green*, 99 P.3d 820 (Utah 2004) (affirming polygamy conviction); *State v. Woodruff*, 392 S.E.2d 434 (N.C. Ct. App. 1990) (affirming bigamy conviction of defendant who claimed polygamous beliefs); *Brown v. State*, 559 P.2d 107 (Alaska 1977) (upholding sentence for polygamy conviction); *State v. Hendrickson*, 245 P. 375 (Utah 1926) (affirming polygamy conviction); *Com. v. Ross*, 142 N.E. 791 (Mass. 1924) (affirming polygamy conviction); *State v. Locke*, 151 P. 717 (Or. 1915) (affirming polygamy conviction). See also Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308 (1964) (summarizing Supreme Court jurisprudence addressing federal anti-polygamy laws in the second half of the nineteenth century).

<sup>7</sup> *Id.* at 164.

<sup>8</sup> *Id.*

polygamy. Once polygamy was deemed uncivilized, immoral, and harmful to women by association, the nineteenth century political and legal campaigns mostly eschewed empiric accounts of polygamous life, captured instead by the rhetoric and issues of the era.

Polygamy continues to this day to be a bogeyman in legal and political discourse on state regulation of the family. Most Americans still view polygamy as something nefarious, much like slavery, its “twin.” In a Gallup Poll taken in May 2003, just one month prior to the Supreme Court’s decision in *Lawrence v. Texas*,<sup>9</sup> overturning that state’s ban on same-sex sodomy, ninety-two percent of adults surveyed nationwide considered “polygamy, when one husband has more than one wife at the same time”—or, more precisely, polygyny<sup>10</sup>—to be “morally wrong.”<sup>11</sup>

Thus, it is less than surprising that Justice Scalia’s apoplectic dissent to the *Lawrence* decision warned that the Court’s ruling called into question the constitutional validity of state bans on “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”<sup>12</sup> While the items on this list were selected as examples of “traditional ‘morals’ offenses,”<sup>13</sup> linking these practices together suggests moral equivalence—that all these sexual behaviors are “immoral and unacceptable.”<sup>14</sup>

This was not the first alarm that Scalia has sounded that a Supreme Court decision could pave the way for constitutionally-mandated legal-

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<sup>9</sup> 539 U.S. 558 (2003).

<sup>10</sup> Polygamy is defined as “marriage in which a spouse of either sex may have more than one mate at the same time.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 962 (11th ed., 2003). This is from the roots “poly” (multiple) and “gamos” (marriage). Accordingly, bigamy is having two spouses at the same time. *Id.* Polygyny means “the practice of having more than one wife or female mate at one time,” stemming from the root “gyn” (female). *Id.* The opposite is polyandry, which is “the practice of having more than one husband or male mate at one time.” *Id.* Polyamory is the “participation in multiple and simultaneous loving or sexual relationships.” *Id.* Thus, polygyny and polyamory are each subsets of polygamous practice, at least in a *de facto* sense.

<sup>11</sup> Based on a Gallup Poll from May 5–7, 2003 asking Americans “their moral view of 16 hot button social topics of the day.” In contrast, fifty-two percent considered “homosexual behavior” to be morally wrong, though sixty percent thought it should be legal. *Who’s the Moral Majority? Numbers Shed Some Light; Americans Condemn a Lot, but Legality is Something Else*, CHI. SUN-TIMES, MAY 15, 2003, at 4.

<sup>12</sup> *Lawrence* 539 U.S. at 590 (“Every single one of these laws is called into question by today’s decision.”) (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 589.

ized polygamy.<sup>15</sup> Seven years prior, in *Romer v. Evans*,<sup>16</sup> Scalia dissented from the majority's decision to invalidate Colorado's Amendment 2, which would have prevented any state or local government from banning discrimination on the basis of sexual orientation.<sup>17</sup> Chastising the Court's insertion of itself in a "Kulturkampf"<sup>18</sup> and its lack of adherence to the deference to states warranted in rational basis review,<sup>19</sup> Scalia pointed out that the amendment in question was no different from state bans on polygamy, including not only statutory prohibitions, but also those contained in the state constitutions of Arizona, Idaho, New Mexico, Oklahoma and Utah.<sup>20</sup> Accordingly, the dissent asserted, "[t]he Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless of course, polygamists for some reason have fewer constitutional rights than homosexuals."<sup>21</sup>

As Justice Scalia's opinions demonstrate, using polygamy as a rhetorical tool in an unrelated legal or political debate is hardly limited to nineteenth century America. Nor is Scalia alone in making this connection; polygamy has been dragged repeatedly into the discussion about

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<sup>15</sup> And, indeed, there is reason to believe that Scalia's concerns are legitimate. See, e.g., Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of The United States Supreme Court*, 12 SUP. CT. ECON. REV. 75, 96 (2004) (agreeing with Scalia that *Lawrence* may legitimize a constitutional right to same-sex marriage and polygamy); David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 472 (2004) ("The bogeymen of Justice Scalia's dissent, including polygamy and incest, would not obviously fall outside the scope of constitutional protection."); Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711 (2004) (making a liberty interest argument for polygamy after *Lawrence*); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1073 (2004) (analyzing how *Lawrence* brought polygamy bans into question); Joseph Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions after Lawrence v. Texas: Is Scalia a Punchline Or a Prophet?*, 43 CATH. LAW. 409, 411 (2004) (arguing that *Lawrence* does not make polygamy constitutional, but noting that it has already led to a Utah challenge to the polygamy ban); Michael G. Myers, Comment, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1456–67 (2006) (concluding that if *Lawrence* mandates recognition of same-sex marriage, it must also extend to plural marriage); Samantha Slark, Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451 (2004) (making a liberty interest argument for polygamy after *Lawrence*).

<sup>16</sup> 517 U.S. 620 (1996).

<sup>17</sup> *Id.* at 635 (applying rational basis review to strike down the amendment).

<sup>18</sup> *Id.* at 636 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite.").

<sup>19</sup> *Id.* at 640–41 ("I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment. . . . It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes.").

<sup>20</sup> *Id.* at 648–50.

<sup>21</sup> *Id.* at 648.

same-sex marriage.<sup>22</sup> Indeed, the vast majority of legal scholarship discussing polygamy contextualizes the debate by reference to same-sex marriage;<sup>23</sup> nearly the entire remainder revisits the constitutional rulings of *Reynolds* in light of subsequent free exercise holdings.<sup>24</sup> Only one legal scholar, Professor Maura Strassberg, has even considered the regulation of polygamy—in its many forms—on its own merits.<sup>25</sup>

The full case has not been made for criminalization of polygamy, it has been assumed. The harms of polygamy have been assumed, as have the effects of criminalization. The accepted rationale is that polygamy will spring up wherever it is permitted, harming women, children, and the very foundations of free society.<sup>26</sup>

Reliance on the visceral abhorrence to polygamy has preempted the development of a full legal debate on the merits of polygamy criminalization and prevented a discussion of how polygamy fits within the framework of governmental regulation of the family. Hidden beneath the rhetoric, lying in the shadows of automatic illegality, rests a rich, empirical social science literature identifying the numerous causes of polygamy, parsing out some of its observable effects, and demonstrating the complexity and diversity of experiences that fall under the banner of polygamy.

It is time that lawyers—judges, legislators, policymakers, and scholars—pay attention to the contributions of anthropologists, evolutionary biologists, economists, and sociologists, and see what the data show about the realities of polygamous practice. Only then can we embark on

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<sup>22</sup> See, e.g., William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, at 27; Else Soukup, *Polygamists, Unite!; They Used to Live Quietly, But Now They're Making Noise*, NEWSWEEK, Mar. 20, 2006, at 52 (“Almost always, when the legalization of POLYGAMY is brought up, it’s used to make a case against gay marriage.”).

<sup>23</sup> See, e.g., Myers, *supra* note 15.

<sup>24</sup> Of the more than 800 law review articles in Westlaw’s Journals and Law Reviews database that discuss *Reynolds* and polygamy, about 700 address “free exercise.” Most of the remainder discuss *Reynolds* in connection with same-sex marriage, or cite to *Reynolds* only in passing (search conducted in Westlaw’s JLR database on Mar. 9, 2006).

<sup>25</sup> See generally Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003) [hereinafter Strassberg, *Considering Polyamory*] (distinguishing polyamory from traditional polygamy); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003) [hereinafter Strassberg, *Crime of Polygamy*]; Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997) [hereinafter Strassberg, *Distinctions of Form or Substance*]. See also Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004) (considering polyamory).

<sup>26</sup> Cf., e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (pointing out that “the legal and social trend is toward greater recognition of polyamorous relationships”); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 519 (1992) (questioning traditional criminalization of “alternative institutions” such as “polygamy, adultery, fornication and homosexuality”).

an informed debate about legal policy regarding the criminalization of polygamy, the enforcement of these prohibitions, and the relationship between legal policy and existing harms that may result from polygamous practice. This discussion is also a necessary precursor to exploring whether polygamous relationships should be recognized by the state, which would be a significant step beyond merely decriminalizing the practice.<sup>27</sup>

This article provides that foundation. It presents the history of legal policy in the United States concerning the practice of polygamy and contrasts the rationale of the anti-polygamy movement and polygamy criminalization with the findings of the social science literature on the practice of polygamy. It then demonstrates how the disconnect between the empirical reality of polygamous practice, on the one hand, and legal policy and law enforcement, on the other, has emphasized imagined harms at the expense of existing harms—or even state-created new ones. This article shows that in light of this history and data, polygamy should be decriminalized.

Section I presents the history of legal regulation of polygamy within the United States, focusing primarily on the nineteenth century federal campaign against the LDS Church and the Mormon belief in polygamy and, subsequently, the governmental treatment of the splintered fundamentalists who have continued practicing polygamy. This section identifies the prevailing theories behind the anti-polygamy movement, and the long-term effects the campaign against polygamy has had on polygamous communities in America.

Section II lays out five theories why polygamy does—or does not—occur in a given society: (a) biology, (b) demographics, (c) economic conditions, (d) political regime, and (e) religion or ideology. It discusses each of these theories within the framework of two meta-theories. First, it questions whether polygamy is a product of male or female empowerment and choice. Second, it explores whether polygamy is a top down or bottom up phenomenon; that is, does polygamy stem from the behavior of leaders and elites or from the behavior of the masses?

This section concludes that: (1) demographics and economic conditions are more influential causes of polygamy than biology, political regime, or religion; (2) female choice and empowerment is at least as important as male choice, though very much dependent on the primary

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<sup>27</sup> Accordingly, this article focuses solely on the issue of criminalization of polygamy, leaving for a later date the discussion of the complexities of state recognition of the many types and forms of polygamous relationships and families. See, e.g., Martha M. Ertman, *The ALI Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107 (2001) (demonstrating through various fact patterns the complications of what might legally constitute a domestic partnership among cohabitators).



cause of the polygamy; and (3) ideological or political polygamy is top down, but biological, economic, or demographic polygamy is bottom up.

Section III demonstrates how the gap between American legal policy regulating polygamy and the root causes and likely effects of the practice has resulted in over-enforcement of anti-polygamy statutes, under-enforcement of other criminal provisions, state persecution of men, women, and children, and a lack of awareness of the particularized harms that polygamists may create or suffer.

The article provides the groundwork for a fully-informed discussion of the criminalization of polygamy. It concludes that existing anti-polygamy legislation and enforcement practices do not appear to solve the true problems of polygamy, and, more importantly, they likely have contributed to a set of particularized harms that affect different segments of various polygamous populations in unforeseen ways. Accordingly, we must rethink the criminalization of polygamy within the United States.

## I. THE HISTORY OF CRIMINALIZATION IN THE UNITED STATES

Polygamy has always been illegal within the United States. At the time of the founding of the nation, England and Wales prohibited polygamy, and each of the original thirteen states passed anti-polygamy statutes.<sup>28</sup> Criminalization was the norm.

Yet it would be inaccurate to suggest that current bans on polygamy in the United States stem solely, or even primarily, from these original prohibitions. In the early nineteenth century, Congress did not ban polygamy in the newly acquired federal territories. Moreover, for new states entering the union, the decision to ban polygamy was left to the discretion of each state, though it most likely would have shocked the founders had any states actually recognized polygamous practice or even give tacit approval to such arrangements.

The history of the criminalization of polygamy in the United States—especially the enforcement of any prohibitions on polygamous family structures—reveals a far more complex story than “once and always banned.” The true story of polygamy prohibitions occurred mostly during the second half of the nineteenth century, when polygamy became ensnared first in the politics of the antebellum era and then afterwards was captured as part of Reconstruction.

During the nineteenth century, polygamy emerged as a significant weapon in a political, legal, and cultural war against the newly formed

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<sup>28</sup> See 1 Jac. I. c. 11 (1603) (banning polygamy in England and Wales); Paul Finkelman, *Essay: The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1507 (2005) (noting that polygamy was outlawed in all of the American colonies).

LDS Church. Polygamy became legally, politically, and rhetorically connected with the issues of states' rights and the scope of federal power, abolition, Reconstruction of the Union, women's suffrage, conceptions of church and state, and the role of marriage. Thus, the debate about polygamy and the efforts to criminalize it were not exactly about polygamy, rather polygamy was a pretext.

This section traces the history of anti-polygamy legislation and related enforcement in the United States to its nineteenth century roots and its relationship to the burgeoning LDS Church. It shows how the Church became locked in battle with the federal government, and how polygamy served to pit the entire nation against the Mormons.

While this is not an article solely about Mormons or Fundamentalists, the LDS Church, its members, and, ultimately, splinter groups departing from the LDS Church have played—and continue to play—an important role in governmental regulation of plural marriage. It is impossible to discuss the anti-polygamy laws and sentiments in the United States without reference to the LDS story, because the two are inextricably intertwined. The gap between state regulation of polygamy and the empirical reality of the harms of polygamy began as a small fissure in the mid-nineteenth century, and, by the end of that century, it grew into a gaping hole, one that has never been properly repaired.

Subsection I.A begins with a discussion of the rise of the Mormon faith and the relationship between early Mormon beliefs and doctrine to the practice of polygamy. It follows this early establishment through the era known as the Mormon Reformation (1856–1857), in which the practice of polygamy grew in significant numbers, and the burgeoning conflict between the Mormons and the federal government thrust the discussion of polygamy into national political discourse. This subsection demonstrates how public hostilities against the Mormons predated the public Revelation mandating polygamy and the subsequent proliferation of the practice.

Subsection I.B. then describes how negative sentiments against the Mormons fed into other principles of Reconstruction, leading to federal legislation prohibiting polygamy. In the postbellum era, Congress and the American public increasingly began to view polygamous wives less as victims and more as criminals, pushing through increasingly punishing legislation against the practice of polygamy and its practitioners.

The swell of the anti-polygamy movement and its clash with the Mormons culminated in numerous courts decisions upholding various prohibitions on the practice of polygamy and against the polygamists themselves. These cases include the landmark Supreme Court case *Reynolds v. United States*, which ruled that the First Amendment did not protect polygamists from federal prosecution. This subsection concludes

with a description of the compromise in which Utah was admitted to the Union, provided that its Constitution explicitly prohibit polygamy and mandate separation of church and state. As part of the compromise, the LDS Church capitulated and agreed to repudiate the practice of polygamy.

Subsection I.C. presents polygamy in the twentieth century, when the LDS Church decision to denounce polygamy gave birth to the fundamentalists, a group splintered from the Mormons, who steadfastly adhered to the belief that polygamy was either a mandated or preferred religious practice. This subsection describes how the fundamentalists' continued practice of polygamy created a conflict with state and federal authorities (and the LDS Church), one that ultimately resulted in the 1953 Short Creek Raid, which included the controversial removal of hundreds of children from their families in Arizona and Utah.

By the middle of the twentieth century, the criminalization of polygamy had a history and life of its own. It was not until the American public faced the pictures of government officials taking fundamentalist children from the arms of their mothers and fathers that the pendulum began to swing in favor of polygamists. The political disaster of Short Creek left a lasting legacy of non-enforcement of polygamy prohibitions against fundamentalists, who have also splintered, creating several groups and other individual family units that continue to practice polygamy to this very day. After Short Creek, the era of persecution and over-prosecution had ended, and the era of under-enforcement had begun. Again, regulation of the polygamous family was divorced from anticipated or actual harms from the practice.

#### A. THE ANTEBELLUM ERA: EMERGENCE OF THE "MORMON QUESTION"

##### 1. *The Rise of the Mormon Faith, the Mormon Reformation, and the Role of Polygamy*

The Church of Jesus Christ of Latter-Day Saints arose in America in the middle of the nineteenth century as part of the Second Great Awakening, a movement that had its strongest roots in the northeast and mid-west.<sup>29</sup> According to Mormon belief, Church founder Joseph Smith, Jr., a

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<sup>29</sup> SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 19 (2002) (stating that Mormonism arose in the context of the Second Great Awakening); James D. Bratt, *The Reorientation of American Protestantism, 1835–1845*, 67 *CHURCH HIST.* 52, 56 (1998) (stating that the Second Great Awakening "followed the New England diaspora across New York and Pennsylvania into the Middle West over the first half of the nineteenth century"); Donald G. Mathews, *The Second Great Awakening as an Organizing Process, 1780–1830: An Hypothesis*, 21 *AM. Q.* 23, 28 (1969) (noting the strength of the movement in New England).

farmer from upstate New York, translated the Book of Mormon from gold plates received from an angel, which described the history of how the Hebrews traveled to the American continent in the face of exile.<sup>30</sup> Smith and several followers officially established the new religion in 1830.<sup>31</sup> Scholars have described the origin of the Mormon faith as part of the larger conservative counter-movement to the increasingly liberal mores of that era.<sup>32</sup>

The Mormons encountered conflicts with non-Mormon locals from their inception. They established communities during the 1830s in the midwest (Ohio and Missouri), where they fought with other factions over who controlled local political and economic arenas.<sup>33</sup> There were concerns that the Mormons sought to dominate political office at the local, state, and even federal level.<sup>34</sup>

Beyond the fight for political control, non-Mormons accused the Mormons of engaging in fraud, theft, counterfeiting, and other illegal banking practices.<sup>35</sup> In Missouri, the local citizens objected to the fact that the Mormons opposed slavery.<sup>36</sup> And even early on, there were rumors that the Mormons were practicing polygamy, which added to the locals' concerns.<sup>37</sup>

The tension in Missouri was serious enough that it led to armed conflict,<sup>38</sup> and, ultimately, the Governor issued an order to drive out and "exterminate" the Mormons.<sup>39</sup> Smith and other Church leaders were jailed and sentenced to death for treason.<sup>40</sup> Given the hardships that the Mormons had faced in Missouri, Smith told Brigham Young, who would ultimately succeed him, to move the group,<sup>41</sup> leading to the Mormons'

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<sup>30</sup> See LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* 8–9, 14 (2d ed. 1992).

<sup>31</sup> Joseph T. Hepworth, *A Causal Analysis of Missionary and Membership Growth in the Church of Jesus Christ of Latter-Day Saints (1830–1995)*, 38 J. SCI. STUD. RELIGION. 59, 60 (1999).

<sup>32</sup> See David Brion Davis, *The New England Origins of Mormonism*, in *MORMONISM AND AMERICAN CULTURE* 18–19 (Marvin S. Hill & James B. Allen eds., 1972).

<sup>33</sup> See *id.* at 21 (stating that "the tolerant and free Americans of the frontier found it difficult to be tolerant" of Mormon beliefs and practices); ARRINGTON & BITTON, *supra* note 30, at 46–49 (discussing reasons that Mormons aroused opposition).

<sup>34</sup> ARRINGTON & BITTON, *supra* note 30, at 50–52 (discussing fears of Mormon bloc voting).

<sup>35</sup> *Id.* at 54.

<sup>36</sup> *Id.* at 48–49 (describing how Missourians accused Mormons of tampering with Negro slaves and of opposing slavery).

<sup>37</sup> *Id.* at 55.

<sup>38</sup> *Id.* at 58.

<sup>39</sup> RAY B. WEST, *KINGDOM OF THE SAINTS: THE STORY OF BRIGHAM YOUNG AND THE MORMONS* 86–87 (1957).

<sup>40</sup> *Id.* at 88.

<sup>41</sup> *Id.* at 90 (stating that Joseph Smith's brother, Hyrum, brought Young a message from Joseph, telling Young to take the Mormons from Missouri).

migration to Illinois in 1839.<sup>42</sup> When Smith escaped from jail, he re-joined the Mormons there.<sup>43</sup>

The conflict in Missouri alone should raise a red flag to any claim that the Mormons were disliked originally because they espoused polygamy. It is not entirely clear when the Mormon faith even first embraced or accepted polygamy. Historians believe that Smith entertained the idea as early as 1831,<sup>44</sup> and there are some accounts that, by the middle of the 1830s, Smith was engaged in polygamous behavior, though perhaps without formalized marital status.<sup>45</sup> But it was not until the Mormons migrated to Nauvoo, Illinois in 1839 that their practice of polygamy became more open.<sup>46</sup>

The formal basis and reasoning for polygamy did not occur until the Revelation on Celestial Marriage, which Joseph Smith received in 1843,<sup>47</sup> the same year he married a sixteen-year-old girl who had been living in his household.<sup>48</sup> At first, Smith's practice of polygamy and the Revelation itself were kept secret among Smith, select Church leaders, and the women and family involved.<sup>49</sup> In public, Smith denied any rumors of polygamous practice.<sup>50</sup> It appears that Smith and some other leaders, including Smith's successor Brigham Young, had some misgivings about polygynous practice.<sup>51</sup>

Meanwhile, the Mormons did not escape the political tensions and difficulties with their non-Mormon neighbors even after they left Missouri and settled in Nauvoo.<sup>52</sup> After several years of conflict, in which the practice of polygamy by Smith and other Church leaders was increas-

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<sup>42</sup> See MILTON V. BACKMAN, JR., *AMERICAN RELIGIONS AND THE RISE OF MORMONISM* 323–24 (1965) (summarizing persecution in Missouri and consequent migration to Illinois).

<sup>43</sup> ARRINGTON & BITTON, *supra* note 30, at 68 (stating that Smith and his party escaped from Missouri in April 1839).

<sup>44</sup> *Id.* at 195–96.

<sup>45</sup> See *id.* at 197 (summarizing agreement among historians that Smith had formed plural relationships at least before 1843); RICHARD N. OSTLING & JOAN K. OSTLING, *MORMON AMERICA: THE POWER AND THE PROMISE* 60 (1999) (describing one of Smith's plural marriages in Kirtland).

<sup>46</sup> See OSTLING & OSTLING, *supra* note 45, at 59–61; Stanley S. Ivins, *Notes on Mormon Polygamy in MORMONISM AND AMERICAN CULTURE* 101 (Marvin S. Hill & James B. Allen eds., 1972) (describing the 1841 "sealing" of Louisa Beeman to Joseph Smith).

<sup>47</sup> B. CARMON HARDY, *SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE* 9 (1992).

<sup>48</sup> See ARRINGTON & BITTON, *supra* note 30, at 198 (describing Smith's marriage to Lucy Walker). Scholars raise the interesting point that Smith's own wife, Emma, objected to the practice. *Id.* at 197. After Smith's death, Emma denied she had ever consented to him taking another wife. OSTLING & OSTLING, *supra* note 45, at 69 (repeating Emma Smith's claim that Joseph Smith "had no other wife but me").

<sup>49</sup> ARRINGTON & BITTON, *supra* note 30, at 197 (stating that Smith introduced "a few chosen associates" to the practice, while denying the practice in public).

<sup>50</sup> *Id.*; GORDON, *supra* note 29, at 23.

<sup>51</sup> ARRINGTON & BITTON, *supra* note 30, at 197–98.

<sup>52</sup> WEST, *supra* note 39, at 124–25.

ingly called into question, the tension culminated when a dissident newspaper denounced Smith and the Church leaders for exerting political dominance over city governance and for their practice of polygamy.<sup>53</sup>

In response to this charge, and perhaps proving the accuracy of it, the Church-controlled city council raided the newspaper office and destroyed the printing press.<sup>54</sup> Charges were filed against Smith and the other Church leaders for incitement.<sup>55</sup> Smith allowed himself to be jailed under special security; however, the security failed to protect him, and he was killed by an angry mob.<sup>56</sup>

There is no evidence that polygamy played an important part of the conflicts between the Mormons and the non-Mormons in Missouri or Illinois. Polygamy did not even become official Church doctrine publicly until after Smith's successor, Brigham Young, led the Mormon migration in 1845–1848 from Illinois through Iowa and Nebraska and ultimately to Utah.<sup>57</sup> The Mormons specifically chose a destination that was mostly uninhabited to allow for self-governance, which would avoid the challenge of integrating their religious beliefs with local political, economic, and social life.<sup>58</sup>

After Brigham Young's 1852 public approval of polygamy,<sup>59</sup> the Church and its leaders undertook a widespread effort to increase its practice.<sup>60</sup> The period of 1856–1857, known as the Mormon Reformation,<sup>61</sup> noted a marked increase in polygyny.<sup>62</sup> Although there was still some resistance and ambivalence, the practice had its supporters in the community.<sup>63</sup> Comparable to current levels of polygyny among the more po-

<sup>53</sup> ARRINGTON & BITTON, *supra* note 30, at 77–78.

<sup>54</sup> HARDY, *supra* note 47, at 11.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; ARRINGTON & BITTON, *supra* note 30, at 80–81.

<sup>57</sup> ARRINGTON & BITTON, *supra* note 30, at 199.

<sup>58</sup> See DANIEL L. BIGLER, *FORGOTTEN KINGDOM: THE MORMON THEOCRACY IN THE AMERICAN WEST, 1847–1896*, at 29 (1998) (stating that Mormons deliberately chose “seclusion”); ARRINGTON & BITTON, *supra* note 30, at 162 (“By embarking for the remote and unsettled Great Basin, the Mormons were hoping for tolerance under conditions of geographic separation.”).

<sup>59</sup> John Kincaid, *Extinguishing the Twin Relics of Barbaric Multiculturalism—Slavery and Polygamy—From American Federalism*, 33 *PUBLIUS* 75, 82. (2003).

<sup>60</sup> HARDY, *supra* note 47, at 14.

<sup>61</sup> GORDON, *supra* note 29, at 58.

<sup>62</sup> Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 *STAN. L. REV.* 1295, 1321 (1998).

<sup>63</sup> Omri Elisha, *Sustaining Charisma: Mormon Sectarian Culture and the Struggle for Plural Marriage, 1852–1890*, 6 *NOVA RELIGIO* 45, 46–47 (2002).

lygamous nations,<sup>64</sup> approximately twenty percent of LDS members practiced polygyny during this period of its greatest prevalence.<sup>65</sup>

## 2. *The Mormon War of 1857 and Polygamy in National Political Discourse*

The Mormons migrated to Utah in 1847 specifically because that territory was uninhabited and would allow them to self-govern.<sup>66</sup> Instead of generating local conflict, though, the Mormons aroused hostility nationwide.<sup>67</sup> Polygamy, which was only first publicly avowed in 1852 and was not practiced much until the Reformation began in 1856, was only one of the LDS practices that the American public objected to. In addition, negative reactions stemmed from some of the concerns that plagued the Mormons in the Midwest: alleged acts by Mormons against non-Mormons<sup>68</sup> and the role of the Church in political life.<sup>69</sup> In addition, the Mormons were suspected of aiding Native Americans against the federal government.<sup>70</sup>

John Charles Fremont, the first Republican presidential candidate, formulated his 1856 campaign against the “twin relics of barbarism—polygamy and slavery.”<sup>71</sup> The antebellum movement against polygamy

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<sup>64</sup> Theodore C. Bergstrom, *On the Economics of Polygyny* 1 (1994) (unpublished manuscript, <http://www.econ.ucsb.edu/~tedb/Evolution/polygyny3.pdf>) (citing statistics on rates of polygamy).

<sup>65</sup> *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 27 (1890); Elisha, *supra* note 63, at 47. *But see* Ivins, *supra* note 46, at 102 (placing twenty percent at the high end of estimates, and arguing that the extent will probably never be known).

<sup>66</sup> The Utah territory passed to the United States from Mexico in 1848 based on the Treaty of Guadalupe Hidalgo, but Congress did not formally impose rule until 1850, when it rejected the Mormon request for statehood in favor of a federal territory. *See* An Act to Establish a Territorial Government for Utah, ch. 51, 9 Stat. 453 (1850) (creating the Territory of Utah); Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922; Sarah Barringer Gordon, *A War Of Words: Revelation and Storytelling in the Campaign against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 744 (2003) (describing how Congress rejected Utah’s 1849 bid for statehood).

<sup>67</sup> *See* ARRINGTON & BITTON, *supra* note 30, at 63 (stating that opposition to Mormons did not stop with the Mormons’ migration); *see also* Klaus Hansen, *The Political Kingdom as a Source of Conflict*, in *MORMONISM AND AMERICAN CULTURE* 121 (Marvin S. Hill & James B. Allen eds., 1972) (describing early rise of opposition to the Mormon state).

<sup>68</sup> *See, e.g.*, ARRINGTON & BITTON, *supra* note 30, at 164–65 (“Mormons were planning to employ Native Americans in a war of vengeance against all non-Mormon settlers and travelers.”).

<sup>69</sup> *See* GORDON, *supra* note 29, at 95 (describing outsiders’ perception that the church “held the reins of secular power”).

<sup>70</sup> *See* ARRINGTON & BITTON, *supra* note 30, at 146, 148 (citing public suspicions of Mormons’ relationships with Native Americans). This is an interesting claim given that the Mormons fought against Native Americans in the Walker War (1850s) and the Black Hawk War (1860s). *Id.* at 151–52, 156–57; BIGLER, *supra* note 58, at 237–40.

<sup>71</sup> *See* GORDON, *supra* note 29, at 55 (describing Republican party platform, including its call for the abolition of the “twin relics”); Keith E. Sealing, *Polygamists out of the Closet*:

grew as the practice increasingly was linked to the practice of slavery,<sup>72</sup> and as women in polygynous marriages were compared to southern slaves.<sup>73</sup> This connection logically followed from concerns about the polygamous-like behavior of white masters who had sex with many of their black female slaves.<sup>74</sup>

Federal power over the territories of the United States became a significant issue in the years leading up to the Civil War. In January of 1857, the very first month of Buchanan's presidency, the Supreme Court handed down the *Dred Scott* decision, striking down the provision of the Missouri compromise that permitted Congress to outlaw slavery in the territories.<sup>75</sup> This decision fueled the anti-slavery movement<sup>76</sup> and the newly-formed Republican party.<sup>77</sup> At the same time, states'-rights activists in the south and west objected to federal efforts to dictate the terms in which states could enter the union.

Meanwhile, in Utah, the Mormons were swept up in their reformation, growing in number, spirit, and boldness. In 1850, when Congress created the Utah territory in response to the Mormon migration to that region,<sup>78</sup> President Fillmore named Brigham Young governor of the territory.<sup>79</sup> Young, the leader of the LDS Church at that time, refused to separate church from state,<sup>80</sup> and rejected principles of separation of powers that would have allowed for legislative or judicial authority over Utah.<sup>81</sup>

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*Statutory and State Constitutional Prohibitions against Polygamy Are Unconstitutional under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 703 (2001).

<sup>72</sup> See Kincaid, *supra* note 59, at 82 ("Opponents of polygamy were quick to level it female slavery and equally quick to urge the federal government to extinguish the 'barbaric' practice.").

<sup>73</sup> GORDON, *supra* note 29, at 47-49.

<sup>74</sup> See Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse As Slavery: A Thirteenth Amendment Response to* (Deshaney), 105 HARV. L. REV. 1359, 1366 (1992).

<sup>75</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 395-96 (1857).

<sup>76</sup> Tony A. Freyer, *A Precarious Path: The Bill Of Rights After 200 Years*, 47 VAND. L. REV. 757, 773 (1994) (reviewing *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS* (David J. Bodenhamer & James W. Ely eds., 1993)) ("The abolitionists' repudiation of *Dred Scott* culminated in the amendment abolishing slavery.").

<sup>77</sup> See Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 286 (2000) (reviewing ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998)) ("*Dred Scott v. Sandford* mainly served to mobilize Republicans in defense of the legitimacy of their party.").

<sup>78</sup> See BIGLER, *supra* note 58, at 48.

<sup>79</sup> *Id.* at 49.

<sup>80</sup> Robert C. Black, *If at First You Don't Secede, Try, Try Again*, 39 NEW ENG. L. REV. 839, 862 (2005) (reviewing THOMAS H. NAYLOR, *THE VERMONT MANIFESTO: THE SECOND VERMONT REPUBLIC* (2003)).

<sup>81</sup> See GORDON, *supra* note 29, at 94-95 (describing control of government by Brigham Young).



At the end of 1856, Mormons broke into the office of Judge George Stiles, one of two federal judges appointed to the Utah territory.<sup>82</sup> They burned his books and stole his records.<sup>83</sup> While the Supreme Court was presiding over *Dred Scott*, the two judges had already returned to Washington, because they were unable and unwilling to carry out their responsibilities.<sup>84</sup> By May of 1857, all but one of the federal appointees to Utah had left.<sup>85</sup>

That June, President James Buchanan appointed a non-Mormon, Alfred Cumming, the new governor of Utah.<sup>86</sup> He also appointed a host of other non-Mormons to various judicial and administrative posts.<sup>87</sup> To protect these officials and reestablish federal order over Utah, Buchanan sent 2,500 federal troops along with them.<sup>88</sup> Young treated the U.S. Army as a hostile invasion,<sup>89</sup> and Mormon raiders succeeded in stranding the army for the winter northeast of Salt Lake City.<sup>90</sup> The conflict was not resolved until the following year, when Buchanan sent Thomas Kane to negotiate a settlement and Young surrendered his governorship and allowed Cummings to take office.<sup>91</sup>

This armed conflict, known as the Mormon War of 1857 or the Utah War, was not about the right to practice polygamy, but rather the role of the Mormons' theo-democratic "State of the Deseret."<sup>92</sup> Young and the LDS leadership were unwilling to recognize the federal government and its officials as sovereign for local matters, preferring to govern themselves as a state within the Union. In addition, the LDS's failure to act in accordance with basic constitutional rights, including free press, separation of church and state, and due process, was completely at odds with the federal government and the American public.

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<sup>82</sup> BIGLER, *supra* note 58, at 130.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 134.

<sup>85</sup> *Id.* at 136.

<sup>86</sup> See E. B. LONG, *THE SAINTS AND THE UNION: UTAH TERRITORY DURING THE CIVIL WAR* 32 (2001) ("The anti-Mormons use very hard language and declare [Cummings] to be a Mormon in Christian disguise.").

<sup>87</sup> DONALD R. MOORMAN & GENE A. SESSIONS, *CAMP FLOYD AND THE MORMONS: THE UTAH WAR 17-18* (1992) ("Buchanan had decided to settle the Mormon question by appointing not only a new governor, but also a complete slate of non-Mormon officials who were to be escorted into the territory by the army.").

<sup>88</sup> *Id.*

<sup>89</sup> BIGLER, *supra* note 58, at 148 (stating that Young ordered the Mormons to repel the "threatened invasion").

<sup>90</sup> ARRINGTON & BITTON, *supra* note 30, at 167; Poll & Hansen, *supra* note 2, at 128.

<sup>91</sup> BIGLER, *supra* note 58, at 187 (stating that Young introduced Cummings as Utah governor in the tabernacle); WEST, *supra* note 39, at 263-66 (describing Kane's role in negotiations).

<sup>92</sup> WEST, *supra* note 39, at 205 (noting that in 1849 "a petition for statehood was sent to Congress, asking that the area be designated the 'State of Deseret'—its name, derived from the Book of Mormon, meaning Land of the Honeybee").

After settling with the federal government, the LDS leadership softened its message. Young began to sound “more like ‘an extreme states’-righter than a ruler of an independent country.’”<sup>93</sup> Still, the federal conflict with the Mormons temporarily linked the south and the north, uniting them in the cause of quashing the Mormons. Democrats hoped that Buchanan’s federal intervention would demonstrate that their party’s adherence to states’ rights had limitations. One could support local democratic process and still act when faced with the unsavory Mormons.<sup>94</sup>

The 1860 presidential elections, though, demonstrated that the Democratic Party’s attempts to disentangle slavery from polygamy was unsuccessful. The Republicans continued to harden their party line against polygamy, recognizing the political salience of their campaign against the practice in the overall battle over states’ rights and slavery.<sup>95</sup>

Southerners feared the “unprecedented expansion of federal power inherent in the antipolygamy legislation” that imbued “the federal government with powers of moral evaluation.”<sup>96</sup> But the Republicans took advantage of this equivocation to argue that the Democrats favored immorality through democratic means, which meant allowing “not only slavery, but polygamy, piracy, and whatever else is revolting and monstrous.”<sup>97</sup>

The Mormons were in a precarious position on the eve of the Civil War. They had been subject to persecution since their formation as a community, which had led to their western migration.<sup>98</sup> They hoped that being outside the sovereignty of any state would allow them to govern themselves according to the laws of the Church.<sup>99</sup> Their biggest sympathizers on the arguments for local rule were southern slaveowners, but the Church opposed slavery, and the slaveowners opposed polygamy. Finally, both of Utah’s petitions for statehood during the 1850s had been denied.<sup>100</sup>

During the Civil War, the Mormons supported the Union and hoped to be rewarded with statehood. As the next subsection demonstrates, though, the war only accelerated congressional efforts to act against the Mormons and polygamy; after secession, the federal government was able to pass anti-polygamy legislation that southern Democrats had

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<sup>93</sup> GORDON, *supra* note 29, at 61.

<sup>94</sup> See HARDY, *supra* note 47, at 39 (referring to southerners and Mormons’ “mutual interest in the right of regional populations to regulate themselves”).

<sup>95</sup> GORDON, *supra* note 29, at 62. The Republican platform of 1860 repeated the 1856 pledge to eradicate polygamy. ARRINGTON & BITTON, *supra* note 30, at 170.

<sup>96</sup> GORDON, *supra* note 29, at 62.

<sup>97</sup> *Id.* (attributing the statement to “Lincoln and his supporters”).

<sup>98</sup> Kincaid, *supra* note 59, at 81–82.

<sup>99</sup> *Id.* at 82.

<sup>100</sup> GORDON, *supra* note 29, at 111.

blocked. In the postbellum era, the anti-polygamy movement began to steamroll and found itself part of the “Second Reconstruction.”

## B. THE POSTBELLUM TREATMENT OF POLYGAMY: CONGRESS, THE COURTS & STATEHOOD

### 1. *The Morrill Act for the Suppression of Polygamy of 1862*

1862 marked a significant blow to the Mormons; not only was Utah’s petition for statehood denied,<sup>101</sup> but the federal government—no longer blocked by the southern states, which had seceded—began enacting legislation against polygamy.<sup>102</sup> Over the next two decades, the government would systematically attempt to ban the practice of polygamy by prosecuting polygamists, disenfranchising Church members, and financially crippling the LDS Church itself.<sup>103</sup>

The federal assault began with the Morrill Act for the Suppression of Polygamy of 1862. Senator Justin Morrill had pushed anti-polygamy legislation in Congress during the era of the Mormon Reformation and the Utah War, but his efforts were blocked by the southern states.<sup>104</sup> After secession, the Republican-controlled Congress passed the Morrill Act, which prohibited bigamy in all the territories under the exclusive jurisdiction of the federal government.<sup>105</sup> Section one of the Act declared:

[E]very person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.<sup>106</sup>

Although section one was facially neutral (to use modern parlance), section two of the Act specifically repealed two ordinances that had been enacted in the 1850s by the Young-controlled Utah government, including the ordinance that incorporated the LDS Church in the first place.<sup>107</sup> The statute also limited itself as follows:

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<sup>101</sup> BIGLER, *supra* note 58, at 217.

<sup>102</sup> *Id.* at 217–19.

<sup>103</sup> See Kincaid, *supra* note 59, at 85–86.

<sup>104</sup> *Id.* at 82.

<sup>105</sup> Morrill Act, ch. 126, 12 Stat. 501 (1862).

<sup>106</sup> *Id.* at § 1.

<sup>107</sup> See *id.* at § 2.

*Provided*, That this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right “to worship God according to the dictates of conscience,” but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage . . . .<sup>108</sup>

The last provision of the Morrill Act declared that “it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government of a greater value than fifty thousand dollars.”<sup>109</sup> Property in excess of that amount is forfeited and escheats to the federal government.<sup>110</sup>

On its face, this section clearly distinguished religious or charitable institutions from other corporations. Yet its true purpose—and its connection to the rest of the act—was to limit the financial standing and power of the LDS Church.<sup>111</sup>

The text of the Morrill Act boldly struck three blows at the Mormons. First, it criminalized polygamous practice by individuals.<sup>112</sup> Next, it revoked the Church’s incorporation.<sup>113</sup> And last, it placed strict limitations on the Church’s ability to hold real property.<sup>114</sup>

The reality, though, is that the Morrill Act was a paper tiger<sup>115</sup> and reflects a general difficulty in enforcing anti-polygamy legislation that, to some degree, still exists. While it is easy to prohibit polygamy as a matter of law, it is far more difficult to prove and prosecute, especially when key witnesses and involved parties have no interest in cooperating with prosecutorial efforts.

Beyond evidentiary hurdles, no grand jury in Utah would indict Church leaders for violating the Act, so the Act was never used or challenged in court.<sup>116</sup> Five years later, both Mormons and Congress recognized the inefficacy of the statute, as Mormon leaders requested the

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at § 3.

<sup>110</sup> *Id.*

<sup>111</sup> See GORDON, *supra* note 29, at 82 (stating that the purpose of the Morrill Act was to disestablish the Mormon Church).

<sup>112</sup> See Morrill Act §1.

<sup>113</sup> See *id.* at § 2.

<sup>114</sup> See *id.* at § 3.

<sup>115</sup> Kincaid, *supra* note 59, at 83 (describing the Morrill Act as “ineffective”); GORDON, *supra* note 29, at 83 (stating that the Morrill Act “was not an effective means to dismantle polygamy”).

<sup>116</sup> GORDON, *supra* note 29, at 83 (“[T]he Morrill Act went untried.”).

repeal of the Act and a judiciary committee report referred to it as a "dead letter."<sup>117</sup>

## 2. *The Poland Act of 1874*

In the late 1860s, Congress grew increasingly frustrated with the failures of the Morrill Act.<sup>118</sup> In 1870, the Mormons responded to the anti-polygamist arguments that their society was anti-democratic and that women were subjugated; they passed the Female Suffrage Bill with nary an objection, granting the right to vote to all women over the age of twenty-one who were either citizens or the wives, widows, or daughters of male citizens.<sup>119</sup>

Instead of using their vote to "[do] away with the horrible institution of polygamy," the Mormon women voted along with the LDS Church "party line."<sup>120</sup> Thus, they served to increase the Mormon majority over the territory.<sup>121</sup>

In addition to voting, some women began to take more public stands in defending their right to polygamous marriage.<sup>122</sup> Their defense of polygamy was both pragmatic and spiritual.<sup>123</sup> Polygamy meant that "even the poorest women could ally themselves with worthy men,"<sup>124</sup> and that no women would be condemned to "whoredoms and prostitution."<sup>125</sup> The women were defending their right to the "sacred calling" of being sealed to their husbands "for time and eternity."<sup>126</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 97 ( "[C]ondemnations of Mormon polygamy increased in the late 1860s in Congress as the Morrill Act was revealed as ineffective." ).

<sup>119</sup> *Id.* at 283.

<sup>120</sup> See Elisha, *supra* note 63, at 54 ( "Mormon women overwhelmingly supported the election of Mormon candidates to public offices." ). This perhaps confirmed the best and worst fears of suffragettes who advocated that women should vote since they are different from men, representing other interests, yet also advanced the politically expedient argument that women's suffrage was 'safe,' because women would not deviate from how men voted. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1576 (1983).

<sup>121</sup> See Elisha, *supra* note 63, at 54 (stating that extending the vote to women strengthened Mormon political leverage). For a general discussion about the complexity of women's participation within the political process and its relationship to particular feminist goals, see Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1688 (1997).

<sup>122</sup> GORDON, *supra* note 29, at 97-98.

<sup>123</sup> *Id.* at 85, 99 (describing spiritual and practical arguments for polygamy); HARDY, *supra* note 47, at 87-90 (summarizing some Mormon arguments for polygamy).

<sup>124</sup> GORDON, *supra* note 29, at 98. This argument touches upon the economic theories of marriage discussed *infra* Section II.D.

<sup>125</sup> *Id.* at 99 (quoting George Q. Cannon in DISCOURSES ON CELESTIAL MARRIAGE DELIVERED IN THE NEW TABERNACLE, SALT LAKE CITY, OCTOBER 7TH, 8TH, AND 9TH, 1869 20-21 (1869)).

<sup>126</sup> *Id.* at 98 (referring to a statement by Phoebe Woodruff).

Although some elite Mormon women spoke out in favor of polygamy,<sup>127</sup> one particularly noteworthy woman began railing against the practice: Ann Eliza Young, one of Brigham Young's wives.<sup>128</sup> In 1873, Ann Eliza Young sued her husband for divorce and began a speaking tour against the practice of polygamy.<sup>129</sup>

By the mid-1870s, and once the women's suffrage question had been rendered moot for anti-polygamists,<sup>130</sup> the Mormons realized that their best strategy perhaps lay in judicial recourse, rather than in Washington.<sup>131</sup> At the same time, buoyed by the publicity and prominence of Ann Eliza Young, Congress passed a law that would place the Mormons on a collision course with Supreme Court review.<sup>132</sup>

In 1874, Congress enacted "An act in relation to courts and judicial officers in the Territory of Utah."<sup>133</sup> This act, known as the Poland Act, revoked the jurisdiction of the Utah county courts in all civil, criminal, and chancery affairs other than divorce.<sup>134</sup> The county probate courts had Mormon ecclesiastical leaders as judges, and the Mormons would bring their cases to these courts, eschewing the federal district courts in the region.<sup>135</sup> The Poland Act stripped these courts of much of their jurisdiction,<sup>136</sup> instead granting exclusive jurisdiction to the district courts for any matter involving a sum of money greater than \$300.<sup>137</sup> Most significantly for anti-polygamists, the Act provided that polygamy convictions

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

<sup>128</sup> *Id.* at 112.

<sup>129</sup> See *id.* (describing Ann Eliza Young's tour as "one of the most spectacularly successful lecture tours of the nineteenth century.").

<sup>130</sup> Elisha, *supra* note 63, at 54. But see Nancy L. Rosenblum, *Democratic Families: "The Logic of Congruence" and Political Identity*, 32 *HOFSTRA L. REV.* 145, 162 (2003) (stating that suffragettes Elizabeth Cady Stanton and Susan B. Anthony opposed federal anti-polygamy legislation).

<sup>131</sup> HARDY, *supra* note 47, at 44 (stating that the Mormons expected the *Reynolds* case to be a "turning point" in their favor).

<sup>132</sup> GORDON, *supra* note 29, at 112–13 (stating that Ann Eliza Young's tour fueled a "groundswell of antipolygamy sentiment" that was instrumental in the passage of the Poland Act).

<sup>133</sup> Ch. 469, 18 Stat. 253 (1874).

<sup>134</sup> *Id.* at § 3. Stripping courts of jurisdiction has been recognized as a tactic to achieve desired political results. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249–50 (2004); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 *GEO. L.J.* 1, 22 (2002) (discussing jurisdiction-stripping during Reconstruction); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 *HARV. L. REV.* 4, 117 (2001) (noting jurisdiction-stripping by Congress); Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 *FORDHAM L. REV.* 1439, 1459 (2005) (noting jurisdiction-stripping at the state level).

<sup>135</sup> See GORDON, *supra* note 29, at 94–95, 111 (describing structure and power of probate courts).

<sup>136</sup> See Poland Act § 3.

<sup>137</sup> *Id.*

could be appealed to the United States Supreme Court.<sup>138</sup> Once the Act took effect, federal prosecutors began arresting Mormon leaders en masse.<sup>139</sup>

### 3. United States v. Reynolds: *A Test Case of the Morrill Act*

Congress provided both the jurisdictional hook and the motivation for the Mormons to set in motion the case of George Reynolds. Reynolds was not just any member of the LDS Church caught in the political battle between the nation and the Utah Mormon community;<sup>140</sup> he was the personal secretary to Brigham Young, and was specifically chosen to be the test case for the constitutionality of the Morrill Act.<sup>141</sup>

Reynolds was a young and handsome man,<sup>142</sup> and had only married his second wife a few months prior to the test case.<sup>143</sup> Reynolds was not a significant Church leader, but he held a respected position within the Church.<sup>144</sup> He was selected to counter the public image of polygamy as that of an older man marrying many young girls.<sup>145</sup>

George Q. Cannon, a territorial delegate and Mormon leader, arranged a deal with U.S. Attorney William Carey that Reynolds would provide the information for his own indictment.<sup>146</sup> In exchange, Carey would drop the charges against Cannon and other leaders and would waive all “infliction of punishment” on Reynolds, should a conviction be procured and upheld.<sup>147</sup> According to George Reynolds’s diary, Cannon assured the Mormon leadership that the first polygamy conviction would “be overturned in any event.”<sup>148</sup>

The trial of George Reynolds was bizarre for a test case. Proving polygamy without the cooperation of witnesses is exceptionally difficult, because there are no official records for multiple marriages.<sup>149</sup> When

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<sup>138</sup> *Id.* (“A writ of error from the Supreme Court of the United States to the supreme court of the Territory shall lie in criminal cases, where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy.”).

<sup>139</sup> GORDON, *supra* note 29, at 113.

<sup>140</sup> HARDY, *supra* note 47, at 44 (stating that Reynolds became the test case upon the request of his superiors).

<sup>141</sup> GORDON, *supra* note 29, at 114.

<sup>142</sup> Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28 J. SUP. CT. HIST. 14, 23 (2003) (stating that Reynolds was young and handsome).

<sup>143</sup> BIGLER, *supra* note 58, at 302 (noting that Reynolds had married his second wife in August 1874, three months before his indictment in October of that year).

<sup>144</sup> ARRINGTON & BITTON, *supra* note 30, at 180.

<sup>145</sup> GORDON, *supra* note 29, at 114 (stating that Reynolds “belied the stereotype” of Mormon polygamists).

<sup>146</sup> *Id.*

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

<sup>148</sup> *Id.* at 119.

<sup>149</sup> *Id.* at 114.

Cannon and Reynolds set up the test case, they had submitted a list of witnesses who would have testified to establish his polygamous practice.<sup>150</sup> Yet by the time the trial occurred six months later, many Mormons were convinced that the federal judges and prosecutors had reneged on the deal, so they denied any knowledge of Reynolds's marital situation.<sup>151</sup>

Just when it appeared that convicting Reynolds would prove impossible, a non-Mormon lawyer suggested calling Amelia Jane Schofield, Reynolds's second wife, to the stand.<sup>152</sup> Schofield had not been on the Reynolds witness list, nor had she been coached by defense counsel.<sup>153</sup> She was also visibly pregnant.<sup>154</sup> Schofield testified that she had married Reynolds.<sup>155</sup>

After Schofield's testimony, the defense conceded that Reynolds had been practicing polygamy and shifted its arguments to defending polygamy because of its significance to the Mormon religion.<sup>156</sup> The judge ruled that these arguments were irrelevant, and after half an hour of deliberating, the jury found Reynolds guilty under the Morrill Act.<sup>157</sup>

After a series of appeals, *United States v. Reynolds* made its way to the United States Supreme Court,<sup>158</sup> the very court that found itself to be the federal check on congressional overreaching in its Reconstruction enactments.<sup>159</sup> Both sides recognized the importance of this decision.<sup>160</sup> The Church hired a Democrat of prominence to argue the case for Reynolds: George Washington Biddle, the dean of the Philadelphia bar.<sup>161</sup> The Hayes administration dispatched the Attorney General, Charles Devens, a strong Republican, to represent the United States.<sup>162</sup>

While *Reynolds* is cited today for its interpretation of the First Amendment,<sup>163</sup> the primary thrust of Biddle's argument before the Su-

<sup>150</sup> *Id.* at 115.

<sup>151</sup> *Id.*

<sup>152</sup> BIGLER, *supra* note 58, at 303.

<sup>153</sup> GORDON, *supra* note 29, at 115.

<sup>154</sup> *Id.*

<sup>155</sup> BIGLER, *supra* note 58, at 303.

<sup>156</sup> GORDON, *supra* note 29, at 115.

<sup>157</sup> *Id.*

<sup>158</sup> ARRINGTON & BITTON, *supra* note 30, at 180.

<sup>159</sup> *The Slaughter-House Cases*, 83 U.S. 36 (1873).

<sup>160</sup> See GORDON, *supra* note 29, at 119 (stating that the Mormons hoped the Supreme Court would "rescue their embattled constitutional rights"); BIGLER, *supra* note 58, at 305 (stating that Reynolds was "a target of intense public interest" who was "reviled or praised across the nation" when his appeal was argued).

<sup>161</sup> GORDON, *supra* note 29, at 119.

<sup>162</sup> *Id.* (stating that having the Attorney General argue the case himself was "a clear indication of the importance the Hayes administration attached to the case").

<sup>163</sup> See, e.g., William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2422-28 (1997) (analyzing First Amendment aspects of Reynolds).



preme Court was one based on federalism: that the Morrill Act exceeded congressional authority to regulate the territories.<sup>164</sup> Article 4, Section 3 of the Constitution grants Congress the power to “make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>165</sup> Biddle argued that “needful rules” meant those rules needed to protect the national interest, rather than to intervene with local authority.<sup>166</sup>

Although perhaps correct as an interpretation of the Constitution,<sup>167</sup> the problem with Biddle’s argument is that it was precisely the grounds on which the Supreme Court had decided the *Dred Scott* case in 1857 and invalidated congressional ability to restrict slavery in the territories.<sup>168</sup> The controversial decision had been blamed for causing the Civil War,<sup>169</sup> and even the Supreme Court of the Reconstruction era, which had closed the door on interpretations of the Fourteenth Amendment that would have significantly expanded federal powers,<sup>170</sup> would have been wary of the political landmine that such a ruling would create.<sup>171</sup> Given the extent to which polygamy regulation was a pretext for other nineteenth century legal and political issues, any legal argument linking regulation of polygamy to regulation of slavery could only harm the polygamists’ cause.

Devens, on behalf of the government, focused his arguments solely on polygamy, morality, and humanitarianism.<sup>172</sup> He focused on the atrocities that would occur should Mormon polygamists be allowed to continue their practices.<sup>173</sup> The one issue Devens did not address was the federalism question that Biddle primarily relied upon.<sup>174</sup>

The Supreme Court, though, agreed with Devens, finding that the Mormons had no constitutional right to engage in polygamy,<sup>175</sup> and side-stepped the federalism question altogether by assuming that Congress

<sup>164</sup> GORDON, *supra* note 29, at 123.

<sup>165</sup> U.S. CONST. art. IV, § 3.

<sup>166</sup> GORDON, *supra* note 29, at 123.

<sup>167</sup> See, e.g., Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241, 1242 (2004) (arguing that the “needful rules” clause limits congressional power significantly).

<sup>168</sup> GORDON, *supra* note 29, at 124.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 125. See *United States v. Stanley (Civil Rights Cases)* 109 U.S. 3, 11 (1883) (holding that the Fourteenth Amendment applied only to state action); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (incorporating the “separate but equal” doctrine into the Fourteenth Amendment).

<sup>171</sup> GORDON, *supra* note 29, at 124 (describing Biddle’s arguments as “dangerous”).

<sup>172</sup> *Id.* at 126.

<sup>173</sup> *Id.* Devens also referenced the 1857 massacres, which had been revived earlier in the 1870s with the capture of one of the Mormon ringleaders. *Id.*

<sup>174</sup> *Id.* at 126.

<sup>175</sup> *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878).

had the right to pass such a law.<sup>176</sup> Given its first opportunity to interpret the First Amendment's religion clauses, the Supreme Court looked to the foundation era's enactment of the Bill of Rights to ascertain the original understanding of that Amendment.<sup>177</sup>

The *Reynolds* opinion discussed the objectionable laws at the time of the founding—taxes to support a religion and punishment for lack of worship or exercising other beliefs.<sup>178</sup> It viewed the Free Exercise and Establishment Clauses as historical outgrowths of James Madison's response to the virginian effort to fund Christian teachers with his "Memorial and Remonstrance"<sup>179</sup> and Thomas Jefferson's subsequent bill establishing religious freedom.<sup>180</sup>

After discussing the history of the passing of the First Amendment, the Court turned its inquiry to the English-colonial era regulation of polygamy, explaining that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."<sup>181</sup> The opinion then detailed the longstanding bar on polygamy in England, punishable first in ecclesiastical courts and later in civil courts under the statute of James I.<sup>182</sup>

Even more important to the Court was evidence of the framers' views on polygamy: the very same state of Virginia that had passed Jefferson's bill on religious freedom and supported the First Amendment to the Constitution, had subsequently passed the statute of James I, banning polygamy.<sup>183</sup> According to the Court, "it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity."<sup>184</sup> Accordingly, the Court concluded, the framers would have been astounded to discover that the religion clauses to the Constitution prevented anti-polygamy legislation.<sup>185</sup>

<sup>176</sup> *Id.* at 166.

<sup>177</sup> *Id.* at 162–66.

<sup>178</sup> *Id.* at 162–63.

<sup>179</sup> *Reynolds*, 98 U.S. at 163 (citing to James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 9 (Marvin Meyers ed., 1981)).

<sup>180</sup> *Id.* at 163–64 (referring to Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 *THE FOUNDERS' CONSTITUTION* 77 (Philip B. Kurland & Ralph Lerner eds., 1987)).

<sup>181</sup> *Id.* at 164.

<sup>182</sup> *Id.* at 164–65.

<sup>183</sup> *Id.* at 165 ("[I]t is a significant fact that on the eighth of December, 1788, after the passage of the act establishing religious freedom . . . the legislature of that State substantially enacted the statute of James I.").

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* ("[I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.").

The Court next analyzed the Morrill Act and entertained the question “whether those who make polygamy a part of their religion are excepted from operation of the statute.”<sup>186</sup> The phrasing of this question—which suggests that a practitioner can choose the dictates of his or her religion—suggested the ultimate outcome.<sup>187</sup>

Creating a distinction that would form the basis of free exercise jurisprudence, Justice Waite distinguished between religious beliefs and actions, finding that the government can enact laws that restrict actions rather than beliefs.<sup>188</sup> The Court offered the example of human sacrifice to demonstrate that the government can validly restrict religious practice.<sup>189</sup> The Court continued that allowing religious exemptions from law “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstance.”<sup>190</sup>

The rhetoric of the *Reynolds* decision, for which Justice Waite borrowed whole-cloth from Devens’s arguments, is not only anti-Mormon, but racist as well.<sup>191</sup> It rejected polygamy as being “almost exclusively a feature of the life of Asiatic and of African people,” which was deemed inferior to the practice “among the northern and western nations of Europe.”<sup>192</sup> Justice Waite went on to characterize the Mormon practice of polygamy as “uncivilized” and comparable to Hindu women being thrown on the funeral pyre.<sup>193</sup>

The opinion also relied upon and cited favorably to the writing of philosopher and anti-polygamist Francis Lieber.<sup>194</sup> Lieber argued that the

<sup>186</sup> *Id.* at 166.

<sup>187</sup> The *Reynolds* opinion has been described as following a “narrow, traditionalist conception of ‘religion’ and placing the Mormons “effectively outside the scope of protected religion.” David D. Meyer, *Self-Definition in the Constitution of Faith & Family*, 86 MINN. L. REV. 791, 811 (2002) (explaining how during the twentieth century, the Court adopted a more fluid definition of religious life, yet adhered to a traditionalist conception of ‘family’); see also June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 273 (1996) (placing the *Reynolds* decision within the context of the long-standing American view of marriage as connected to religion and sexual morality).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 167.

<sup>191</sup> See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1841 (1985) (referring to the *Reynolds* decision and Court treatment of the LDS Church more generally as being impossible for modern pluralists to read without “embarrassment”); Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1126 n.176 (1989).

<sup>192</sup> *Reynolds*, 98 U.S. at 164.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 166.

existence of polygamy damaged the democratic liberal state.<sup>195</sup> Although some aspects of Lieber's analysis regarding the relationship between political regime and polygamy have survived to the modern era, part of his reasoning is linked to race-based social evolutionary theory that is distinct to an older era.<sup>196</sup> Lieber objected to polygamy because it made Caucasians act as though they were "Asiatic" or "African."<sup>197</sup>

#### 4. *The Edmunds Anti-Polygamy Act of 1882*<sup>198</sup>

After the Supreme Court upheld the constitutionality of the Morrill Act, the government was still hampered in its efforts to prosecute polygamy because the problem of proof had not been solved.<sup>199</sup> From 1879 to 1880, the government brought seventy-eight indictments for polygamy, a scant number given the population size engaged in the practice.<sup>200</sup>

But emboldened by the *Reynolds* decision and exasperated by the behavior of the "victims" of polygamy—the women who continued to support it politically—the Republicans ratcheted up the legal war against polygamy.<sup>201</sup> Like the Reconstruction of the Union, which had sought to punish the Confederate South, the "Second Reconstruction" (of the West) punished the Mormons for their resistance.<sup>202</sup>

The problems with enforcing the Morrill Act had been twofold. First, prosecutors could not prove multiple marriages, given the paucity of formal records,<sup>203</sup> and, second, Mormon juries would not convict their peers for polygamy.<sup>204</sup> Senator George Edmunds, who chaired the Senate Judiciary Committee, proposed anti-polygamy legislation—the Edmunds Act—that would cure both of these defects.<sup>205</sup>

First, the Edmunds Act prohibited co-habitation, absolving prosecutors of the need to prove an actual marriage.<sup>206</sup> Second, the Act dictated

<sup>195</sup> See discussion *infra* Part III. A. 2.

<sup>196</sup> See discussion *infra* Part III. A. 2.

<sup>197</sup> Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 661 n.112 (2003). ("Francis Lieber, in an unsigned article in *Putnam's Monthly*, identified monogamy as 'one of the elementary distinctions—historical and actual—between European and Asiatic humanity' and claimed that destroying monogamy would 'destroy our very being; and when we say our, we mean our race.'") (quoting Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?* 5 PUTNAM'S MONTHLY 225, 234 (1855)).

<sup>198</sup> Edmunds Act, ch. 47, 22 Stat. 30 (1882).

<sup>199</sup> See HARDY, *supra* note 47, at 44 (noting that the evidentiary basis for prosecutions was "impoverished").

<sup>200</sup> GORDON, *supra* note 29, at 147.

<sup>201</sup> *Id.* at 149.

<sup>202</sup> *Id.* at 149–51 (describing renewed attack on polygamists).

<sup>203</sup> HARDY, *supra* note 47, at 44.

<sup>204</sup> *Id.*

<sup>205</sup> GORDON, *supra* note 29, at 151.

<sup>206</sup> Edmunds Act, ch. 47, §3, 22 Stat. 30 (1882).

that any juror in a proceeding for “bigamy, polygamy, or unlawful cohabitation” could be challenged and removed with “sufficient cause” if: (1) he “is or has been living in the practice of bigamy, polygamy, or cohabitation with more than one woman;” or (2) “he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.”<sup>207</sup> Thus, the Edmunds Act did more than bar polygamists from juries. Even non-polygamists who merely *believed* that polygamy would be acceptable were prohibited from serving on juries.

Moreover, the Act disenfranchised not just polygamists, but also their wives:

[N]o polygamist, bigamist, or any person cohabitating with more than one woman, and no woman cohabitating with any of the persons described as aforesaid . . . shall be entitled to vote at any election held in any such Territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under, or for any such Territory or place, or under the United States.<sup>208</sup>

It vacated all elected offices in Utah, purged the polygamists from the voter registrations, and created a commission to oversee elections.<sup>209</sup> The prohibitions against polygamists taking office allowed Congress to refuse to seat Utah territorial delegate George Q. Cannon, architect of the *Reynolds* case, who himself was a polygamist.<sup>210</sup>

After the passage of the Edmunds Act, some 1,300 LDS practitioners were prosecuted under various anti-polygamy statutes.<sup>211</sup> From 1871 to 1896, ninety-five percent of the approximately 2,500 criminal cases in the Utah court records were for sex crimes, such as fornication or bigamy.<sup>212</sup> Almost all of the sex-related prosecutions and many others involved polygamy.<sup>213</sup>

This “era of prosecutions,” dubbed by Mormons “The Raid” (while non-Mormons referred to it as “The Crusade”),<sup>214</sup> began in 1884 with

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<sup>207</sup> *Id.* § 5.

<sup>208</sup> *Id.* § 8.

<sup>209</sup> *Id.* § 9.

<sup>210</sup> GORDON, *supra* note 29, at 153.

<sup>211</sup> James M. Donovan, *Rock-Salting the Slippery Slope, Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, 568 (2002). See also estimate cited in GORDON, *supra* note 29, at 27 n.16.

<sup>212</sup> GORDON, *supra* note 29, at 155. Gordon describes the total number of indictments for polygamy-related charges between 1870 and 1891 as being “in the neighborhood of 2,300.” *Id.* at 275 n.16.

<sup>213</sup> *Id.* at 156.

<sup>214</sup> *Id.* at 155.

*Clawson v. U.S.*<sup>215</sup> That case was the first polygamy trial in years and the first in which the jury had been impaneled under the Edmunds Act.<sup>216</sup> In the latter 1880s, the Utah penitentiaries were filled with Mormon polygamists.<sup>217</sup>

By the middle of the 1880s, the Supreme Court had upheld the voter registration system created by the Edmunds Act. In *Murphy v. Ramsey*,<sup>218</sup> the Court held that the Act was not an ex post facto law, as it only prohibited the continuing conduct of living in a state of bigamy or polygamy.<sup>219</sup> And federal prosecutors attempted to target Church leaders, who chose a strategy of evasion and hiding “underground.”<sup>220</sup>

During this era, Mormons began settling in other regions, such as Arizona, Nevada, Wyoming, and Colorado, and sometimes other countries, such as Canada or Mexico, to evade the authorities.<sup>221</sup> These new settlements also helped the Mormons spread out during a time when they were reproducing rapidly and outgrowing Utah.<sup>222</sup>

### 5. *The Edmunds-Tucker Act of 1887*

As “The Raid” continued, and, as locating leaders of the Church grew increasingly difficult,—George Reynolds and George Cannon were both among the ‘disappeared’<sup>223</sup>—Congress increased its efforts to target Mormon women who refused to cooperate and therefore stood in the way of capturing and convicting Mormon leaders.<sup>224</sup>

The Edmunds-Tucker Act<sup>225</sup> stopped short of mirroring an earlier legislative proposal in which the federal government would have taken over the regulation of marriage altogether.<sup>226</sup> To combat the problem of these Mormon women, the Act criminalized fornication and adultery

<sup>215</sup> 114 U.S. 477 (1885); see also ARRINGTON & BITTON, *supra* note 30, at 181 (stating that federal judges “launched the first sustained offensive against polygamists”).

<sup>216</sup> See *id.* (stating that the *Clawson* jury comprised twelve Gentiles); GORDON, *supra* note 29, at 157 (stating that the *Clawson* trial was “the first polygamy trial to take place in years”). *Clawson* received a more severe sentence—four years in prison and an \$800 fine—because of his defiance. *Id.*

<sup>217</sup> The irony being that the prosecutions were creating a sex ratio favorable to polygamy. See discussion *infra* Part II.C.

<sup>218</sup> 114 U.S. 15, 37 (1885).

<sup>219</sup> *Id.* at 41–42. The Supreme Court later upheld anti-polygamy oaths in *Davis v. Beason*, 133 U.S. 333 (1890).

<sup>220</sup> ARRINGTON & BITTON, *supra* note 30, at 181.

<sup>221</sup> *Id.* at 182 (stating that some leaders sought refuge in Mexico, Canada, and Hawaii); GORDON, *supra* note 29, at 158–59, 192.

<sup>222</sup> *Id.*

<sup>223</sup> ARRINGTON & BITTON, *supra* note 30, at 181 (discussing Cannon’s situation); GORDON, *supra* note 29, at 159 (discussing Reynolds’ situation).

<sup>224</sup> GORDON, *supra* note 29, at 164.

<sup>225</sup> Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887).

<sup>226</sup> GORDON, *supra* note 29, at 166–67 (describing original proposal).

(thereby rendering many women criminals) and revoked women's suffrage.<sup>227</sup>

Within three years of the passage of the Edmunds-Tucker Act, nearly two hundred Mormon women had been indicted for fornication.<sup>228</sup> However, prosecutors did not press these cases through to conviction.<sup>229</sup> The goal was to arrest and indict these women, often for the purpose of securing testimony against their husbands.<sup>230</sup>

The other aim of the Edmunds-Tucker Act was to cripple the Church itself and to compensate for the government's failure to capture and punish the leaders of the LDS Church.<sup>231</sup> The Act disincorporated the Church and declared its property forfeited to the United States government.<sup>232</sup> Unlike the Morrill Act's failed efforts to revoke the ordinance that had established the Church's incorporation, the Edmunds-Tucker Act provided for a receivership that would manage the Church's estate and facilitate the process.<sup>233</sup>

The Mormons set up a test case under this provision by voluntarily "surrendering" some real property to Frank Dyer, the anti-polygamist territorial officer designated as the receiver for the dissolved corporation.<sup>234</sup> Dyer then "rented" the property back to the Church.<sup>235</sup>

*Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States* reached the Supreme Court in 1888.<sup>236</sup> The Church challenged the legality of the Edmunds-Tucker Act's disincorporation as an unconstitutional repudiation of a contract, pointing to the thirty-plus year lag between creation and revocation, and arguing that the Act bestowed upon the court equitable powers in excess of those constitutionally permitted.<sup>237</sup>

According to some reports, the Supreme Court delayed its ruling for over a year, hoping that the Mormons would capitulate on the polygamy question.<sup>238</sup> Indeed, Mormon leaders were beginning to fracture on this issue.<sup>239</sup> George Cannon turned himself in and began renouncing poly-

<sup>227</sup> Edmunds-Tucker Act § 3.

<sup>228</sup> GORDON, *supra* note 29, at 181.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> ARRINGTON & BITTON, *supra* note 30, at 183 (stating that the Edmunds-Tucker Act "provided for the legal dismemberment of the church itself").

<sup>232</sup> *Id.*; GORDON, *supra* note 29, at 206.

<sup>233</sup> Compare Morrill Act, § 2, 12 Stat. 501 (1862), with the Edmunds-Tucker Act, § 17, 24 Stat. 635 (1887).

<sup>234</sup> GORDON, *supra* note 29, at 208–09.

<sup>235</sup> *Id.*

<sup>236</sup> 136 U.S. 1 (1890).

<sup>237</sup> *Id.* at 44, 64.

<sup>238</sup> GORDON, *supra* note 29, at 211.

<sup>239</sup> *Id.*

amy. He was tried for his own polygamous practice and given a minimal sentence.<sup>240</sup> The Church also announced that no new instances of polygamy had been allowed between 1888 and 1889.<sup>241</sup>

Still, Mormon internal conflict about proper strategy prevented any bold declarations,<sup>242</sup> and in 1890, the Supreme Court handed down its ruling upholding the Act and allowing the disincorporation of the Church.<sup>243</sup> The federal campaign to browbeat the Mormons into submission had reached a pinnacle.

The following year, new Mormon President Wilford Woodruff issued a "Manifesto" counseled from God to abandon the practice of polygamy.<sup>244</sup> Within three or four years, most prosecutions of polygamists had been dropped and polygamists who had been convicted or indicted were pardoned.<sup>245</sup> The confiscated Church property was returned as well.<sup>246</sup>

Since 1850, Utah repeatedly tried to gain admission to the Union.<sup>247</sup> Six petitions had all been rejected.<sup>248</sup> In 1894, Utah was granted a provisional state government<sup>249</sup> and two years later, in 1896, Utah's petition for statehood finally succeeded.<sup>250</sup> As a condition to admission, the Utah Constitution declared that "polygamous or plural marriages are forever prohibited."<sup>251</sup>

## 6. *Concluding Thoughts on the Nineteenth Century*

One could reasonably surmise that so many Americans were hostile to the LDS Church because they objected to its endorsement of polygamy. And, indeed, many Americans opposed the practice of polygamy during that period.<sup>252</sup>

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<sup>240</sup> *Id.* at 211–12.

<sup>241</sup> *Id.* at 212.

<sup>242</sup> *See id.* at 212–13.

<sup>243</sup> *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

<sup>244</sup> *ARRINGTON & BITTON*, *supra* note 30, at 183–84.

<sup>245</sup> *GORDON*, *supra* note 29, at 220.

<sup>246</sup> *Id.*

<sup>247</sup> Mark C. Anderson, *A Tougher Row to Hoe: The European Union's Ascension as a Global Superpower Analyzed through the American Federal Experience*, 29 *SYRACUSE J. INT'L. L. & COM.* 83, 105 n.148 (2001).

<sup>248</sup> *Id.*

<sup>249</sup> *Utah Enabling Act*, ch. 138, 28 Stat. 107 (1894); *ARRINGTON & BITTON*, *supra* note 30, at 244 (stating that in 1894, Congress passed an enabling act "that put Utah on its way to statehood").

<sup>250</sup> *ARRINGTON & BITTON*, *supra* note 30, at 244.

<sup>251</sup> *Id.*

<sup>252</sup> *HARDY*, *supra* note 47, at 58–59 (discussing popular perceptions of, and opposition to, polygamy).



At the same time, though, much of the impetus to the legal crusade against polygamy seems rooted in the problem of Mormon political control<sup>253</sup>—the same problem that had hampered Mormon relations with non-Mormons during the antebellum era in Ohio, Missouri, Illinois, and Utah.<sup>254</sup> The difficulties predated the growth of Mormon steadfast advocacy for polygamy and actual adherence to the practice, and then spiraled into a feedback loop where Mormons were attacked for being polygamists and polygamy was attacked because the Mormons practiced it.

There is some measure of irony in the fact that the Mormons, who believed that the Free Exercise Clause of the Constitution ought to protect them from hostile state government actions, sought to avoid this persecution by leaving states that were admitted into the Union for the federally-controlled territories of the West.<sup>255</sup> Instead of freeing the Mormons from regulation, their migration merely triggered federal scrutiny and congressional attention,<sup>256</sup> which ultimately led to the demise of Mormon polygamy.<sup>257</sup>

The Mormons believed in a theo-democratic state, and while they were inclined to support the First Amendment when it served them on free exercise grounds, they did not demonstrate any appreciation for the concept of separation of church and state, affirmatively engaging in attacks on free press on multiple occasions.

Senator Frederick Dubois of Idaho explained:

[T]hose of us who understand the situation were not nearly so much opposed to polygamy as we were to the political domination of the Church . . . . There was a universal detestation of polygamy, and inasmuch as the Mormons openly defended it we were given a very effective weapon with which to attack.<sup>258</sup>

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<sup>253</sup> *Id.* at 255 (noting issue of “Mormon loyalty to the nation and church involvement in commercial and political affairs”).

<sup>254</sup> See generally *supra* notes 33–43, 52–53, 66–92, and accompanying text (supporting the idea that antagonism towards Mormons in Ohio, Missouri, Illinois, and Utah, was based in part on distrust of their political power).

<sup>255</sup> GORDON, *supra* note 29, at 108–09.

<sup>256</sup> Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1069 (1997) (stating that after the Mormons settled in Utah, the federal government began an “extraordinary campaign to destroy the Mormon church”).

<sup>257</sup> See *id.* at 1069–70 (stating that the Mormons had “little choice but to alter their religious practices”).

<sup>258</sup> Harmer-Dionne, *supra* note 62, at 1324 (citing KLAUS J. HANSEN, *QUEST FOR EMPIRE: THE POLITICAL KINGDOM OF GOD AND THE COUNCIL OF FIFTY IN MORMON HISTORY* 170 (1967)).

Mormon theocratic life was at odds with liberal democratic Christian America.<sup>259</sup> Polygamy was only one part of the picture and served as a proxy and pretext for other debates of the nineteenth century. Indeed, even when the practice was at its most prevalent, no more than twenty percent of the Church's membership practiced polygamy.<sup>260</sup> Based on data of pioneer Mormon families, two-thirds of the men practicing polygamy only had two wives and less than ten percent had four or more wives.<sup>261</sup> Some Church leaders married far more many women, though some of these marriages were of older widows, in order to support the women. For example, Brigham Young married one of Joseph Smith's widows after Smith was killed.<sup>262</sup>

The Utah State Constitution itself suggests that polygamy merely served as the basis for broader objections to the Mormon religion. Unlike other state constitutions, Utah's Constitution expressly mandates separation of church and state with a distinctly nineteenth century phrasing and with unique prohibitions on the establishment of religion.<sup>263</sup> This clause was also a precondition to Utah's admission to the Union.<sup>264</sup>

Had the LDS Church distanced itself from polygamy as soon as the Civil War ended, but maintained its overall political influence and structure, it is unclear whether the federal government would have accepted Utah's petition for statehood and allowed the Mormons to govern themselves within the context of the Constitution and the Union.<sup>265</sup> After all, when women's suffrage only strengthened the Mormon political stronghold on Utah, the federal solution was to disenfranchise Mormon women.<sup>266</sup>

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<sup>259</sup> James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317, 413 (2001) ("While seeking to be left alone to follow their own consciences, free from external imposition, the Mormons created a community that many nineteenth century Americans considered theocratic.").

<sup>260</sup> Elisha, *supra* note 63, at 47 (arguing that plural marriage was a symbol of early Mormon identity).

<sup>261</sup> *Id.* at 51–52.

<sup>262</sup> Rickey Lynn Hendricks, *Landmark Architecture for a Polygamous Family: The Brigham Young Domicile, Salt Lake City, Utah*, 11 PUB. HISTORIAN 25, 42 (1989).

<sup>263</sup> Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 191 n.304 (2004).

<sup>264</sup> *Id.*

<sup>265</sup> At least one scholar has argued that the Mormons only became so entrenched in the belief in polygamy because of how hard the federal government went after them. *See* KLAUS J. HANSEN, *MORMONISM AND THE AMERICAN EXPERIENCE* 176 (1981); *see also* Elisha, *supra* note 63, at 53 ("Persecution and media stigmatization by the outside world united Mormons around the common cause of self-determination, and their vigilance on the subject enhanced the unique aura of radical peculiarity that surrounded plural marriage in their social consciousness.").

<sup>266</sup> GORDON, *supra* note 29, at 168–71.

Thus, the nineteenth century fight over polygamy was about far more than polygamy—and often quite less than it too. The Mormons ultimately capitulated, but with effects that would continue through the next century.

### C. TWENTIETH CENTURY LDS RESPONSES: RENUNCIATION, THE RISE OF THE FUNDAMENTALISTS & THE RAIDS

#### 1. *The Birth of the Fundamentalists*

Although Woodruff's announcement of the Manifesto in 1890 may have appeased anti-polygamists and precipitated Utah's admission to the Union six years later, it would be naïve to suggest that all polygamy simply ended.<sup>267</sup>

While Church leaders publicly condemned polygamy, they privately authorized it and some continued to engage in polygamous behavior.<sup>268</sup> The Manifesto itself was suspect to the Mormons as religious doctrine, because it did not follow the customs of other Church documents (e.g., it was unsigned by leaders and contained a different type of opening statement).<sup>269</sup> In addition, the Manifesto never declared polygamy to be "wrong;" rather, it stated that because of Congress and the Court's interpretation of the laws, polygamy should not be practiced.<sup>270</sup>

The lack of a "real" repudiation was eventually noticed by the anti-polygamists back in Washington, and in 1904, Congress challenged the right of Reed Smoot, a U.S. Senator from Utah, to his seat.<sup>271</sup> Smoot was a monogamous Mormon.<sup>272</sup> Nonetheless, hearings and an investigation into the matter revealed the extent to which polygamy continued to exist in the Mormon sphere.<sup>273</sup>

In 1904, President Joseph F. Smith issued another Manifesto against polygamy, though it too was couched in ambiguous terms.<sup>274</sup> Then in

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<sup>267</sup> See, e.g., HARDY, *supra* note 47, at 206–32.

<sup>268</sup> *Id.*

<sup>269</sup> See Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29, 51 (2001) (noting Mormon uncertainty about effect of the Manifesto); Robert J. Morris, "What Though Our Rights Have Been Assailed?" *Mormons, Politics, Same-Sex Marriage, and Cultural Abuse in the Sandwich Islands (Hawai'i)*, 18 WOMEN'S RTS. L. REP. 129, 197 (1997) (questioning the Manifesto as a means of forbidding polygamy).

<sup>270</sup> Wilson Woodruff, President of the Church of Jesus Christ of Latter-Day Saints, Official Declaration, *reprinted in* THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 256–57 (1976).

<sup>271</sup> GORDON, *supra* note 29, at 235.

<sup>272</sup> Samuel R. Olken, *The Business Of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 263 n.64 (2002).

<sup>273</sup> GORDON, *supra* note 29, at 235.

<sup>274</sup> RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 173–74 (2nd ed. 1992) (1986).

1907, Church leaders released another document rejecting polygamy, after which leaders who engaged in polygamy or advocated it were removed from their posts and/or excommunicated from the Church.<sup>275</sup> At this point, the LDS Church embarked on a campaign to disassociate itself from the practice of polygamy.

Nonetheless, a small group of polygamists, the fundamentalists, continued to fight for the principle.<sup>276</sup> In 1912, Lorin Woolley publicized an 1886 visitation by Joseph Smith and Jesus Christ to then-LDS President John Taylor.<sup>277</sup> Taylor had held on tightly to his belief in polygamy<sup>278</sup> and repudiation had not occurred during his lifetime.<sup>279</sup>

According to Woolley, Taylor was instructed not to abolish polygamy and had a revelation from God confirming the validity of polygamy.<sup>280</sup> Taylor bestowed on Woolley and several others the authority to perform polygamous marriages.<sup>281</sup> When Woolley's statement was published in 1929, he was the only living individual to have received this power from Taylor in 1886.<sup>282</sup> Consequently, he became the leader of the burgeoning fundamentalist movement, and ordained several apostles to create a leadership structure around him.<sup>283</sup>

During the early period of the fundamentalist movement, the LDS Church was particularly hostile to the fundamentalists and to the practice of polygamy. In the 1930s, the Church adopted a number of internal practices against polygamy. First, the Church published *The Final Manifesto*, which condemned polygamy and denounced Taylor's 1886 revelation as invalid.<sup>284</sup> Next, the Church required its members to sign a loyalty oath that condemned polygamy.<sup>285</sup> The Church withheld support for poor polygamous families, refused to baptize children of polygamists (until the children were grown and willing to denounce the practice), and encouraged members to report those who attended fundamentalist meetings.<sup>286</sup> These efforts stemmed from the desire to centralize "true" Mor-

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<sup>275</sup> *Id.* at 180–81.

<sup>276</sup> HARDY, *supra* note 47, at 310–11 (describing continued support for polygamy among some Mormons).

<sup>277</sup> IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* 44 (1996).

<sup>278</sup> HARDY, *supra* note 47, at 52.

<sup>279</sup> ARRINGTON & BITTON, *supra* note 30, at 182 (noting Taylor's death in 1887).

<sup>280</sup> ALTMAN & GINAT, *supra* note 277, at 44. *See also* HARDY, *supra* note 47, at 341–42 (discussing Taylor's revelation).

<sup>281</sup> ALTMAN & GINAT, *supra* note 277, at 43.

<sup>282</sup> *Id.* at 44.

<sup>283</sup> *Id.*

<sup>284</sup> HARDY, *supra* note 47, at 342 (discussing church President Herber J. Grant's statement of 1933, which repudiated Taylor's alleged revelation).

<sup>285</sup> *Id.* at 343.

<sup>286</sup> *Id.*

mon beliefs and to prevent the fundamentalists from undermining LDS political gains that had occurred after statehood.

During the 1930s, LDS President Heber Grant announced that the Church would cooperate in criminal prosecutions of polygamists.<sup>287</sup> In 1935, the Utah legislature—largely influenced by the LDS Church—made cohabitation a criminal felony.<sup>288</sup> Accordingly, the legal campaign against polygamists had shifted from the nineteenth century federal attack on the LDS Church to the twentieth century attack on the fundamentalists by not just state and local officials, but also by the LDS Church itself.

Despite these barriers, the fundamentalists grew in numbers, establishing communities in both Salt Lake City, Utah and Short Creek—the latter would be a target of numerous raids by state and federal government agents.<sup>289</sup> Short Creek is known today by the city names of Hildale, Utah and Colorado City, Arizona.<sup>290</sup> In 1935, the fundamentalists began publishing a magazine called *Truth* that criticized the LDS Church and cited to nineteenth century Mormon leaders who advocated polygamy.<sup>291</sup>

In the 1940s, the Short Creek fundamentalists established a co-op—the United Effort Plan—to hold land in trust for the benefit of the community.<sup>292</sup> The Plan operated similar to the nineteenth century LDS Church corporation, which was based on communal ownership of property.

The first raid on Short Creek occurred in 1935 when Arizona law enforcement arrested the fundamentalist prophet John Barlow and two other men and three of their wives.<sup>293</sup> Although the charges against Barlow and two of the women were dismissed, the other men were convicted of cohabitation and imprisoned for one year.<sup>294</sup>

By 1944, the government escalated its enforcement efforts against the fundamentalists. In a raid significant enough to garner the attention of *Life* magazine, the federal government combined forces with state authorities in Utah, Arizona, and Idaho to arrest forty-six men and women on charges of cohabitation, white slavery (under the Mann Act), mailing

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<sup>287</sup> Ken Driggs, *'This Will Someday Be the Head and Not the Tail of the Church': A History of the Mormon Fundamentalists at Short Creek*, 43 J. CHURCH & ST. 49, 58 (2001).

<sup>288</sup> HARDY, *supra* note 47, at 343.

<sup>289</sup> See ALTMAN & GINAT, *supra* note 277, at 44–45 (explaining the establishment, growth, and development of the Short Creek fundamentalist group).

<sup>290</sup> Driggs, *supra* note 287, at 50–51.

<sup>291</sup> HARDY, *supra* note 47, at 341.;

<sup>292</sup> ALTMAN & GINAT, *supra* note 277, at 45; *see also* Driggs, *supra* note 287, at 64.

<sup>293</sup> ALTMAN & GINAT, *supra* note 277, at 46; *see also* Driggs, *supra* note 287, at 61 fn.61.

<sup>294</sup> ALTMAN & GINAT, *supra* note 277, at 46; *see also* Driggs, *supra* note 287, at 61.

obscene literature, and conspiracy.<sup>295</sup> Also cooperating in the enforcement effort was the LDS Church, which aided in the arrests and publicly condemned polygamy.<sup>296</sup>

When John Barlow died in 1949, the Short Creek fundamentalists split from the Salt Lake City fundamentalists, naming themselves the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS).<sup>297</sup> The Salt Lake City group remained committed to their founder Joseph Musser, while the Short Creek group doubted Musser's mental competence to lead.<sup>298</sup> In the early 1950s, Leroy Johnson became the prophet of Short Creek, a position he held until his death in 1986.<sup>299</sup>

## 2. *The Short Creek Raid of 1953 and its Continuing Legacy*

In 1953, Arizona authorities executed another raid on Short Creek, this one on a wider scale than any before.<sup>300</sup> By this time, Short Creek had become a thorn in the side of non-fundamentalist locals, the LDS Church, and welfare authorities.<sup>301</sup>

The 1953 raid was planned well in advance.<sup>302</sup> Arizona law enforcement hired private detectives to investigate various town events.<sup>303</sup> Mormon leaders in Phoenix and Mesa surveyed their membership to see who could house women and children from Short Creek, and it was rumored that the LDS Church had promised the State of Arizona \$100,000 if it acted against the Short Creek polygamists.<sup>304</sup> The Arizona legislature appropriated \$50,000 to plan the raid a year in advance,<sup>305</sup> though at one point the bill characterized the money as necessary for "grasshopper control."<sup>306</sup> The Salt Lake newspapers reported on the raid before it even occurred.<sup>307</sup>

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<sup>295</sup> ALTMAN & GINAT, *supra* note 277, at 46–47 (describing the 1944 raid); *see also* Driggs, *supra* note 287, at 65–66; *cf.* *The Lonely Men of Short Creek*, LIFE, Sept. 14, 1953, at 35–39 (detailing the 1953 raid).

<sup>296</sup> *See* ALTMAN & GINAT, *supra* note 277, at 48.

<sup>297</sup> *See id.* at 47; *see also* Driggs, *supra* note 287, at 66–67.

<sup>298</sup> ALTMAN & GINAT, *supra* note 277, at 47; *see also*, Driggs, *supra* note 287 at 67.

<sup>299</sup> *See* ALTMAN & GINAT, *supra* note 277, at 47; Driggs, *supra* note 287 at 68.

<sup>300</sup> *See* ALTMAN & GINAT, *supra* note 277, at 48; *see also* HARDY, *supra* note 47, at 344.

<sup>301</sup> *See* ALTMAN & GINAT, *supra* note 277, at 48.

<sup>302</sup> *See id.*, at 47–48; *see also* HARDY, *supra* note 47, at 344.

<sup>303</sup> ALTMAN & GINAT, *supra* note 277, at 48; HARDY, *supra* note 47, at 344; Driggs, *supra* note 287, at 68; James Cary, *The Untold Story of Short Creek*, AMERICAN MERCURY, May 1954, at 120.

<sup>304</sup> ALTMAN & GINAT, *supra* note 277, at 48–49.

<sup>305</sup> Driggs, *supra* note 287, at 68.

<sup>306</sup> Wiley S. Maloney, *Arizona Raided Short Creek—Why?*, COLLIER, Nov. 13, 1953, at 30, 31.

<sup>307</sup> VAN WAGONER, *supra* note 274, at 201.

Given the advance planning and warnings, the raid on Short Creek did not surprise the fundamentalists.<sup>308</sup> Observers kept watch overnight and lit flares to warn the community when law enforcement appeared in sight.<sup>309</sup> Before dawn on July 27, 1953, the raid began.<sup>310</sup> As one historian wrote:

[H]eavily armed law enforcement officers arrived at the Short Creek community square, car sirens wailing, red lights flashing, spotlights glaring. The posse was accompanied by national guardsmen, the Arizona Attorney General, superior and juvenile court judges, police-women, nurses, doctors, twenty-five carloads of newspapermen, and twelve liquor control agents. They expected to find the community sleeping. Instead, they found most members of the colony grouped around the city flagpole singing "America" while the American flag was being hoisted.<sup>311</sup>

Leroy Johnson, the prophet of Short Creek, met Sheriff Porter and told him that the fundamentalists "had run for the last time and were going to stand and shed their blood if necessary."<sup>312</sup> The authorities searched homes and confiscated many belongings,<sup>313</sup> arrested one hundred men, and placed eighty-five women and 263 children under the state's protective custody.<sup>314</sup>

The 1953 Short Creek Raid was qualitatively different from other enforcement efforts against polygamists. According to one polygamous husband:

[o]ur people have known other polygamy raids. But they say this time our families are to be broken up, our property to be confiscated . . . [N]othing hurt like the homecoming to an empty hearth—our discovery that the state of Arizona had spirited 154 innocent women and children away to Phoenix just to keep us husbands and fathers from our families.<sup>315</sup>

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<sup>308</sup> Driggs, *supra* note 287, at 68.

<sup>309</sup> *The Great Love-Nest Raid, Short Creek, Arizona*, TIME, Aug. 3, 1953, at 16.

<sup>310</sup> Ken Driggs, *After The Manifesto: Modern Polygamy And Fundamentalist Mormons*, 32 J. Church & State 367, 367 (1969).

<sup>311</sup> ALTMAN & GINAT, *supra* note 277, at 49.

<sup>312</sup> MARTHA S. BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* 130 (1993).

<sup>313</sup> ALTMAN & GINAT, *supra* note 277, at 49.

<sup>314</sup> *The Lonely Men of Short Creek*, *supra* note 295, at 35; *The Big Raid, Short Creek, Arizona*, NEWSWEEK, Aug. 3, 1953, at 26; *see also* Cary, *supra* note 303, at 119, 123.

<sup>315</sup> Edson Jessop & Maurine Whipple, *Why I Have Five Wives*, COLLIER, Nov. 13, 1953, at 30.

Ultimately, those arrested were set free, many agreeing to plea bargains with probation, since Arizona had no specific criminal statute to effectuate the State Constitutional prohibition on polygamy.<sup>316</sup> Many of the children—and some of the women—were placed in foster homes.<sup>317</sup> Some women were pressured to give up their children for adoption.<sup>318</sup> It was not until several years of legal battles after the raid that all the Short Creek women and children were allowed to return to their community.<sup>319</sup>

The Short Creek raid of 1953 was a political disaster.<sup>320</sup> Arizona Governor Howard Pyle spearheaded the raid, justifying the arrest of “almost the entire population of a community dedicated to the production of white slaves who are without hope of escaping this degrading slavery from the moment of their birth.”<sup>321</sup>

Yet, newsreel footage showed children being grabbed from the arms of their parents, and the words of polygamist husbands were printed in *Life* magazine, exclaiming: “[w]hat we are worried about is that we are never going to see our children again” and “[w]hose is the next religion that is going to become unpopular?” Not surprisingly, the public sympathized with the fundamentalists and condemned Pyle’s actions.<sup>322</sup> Later court battles vindicated the fundamentalists, finding gross violations of due process rights. Even worse for the government, according to one scholar, the media attention devoted to the raid may have drawn many Mormons specifically to the fundamentalists, increasing the number of polygamists overall.<sup>323</sup>

Since the 1953 raids, there have not been any concerted efforts to prosecute polygamists.<sup>324</sup> The FLDS now contains about eight to ten thousand members, approximately half of whom live in the former Short

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<sup>316</sup> ALTMAN & GINAT, *supra* note 277, at 50.

<sup>317</sup> HARDY, *supra* note 47, at 344.

<sup>318</sup> BRADLEY, *supra* note 312, at 143.

<sup>319</sup> Driggs, *supra* note 287, at 70.

<sup>320</sup> See Todd M. Gillett, Note, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497, 499 n.17 (2000) (explaining that officials had not prosecuted known offenders, and describing the raid as a “public relations nightmare”).

<sup>321</sup> See *Short Creek Smashed by Pyle*, ARIZONA REPUBLIC, July 27, 1953 (discussing Governor Pyle’s scathing accusations of the polygamous lifestyle in Short Creek); see also *Polygamy Debate Set For Today*, ARIZONA REPUBLIC, Feb. 17, 1955, at 1 (discussing Pyle’s accusations); *Cloak Dagger Raid*, ARIZONA REPUBLIC, July 28, 1953, at 1 (same); *Juvenile Delinquency (Plural Marriage): Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary United States Senate*, 84th Cong. 13 (1955).

<sup>322</sup> Rower, *supra* note 15, at 719; cf. *The Lonely Men of Short Creek*, *supra* note 295, at 37.

<sup>323</sup> Driggs, *supra* note 287, at 70. *The Great Love-Nest Raid*, *supra* note 309, at 16 (quoting one Short Creek leader who said “[t]his raid will give us \$10 million worth of publicity”).

<sup>324</sup> HARDY, *supra* note 47, at 344–45; Gillett, *supra* note 320, at 497–99.



Creek region (Colorado City and Hildale).<sup>325</sup> Other concentrated groups of the FLDS live in Salt Lake City and in Bountiful, British Columbia.<sup>326</sup>

Nearly as large in size as the FDLS is the group of fundamentalists that followed Musser after the death of John Barlow.<sup>327</sup> The Apostolic United Brethren (AUB) were led by Rulon Allred, Musser's designee from 1954 until 1977, when Rulon Allred was assassinated by a dissident group,<sup>328</sup> and his brother, Owen Allred became the new leader.<sup>329</sup>

From a statistical standpoint, though, the FDLS and AUB represent no more—and quite likely less—than half of the fundamentalists practicing polygamy in the United States.<sup>330</sup> Some fundamentalists live in clans ranging from fewer than one hundred members to over one thousand, as in the case of the Kingston clan's Latter-Day Church of Christ.<sup>331</sup> Many fundamentalists, perhaps as many as fifteen thousand, live as "Independents."<sup>332</sup> These fundamentalists do not recognize a specific prophet or leader, but may connect for religious and social services.<sup>333</sup>

Today, polygamy is outlawed across the nation through state criminal statutes. However, a few recent, high profile cases involving polygamists notwithstanding,<sup>334</sup> the prohibitions against polygamy are not being enforced in any systematic way.<sup>335</sup>

The legacy of Short Creek lives on, for both fundamentalists and political officials. Recent empirical scholarly work has engaged some of the fundamentalists about their experiences during the raid, and even

<sup>325</sup> *A Brewing Storm*, *ECONOMIST*, Oct. 15, 2005, at 33 (stating that the sect numbers 10,000).

<sup>326</sup> *Hunting Bountiful*, *ECONOMIST*, July 10, 2004, at 34.

<sup>327</sup> Mark Steyn, *The Marrying Kind*, *ATLANTIC MONTHLY*, May 2005, at 142 (giving number of AUB members as 5,000 to 7,000).

<sup>328</sup> Driggs, *supra* note 287, at 70 (stating that Rulon Allred was assassinated in 1977 "by followers of the crazed Ervil LeBaron, another polygamist leader").

<sup>329</sup> *Id.* at 67 (describing Allred's succession to Musser's position)

<sup>330</sup> Brooke Adams, *LDS Splinter Groups Growing*, *SALT LAKE TRIB.*, Aug. 11, 2005, at B1.

<sup>331</sup> See Valerie Richardson, *Two Many Wives—Fight Against Polygamy*, *INSIGHT ON THE NEWS*, May 7, 2001 (referring to Kingston's 34 wives and 200 children).

<sup>332</sup> Adams, *supra* note 330, at B1.

<sup>333</sup> *ALTMAN & GINAT, supra* note 277, at 61–62.

<sup>334</sup> See *State v. Green*, 108 P.3d 710 (Utah 2005) (affirming conviction for child rape based on defendant's intercourse with thirteen-year-old "bride"); see also *State v. Green*, 99 P.3d 820, 822 (Utah 2004) (affirming polygamy conviction); *State v. Green*, 99 P.3d 820 (Utah 2004) (affirming conviction on four counts of bigamy); see also *Clan Accused of Abuse*, *N.Y. TIMES*, Aug. 30, 2003, at 13 (discussing a case where a Utah woman sued her former polygamist clan, seeking \$110 million in damages for physical and sexual abuse).

<sup>335</sup> See *infra* note 651–62 and accompanying text. See also Dirk Johnson, *Polygamists Emerge From Secrecy, Seeking Not Just Peace but Respect*, *N.Y. TIMES*, Apr. 9, 1991, at A22 ("[I]n recent years, as state law enforcement officials have adopted an unwritten policy of leaving them alone, polygamists have gone public.").

forty or fifty years after the fact, the raid still has profound influence and meaning to them.<sup>336</sup>

Fundamentalist women are still haunted by fears that they would lose their children to arbitrary government action.<sup>337</sup> A fundamentalist woman who had been a girl at the time of the Raid explained how she told herself that the Raid was a punishment from God for her sins and could never shake that.<sup>338</sup> Dan Barlow, the Mayor of Colorado City, described how even forty years after the fact it was difficult to talk about the experience of having the government take his three children, one who was ten days old at the time.<sup>339</sup>

At the same time, "law enforcement officials generally [took] a 'live and let live' attitude toward polygamists."<sup>340</sup> This was due to evidentiary hurdles in proving polygamy, the prominence of fundamentalists in Utah and Arizona, and the apathy of prosecutors.<sup>341</sup> In 1998, Utah's Attorney General, Jan Graham, advised prosecutors to avoid prosecuting consenting adults for polygamy.<sup>342</sup> A more recent pronouncement by the current Utah Attorney General, Mark Shurtleff stated: "Would you truly have us arrest every polygamist? Do you want a Short Creek again? We barely have the resources to prosecute crimes within these organizations."<sup>343</sup>

Modern state efforts to deal with harms from polygamy have focused on indirect forms of regulating the polygamous family, including prohibiting child bigamy and raising the age of consent to marriage.<sup>344</sup> These tools either penalize or increase penalties for crimes against young women who were forced into polygamy. At the same time, these legal provisions suffer from the same enforcement difficulties as polygamy prohibitions historically have: they are difficult to prove in the face of unwilling witnesses and lack of formal records. Beyond that, enforcement is captured in the ongoing political battle over the treatment of

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<sup>336</sup> See, e.g., DAVID ISAY, HOLDING ON 169–73 (1996); see also Martha S. Bradley, *The Women of Fundamentalism: Short Creek, 1953*, 23 DIALOGUE: J. OF MORMON THOUGHT 15 (1990); Driggs, *supra* note 287, at 76–80.

<sup>337</sup> Bradley, *supra* note 336, at 34.

<sup>338</sup> *Id.*

<sup>339</sup> ISAY, *supra* note 336, at 169–70.

<sup>340</sup> See *infra* note 651–62 and accompanying text.

<sup>341</sup> See Rower, *supra* note 15; Johnson, *supra* note 335, at A22 (noting that "trying to do anything about it legally would be opening one Pandora's box after another," and that "once you start going after people for cohabitation, or adultery, where do you stop?").

<sup>342</sup> James Brooke, *Utah Struggles with a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, § 1, at 12.

<sup>343</sup> Nancy Perkins, *Polygamists Get Town Hall Hearing*, DESERET MORNING NEWS, Mar. 4, 2005, at B1.

<sup>344</sup> See Dan Harrie, *Bill to Raise Marriage Age to 16 Easily Passes Senate*, SALT LAKE TRIB., Feb. 10, 1999, at A5; see also Dawn House, *Prosecution of Plural Marriage a Thorny Issue for Courts*, SALT LAKE TRIB., June 28, 1998, at J6.

polygamists. The era of under-enforcement began after Short Creek and persists now, over fifty years later.<sup>345</sup>

## II. WHAT CAUSES POLYGAMY?

In the United States, the prevailing view of polygamy mirrors that of the *Reynolds* opinion: polygamy is a nefarious practice unfit for civilized society. Under this view, the presence of polygamy is a sign of backward-thinking and underdevelopment.<sup>346</sup>

The objections to polygamy have remained consistent over time. As Western liberal society has recognized the importance of multiculturalism and tolerance,<sup>347</sup> public hostility toward polygamy in political and legal discourse persists.

In the second half of the nineteenth century, Christian Americans attacked polygamy for being anti-Christian and immoral.<sup>348</sup> Other Americans also attacked the practice of plural marriage: abolitionists<sup>349</sup> and suffragettes<sup>350</sup> likened the wives of polygamous unions to slaves, depicting them in political cartoons bound in chains and surrounded by old, fat, greedy men.<sup>351</sup>

Emerging in the early twentieth century and continuing until today, the crusade against polygamy has found its voice in feminism<sup>352</sup> and egalitarianism,<sup>353</sup> where polygamy is viewed as a means to subjugate

<sup>345</sup> Polygamy is not the only instance of family regulation in which there has been a struggle to balance over-enforcement or intervention versus under-enforcement. See, e.g., Elizabeth Bartholet, *Under-Intervention Versus Over-Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 365 (2005) (discussing child welfare more generally). However, in the polygamy context, the contrast in state behavior has been far more stark in shifting from one dichotomy to the other.

<sup>346</sup> See Mary Lyndon Shanley, *Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 LAW & SOC. INQUIRY 923, 928 (2002) ("Government officials and social reformers pressured those Native Americans who practiced polygamy and consensual divorce to abandon these traditional tribal norms in order to become 'civilized' and be eligible for citizenship.").

<sup>347</sup> Thomas M. Franck, *Is Personal Freedom a Western Value?*, AM. J. INT'L L. 593, 596-99 (1997) (tracing development of tolerance as a public ideal).

<sup>348</sup> Elisha, *supra* note 63, at 46.

<sup>349</sup> See, e.g., Kincaid, *supra* note 59, at 82 (describing abolitionists' opposition to polygamy).

<sup>350</sup> Sarah Barringer Gordon, *The Liberty of Self-Degradation: Polygamy, Woman Suffrage, and Consent in Nineteenth-Century America*, 83 J. AM. HIST. 815, 828 (1996) (citing suffragists' opposition to polygamy).

<sup>351</sup> GORDON, *supra* note 29, at 3.

<sup>352</sup> See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1145 (2004) (stating that the feminist position is that polygamy "should be prohibited"); Sealing, *supra* note 71, at 696 (same).

<sup>353</sup> Brenda Oppermann, *The Impact Of Legal Pluralism on Women's Status: An Examination of Marriage Laws In Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L.J. 65, 73 (2006); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, General Recommendation 21, Equality in Marriage and Fam-

women.<sup>354</sup> At the same time, the Christian right continues to rally against the practice as being immoral and anti-Christian.<sup>355</sup>

An examination of the social science literature on polygamy demonstrates, however, that the conventional understanding of the practice is overly simplistic.<sup>356</sup> Polygamy can certainly be oppressive and patriarchal—a system that cabins women into prototypical gender stereotypes while denying them fundamental rights.<sup>357</sup> Yet polygamy, in other contexts, can be communitarian and inclusive, allowing women greater participation in the economics and social structure of the family unit.<sup>358</sup>

Any scholarly investigation into the propriety of criminalizing polygamy and regulating families must therefore appreciate the complexity and nuances of the practice of polygamy. It is insufficient merely to label polygamy as oppressive, harmful to women, or otherwise indicative of a backwards civilization without any empirical evidence. This form of question-begging presumes that polygamy is both caused by harmful societal conditions and that it also perpetuates these deleterious conditions. Even if one assumes that polygamy is mired in a cycle of self-perpetuating harm, there is the chicken-and-egg question of how the cycle began. Furthermore, it ignores the underlying question whether polygamous societies can thrive and self-sustain and, if so, under what conditions.

This section untangles the web of social science literature studying the phenomenon of polygamous practice to demonstrate that conventional wisdom about polygamy—the belief that polygamy is primarily both a cause and effect of societal subjugation of women—is faulty. This inquiry into the sociology, economics, evolutionary biology, and cultural anthropology literature identifies the characteristics that are most commonly correlated with polygamous practice from an empirical standpoint, and explores the overarching theories supported by the data.

This section presents several theoretical arguments advanced to explain the existence of polygamy and the empirical data used to support or

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ily Relations, HRI/GEN/1/Rev.1 at 90 (1994), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (“Polygamous marriage contravenes a woman’s right to equality with men.”).

<sup>354</sup> See *supra* notes 352–353.

<sup>355</sup> See, e.g., Pat Buchanan, *Santorum Before the Inquisition*, Apr. 28, 2003, <http://www.theamericancause.org/patsantorumbeforetheinquisition.htm>.

<sup>356</sup> See Donovan, *supra* note 211, at 577 (“A recent cross-cultural analysis has, however, ponderously demonstrated that polygamy is not a monolithic institution. The correlatives of polygamy in one part of the world do not readily transfer to another.”); see generally Remi Clignet & Joyce A. Sween, *For a Revisionist Theory of Human Polygyny*, 6 *SIGNS* 445 (1981) (describing ways in which polygynous marriages vary).

<sup>357</sup> Rower, *supra* note 15, at 716 (stating that Fundamentalist Mormon polygamy creates an “uneven power differential” in which women are confined to stereotypical roles).

<sup>358</sup> Emens, *supra* note 25, at 315–17.

disprove these theories.<sup>359</sup> The theories discussed below identify polygyny in terms of biology, demographics, economic conditions, political regime, and religious ideology. This section also presents a theory that explains the rarity of polyandry and why it exists where it does.

This analysis does not explore polygamy fully among any one specific societal group, but rather extrapolates some general observations about the nature of the practice of polygamy and acknowledges the varying degrees of benefits and harms that can stem from it.<sup>360</sup>

#### A. META-THEORIES OF POLYGAMY

In 1957, George Murdock presented evidence that seventy-five percent of world cultures practiced some form of polygamy.<sup>361</sup> Yet even when expressly permitted by law, the global incidence of polygamy is fairly low.<sup>362</sup> Although many societies feature some practice of polygamy, it is not always frequently practiced within each group.<sup>363</sup> The practice of polygamy—in its varying shapes and forms—is limited to particular circumstances.<sup>364</sup>

Accordingly, scholars in various fields have labored to explain the “why”<sup>365</sup> behind polygamy: Why do some groups practice polygyny?

<sup>359</sup> The studies discussed below are descriptive, not normative. They attempt to determine what characteristics lead to polygamy as an accepted and viable form of family structure; they do not argue that polygamy should—or should not—be the norm. Furthermore, these theories and the empirical tests they rely on often present little evidence as to which direction causation runs. The studies by and large identify characteristics of a society that correlate with polygamy, rather than demonstrate a root cause of polygamy.

<sup>360</sup> See PETER BRETSCHNEIDER, *POLYGyny: A CROSS-CULTURAL STUDY* 184 (1995) (“[P]redictors relevant to a worldwide context do not replicate cross-regionally, and vice versa.”). For a more general discussion on some problems that family law scholars have encountered in conducting empirical work, see Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083 (2002) (describing difficulties in relying on state cross-sectional data).

<sup>361</sup> See George Peter Murdock, *World Ethnographic Sample*, 59 AM. ANTH. 664, 686 (1957).

<sup>362</sup> Bergstrom, *supra* note 64, at 1.

<sup>363</sup> See, e.g., J. Chamie, *Polygyny Among Arabs*, 40 POPULATION STUD. 55, 56 (1986) (noting that the proportion of polygynous males in Muslim Arab states is relatively low—from about two to twelve percent).

<sup>364</sup> See, e.g., Chamie, *supra* note 363, at 62 (finding that polygyny occurs more frequently in men and women who lack formal education); Nasra M. Shah, *Women's Socioeconomic Characteristics and Marital Patterns in a Rapidly Developing Muslim Society, Kuwait*, 32 J. COMP. FAM. STUD. 163, 171 (2004) (stating that polygyny occurs more frequently among illiterate husbands).

<sup>365</sup> See, e.g., Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973) [hereinafter Becker, *Part I*] (economics); Gary S. Becker, *Theory of Marriage: Part II*, 82 J. POL. ECON. S11 (1974) [hereinafter Becker, *Part II*] (economics); A.T. Dash & R. Cressman, *Polygamy in Human and Animal Species*, 88 MATH. BIOSCIENCES 49 (1988) (mathematics); Gary R. Lee & Les B. Whitbeck, *Economic Systems and Rates of Polygyny*, 21 J. COMP. FAM. STUD. 13 (1990) (sociology); Shah, *supra* note 364, at 171 (medicine); Douglas R. White,

Why do hardly any groups practice polyandry? And under what conditions do either of these practices actually occur?<sup>366</sup>

Scholars have suggested a variety of explanations, ranging from demographics and evolutionary biology to economics, political regime or structure, and the role of religious thought and practice. Yet amidst the abundant theories, there are two overarching questions cutting across the search for the root cause of polygamy.

The first issue is whether polygamy is a top-down or bottom-up phenomenon. That is, do the leaders and elite members of a society dictate whether polygamy is acceptable within that society? Or do ordinary individuals decide if they would prefer polygamous family structures?<sup>367</sup> Theories that describe polygamy as a function of demographics, economic conditions, or biology represent a bottom-up view of the practice.<sup>368</sup> Conversely, theories that explain polygamy as a function of political regime or religious ideology posit a top-down approach.<sup>369</sup>

The second overarching thematic inquiry in which the polygamy theorists diverge is whether polygamy's incidence—or lack thereof—is based on male dominance and choice,<sup>370</sup> or instead depends on female empowerment and choice.<sup>371</sup> The neo-classical economic model and the

*Rethinking Polygyny: Co-Wives, Codes, and Cultural Systems*, 29 CURRENT ANTH. 529 (1988) (anthropology) [hereinafter White, *Rethinking Polygyny*].

<sup>366</sup> See, e.g., Stephen K. Sanderson, *Explaining Monogamy & Polygyny in Human Societies: Comment on Kanazawa and Still*, 80 SOC. FORCES 329 (2001) (examining causes for polygyny and monogamy); Ronald M. Weigel & M. Margaret Weigel, *Demographic Factors Affecting the Fitness of Polyandry for Human Males: A Mathematical Model and Computer Simulation*, 8 ETHOLOGY & SOCIOBIOLOGY 93 (1987) (examining the infrequency of polyandry).

<sup>367</sup> See, e.g., Satoshi Kanazawa & Mary C. Still, *Why Monogamy*, 78 SOC. FORCES 25 (1999) (arguing that women choose whether to marry polygamously or monogamously, based on economic factors).

<sup>368</sup> See, e.g., Dash & Cressman, *supra* note 365 (postulating that polygamy results from individual strategies to maximize reproductive success); Amyra Grossbad, *An Economic Analysis of Polygyny: The Case of Maiduguri*, 17 CURRENT ANTH. 701 (1976) (presenting an economic analysis of motives for polygamous marriage).

<sup>369</sup> See Alean Al-Krenawi & John R. Graham, *The Story of Bedouin-Arab Women in a Polygamous Marriage*, 22 WOMEN'S STUD. INT'L F. 497 (1999) (attributing Bedouin polygamy to Islam); Rower, *supra* note 15, at 726 (arguing that polygamy is forced on females, particularly girls, using religious tenets); Gary Wyatt, *Mormon Polygyny in the Nineteenth Century: a Theoretical Analysis*, 20 J. COMP. FAM. STUD. 13, 16 (1989) ("[T]he evidence clearly suggests that the practice of Mormon polygyny resulted from belief in a particular ideology."). But see Steven F. Faux & Harold L. Miller Jr., *Evolutionary Speculations on the Oligarchic Development of Mormon Polygyny*, 5 ETHOLOGY & SOCIOBIOLOGY 15, 15 (1984) (characterizing early Mormon polygyny as a top-down practice with biological underpinnings).

<sup>370</sup> See, e.g., Ian M. Timaeus & Angela Reynar, *Polygynists and Their Wives in Sub-Saharan Africa: An Analysis of Five Demographic and Health Surveys*, 52 POPULATION STUD. 145, 148 (1998) ("[T]he decision to take another wife is made by men.").

<sup>371</sup> See, e.g., Irwin Altman, *Challenges and Opportunities of a Transactional World View: Case Study of Contemporary Mormon Polygynous Families*, 21 AM. J. COMMUNITY PSYCH.

theories premised upon it presume that polygamy requires a meeting of the minds between each gender.<sup>372</sup> But this presumed neutrality between males and females ignores the status of women across polygamous societies,<sup>373</sup> which varies greatly.<sup>374</sup> Societies often relegate women not through polygamy, but through denying women the ability to exercise property rights—that is, earn wages for their labor, inherit land, and so forth.<sup>375</sup>

Some theories of polygamy embrace an implicit or explicit view of which gender is really driving polygamous practices.<sup>376</sup> In many cultures, the first wife is the one who suggests that her husband take a second wife.<sup>377</sup> In a 1960 opinion survey in the Ivory Coast, eighty-five percent of women expressed that they preferred to live polygamously, as opposed to monogamously, due to economic or domestic reasons.<sup>378</sup>

At the same time, the notion that men and women act independently in gender blocs ignores the complicated multi-generational family relationships involved. For example, even if a woman does not have status or power in a given society, there might be a man, such as her father, attempting to act in her best interest.<sup>379</sup> But sometimes a daughter may be “traded” for another to wed a brother, or even the father himself.<sup>380</sup> On

135, 145 (1993) (stating that both husbands and wives choose whether to add another wife to a polygynous marriage); Kanazawa & Still, *supra* note 367 (arguing that women choose whether to marry polygamously or monogamously, based on economic factors).

<sup>372</sup> See Becker, *Part I*, *supra* note 365, at 815–16; Becker, *Part II*, *supra* note 365 (both assuming classical “rational choice” model for decision to marry).

<sup>373</sup> For example, Becker makes no mention of the differing status of men and women. Becker, *Part II*, *supra* note 365.

<sup>374</sup> See Alean Al-Krenawi & Rachel Lev-Wiesel, *Wife Abuse among Polygamous and Monogamous Bedouin-Arab Families*, 36 J. DIVORCE & REMARRIAGE 151, 154, 161 (2002) (noting large difference in power between men and women in Bedouin-Arab society); Yasuko Hayase & Kao-Lee Liaw, *Factors on Polygamy in Sub-Saharan Africa: Findings Based on the Demographic and Health Surveys*, 35 DEVELOPING ECON. 293, 296 (1997) (stating that women have “little property right” and are “treated essentially as a form of property to be exchanged for material goods between families”).

<sup>375</sup> FRANCISCO CABRILLO, *THE ECONOMICS OF THE FAMILY AND FAMILY POLICY* 67 (1999).

<sup>376</sup> See, e.g., Kanazawa & Still, *supra* note 367, (arguing explicitly for a theory of female choice); Gary R. Lee, *Marital Structure and Economic Systems*, 41 J. MARRIAGE & FAM. 701, 712 (1979) (assuming implicitly that males choose whether to add wives; “wives are valued” as productive family members); Sanderson, *supra* note 366, at 330–31 (arguing explicitly for a theory of male choice).

<sup>377</sup> ESTER BOSERUP, *WOMEN’S ROLE IN ECONOMIC DEVELOPMENT* 43 (1989); Altman, *supra* note 371, at 145.

<sup>378</sup> BOSERUP, *supra* note 377, at 43.

<sup>379</sup> See Ward Rommel, *Sexual Selection and Human Behavior*, 41 SOC. SCI. INFO. 439, 449–50 (2002) (noting that, in some societies, parents arranging a marriage will take the interests of their daughter into account).

<sup>380</sup> “Bridewealth,” or payment by a man to a wife’s family, is sometimes used by the woman’s father to purchase another wife for himself. Edwins Laban Moogi Gwako, *Polygyny Among the Logoli of Western Kenya* 93 ANTHROPOS 331, 336 (1998).

the other hand, women can form alliances with their sons, who are competing in the marriage market with their father.<sup>381</sup>

Thus, identifying which gender is motivating a particular practice of polygamy might be more complicated than simply looking at the wives and their family structures. Only within the context of a larger framework can one begin to appreciate the full relationship between the practice of polygamy and gender roles and stereotypes within a society.

The subsections that follow evaluate the theories proffered to explain the incidence of polygamy. Each subsection presents a specific theory of polygamous practice along with a commentary on how that theory fits within the more general sociological models of gender choice theories and of how polygamous practices are adopted.

## B. POLYGyny AS A FUNCTION OF BIOLOGY

Several theories of polygamy are rooted in biology.<sup>382</sup> In the animal kingdom, "polygyny" is widespread; that is, the male members of the species that mate do so many times, but not all males mate, whereas the female members universally mate, but only a few times.<sup>383</sup> This phenomena is known as the "Bateman Effect" or "Bateman's Principle," named for the biologist who conducted experiments in the 1940s demonstrating these mating variances.<sup>384</sup> This sociobiological theory often is expressed as an innate male desire for sexual variety.<sup>385</sup>

Reproductive success in each gender differs because the costs of investment in offspring are not the same.<sup>386</sup> Since female investment in offspring is significantly greater than male investment, reproductive success in females produces a small number of children, whereas reproduc-

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<sup>381</sup> See John Hartung, *Polygyny and the Inheritance of Wealth*, 23 CURRENT ANTH. 1, 5 (1982).

<sup>382</sup> See, e.g., MEYER F. NIMKOFF, COMPARATIVE FAMILY SYSTEMS 17 (1965); Faux & Miller, *supra* note 369, at 15 (attributing polygyny to males' attempts to maximize reproductive success).

<sup>383</sup> See Daniel D. Wiegmann & Truc Nguyn, *Mating System and Demographic Constraints on the Opportunity for Sexual Selection*, 69 THEORETICAL POPULATION BIOLOGY 34, 34 (2005) (males in polygynous populations may mate with many females).

<sup>384</sup> Jonathan Knight, *Sexual Stereotypes*, 415 NATURE 254 (Jan. 17, 2002) (discussing challenges and refinements to Bateman's Principle).

<sup>385</sup> See DONALD SYMONS, THE EVOLUTION OF HUMAN SEXUALITY (1979); PIERRE L. VAN DEN BERGHE, HUMAN FAMILY SYSTEMS: AN EVOLUTIONARY VIEW (1979); Hartung *supra* note 381, at 1-12.

<sup>386</sup> See Knight, *supra* note 384, at 254 (stating that under Bateman's Principle, sperm are small and "cost next to nothing to produce" while females invest "a relatively large amount of energy in each [egg]", and that "promiscuity is more valuable to the reproductive success of males than to that of females"); Rommel, *supra* note 379, at 443 ("If the parental investment in an individual offspring differs between the two sexes of a species, then the two sexes also have a different maximum reproductive success.").



tive success in males produces a higher number.<sup>387</sup> To maximize the number of offspring, males must mate with more than one female.<sup>388</sup> Under the "r-strategy," men maximize offspring while minimizing investment in each child.<sup>389</sup> But as male members of a species invest more in their offspring, the reproduction strategy moves toward that of females, and monogamy occurs.<sup>390</sup>

Some scholars have theorized that polygamy is a middle stage level of evolution and occurs in middle-level societies.<sup>391</sup> The theory is that humans are evolving from tendencies of promiscuity toward monogamy.<sup>392</sup> Monogamy is preferable from an evolutionary standpoint because it leads to greater altruism within families, due to a greater "investment" in that family, while promiscuity undermines any such investment. Polygamy is a stage in between.<sup>393</sup>

The obvious flaw in sociobiological theories of polygamy is that people do not necessarily prioritize reproductive success over other factors.<sup>394</sup> That is to say, competing values and the capacity for higher-order reasoning can overcome instinctual tendencies to reproduce.<sup>395</sup>

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<sup>387</sup> Knight, *supra* note 384, at 254.

<sup>388</sup> See E.O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* fig.15.6 (1975).

<sup>389</sup> See, e.g., Richard D. Alexander et al., *Sexual Dimorphisms and Breeding Systems in Pinnipeds, Ungulates, Primates, and Humans*, in *EVOLUTIONARY BIOLOGY AND HUMAN SOCIAL BEHAVIOR: AN ANTHROPOLOGICAL PERSPECTIVE* 402, 413 (Napolean A. Chagnon & William Irons eds., 1979); Michael S. Alvard, *Polygyny as a Human Female Reproductive Strategy*, 5 HALIKSA'I: UNM CONTRIBUTIONS TO ANTH. 42, 47 (1986); Napolean Chagnon, *Is Reproductive Success Equal in Egalitarian Society?*, in *EVOLUTIONARY BIOLOGY AND HUMAN SOCIAL BEHAVIOR: AN ANTHROPOLOGICAL PERSPECTIVE* 374 (Napolean A. Chagnon & William Irons eds., 1979); Hartung, *supra* note 381, at 1.

<sup>390</sup> See Michelle Galler Riegel, *Monogamous Mammals: Variations on a Scheme*, *SCI. NEWS*, July 30, 1977, at 76 (stating that humans became monogamous because infants needed prolonged parental care).

<sup>391</sup> See, e.g., M. KAY MARTIN & BARBARA VOORHIES, *FEMALE OF THE SPECIES* (1975); Rae Lesser Blumberg & Robert F. Winch, *Societal Complexity and Familial Complexity*, 77 *AM. J. OF SOC.* 898 (1972); Umberto Melotti, *Towards a New Theory of the Origin of the Family*, 22 *CURRENT ANTH.* 625 (1981); Marie W. Osmand *Toward Monogamy: A Cross-Cultural Study of Correlates of Type of Marriage*, 44 *SOC. FORCES* 8 (1965). This theory dates back to the nineteenth century and the work of evolutionary theorist Frederick Engels. *FREDERICK ENGELS, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (Eleanor B. Leacock ed., International Publishers 1972).

<sup>392</sup> Rommel, *supra* note 379, at 445 ("[F]eatures of the modern family such as monogamy . . . are adaptations to the industrial production mode.").

<sup>393</sup> Umberto Melotti, *Towards a New Theory on the Origin of the Family: Some Hypotheses on Monogamy, Polygyny, Incest Taboo, Exogamy, and Genetic Altruism*, 21 *MANKIND Q.* 99, 110 (1980) (stating that polygamy overtook promiscuity, and then monogamy overtook polygamy).

<sup>394</sup> CABRILLO, *supra* note 375, at 65 (citing MARVING HARRIS, *OUR KIND* (1989)).

<sup>395</sup> For an interesting discussion of the appropriate role of evolutionary biology in setting legal policy, see June Carbone & Naomi Cahn, *The Biological Basis of Commitment: Does One Size Fit All?*, 25 *WOMEN'S RTS. L. REP.* 223 (2004) (reinforcing the importance of norms that develop and increase family stability).

## C. POLYGyny AS A FUNCTION OF DEMOGRAPHICS

The sex ratio theory posits that polygamy arises when there are many more women in a given society than there are men of a comparable age.<sup>396</sup> Gender imbalance can occur due to circumstances such as war or other forms of violence, which disproportionately affect male members of most societies.<sup>397</sup> Male migration from rural to urban areas may also may leave behind communities with an uneven sex ratio.<sup>398</sup> The resulting demographics produce a situation ripe for polygyny, especially within those societies in which remaining single poses a significant hardship on women.

In several of his works, Gary Becker lays out his theory of the marriage market.<sup>399</sup> His article, *A Theory of Marriage* (Parts I and II), theorizes that monogamy would occur, as a method of optimal sorting, if: (1) all men and all women were identical; (2) the number of men was equal to the number of women, i.e. if there was an even sex ratio; and (3) there was a diminishing return to economic productivity from adding additional spouses.<sup>400</sup>

To support his theory, Becker relied on the empirical account of Paraguay, where wartime killing diminished the male population of Paraguay and directly led to an increase in polygyny, as the supply of men available for marriage was artificially decreased.<sup>401</sup> This theory was also supported by a contemporaneous study by Melvin Ember, comparing the sex ratios of monogamous and polygamous societies.<sup>402</sup>

Amyra Grossbard compared two interacting cultures to demonstrate the sex ratio theory at play.<sup>403</sup> Among the Maiduguri people in Nigeria,

<sup>396</sup> Melvin Ember, *Warfare, Sex Ratio, and Polygyny*, 13 *ETHNOLOGY* 197, 197 (1974).

<sup>397</sup> *Id.*

<sup>398</sup> See Heston E. Phillips et al., *Sex Ratios in South African Census Data, 1970-96*, 20 *DEV. S. AFR.* 387, 388 (2003) ("When there is a high level of labour migration, and males are more likely to be labour migrants than females, then areas of net in-migration will have a high (male) sex ratio and areas of outmigration will have a low sex ratio."); Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship, and Warfare*, 90 *AM. ANTH.* 871, 884 ("High levels of male labor migration skew the sex ration in a society, and may provide continued support for polygyny . . ."). However, migration and urbanization may also allow a man to have spouses in multiple locations—the new urban residence and the village. Gwako, *supra* note 380, at 342.

<sup>399</sup> See, e.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* 66 (1981); Becker, *Part I*, *supra* note 365; Becker, *Part II*, *supra* note 365.

<sup>400</sup> Becker, *Part I*, *supra* note 365 (analyzing the "marriage market"); Becker, *Part II*, *supra* note 365 (extending the analysis of the marriage market laid out in *Part I*).

<sup>401</sup> Becker, *Part II*, *supra* note 365, at S18.

<sup>402</sup> See Ember, *supra* note 396, at 197 (studying twenty-one societies selected from the Human Relations Area File reports, eight of which practiced polygamy); see also Dash & Cressman, *supra* note 365, at 56–57 (mathematical proof that level of polygamy would be related to sex-ratio based on birth levels and mortality rates).

<sup>403</sup> Amyra Grossbard, *An Economic Analysis of Polygyny: The Case of Maiduguri*, 17 *CURRENT ANTH.* 701, 705 (1976).

the Kanuri politically dominated the Shuwa Arabs.<sup>404</sup> Kanuri men were permitted to marry Shuwa women, but Shuwa men could not marry Kanuri women.<sup>405</sup> This asymmetric mobility shifted the sex ratio among each group.<sup>406</sup> Kanuri men were considerably fewer in number than the pool of women they could choose to marry.<sup>407</sup> Shuwa men, on the other hand, were greater in number than the Shuwa women available to them.<sup>408</sup> As a result, the Kanuri were more likely to be polygamous than the Shuwa.<sup>409</sup>

There are two main weaknesses in the sex ratio theory of polygyny. First, it is not clear which direction the causation runs.<sup>410</sup> Although the data show that the practice of polygyny is correlated with an uneven sex ratio,<sup>411</sup> it does not answer the question whether a society adopts polygyny in response to the lack of men due to war or violence, or whether the practice of polygyny increases the amount of war or violence by creating a surplus of unmarried men.<sup>412</sup>

That is, perhaps men who are not able to compete in the “marriage market” due to other factors, such as lack of resources, are driven to more violent behavior because they do not have the responsibility for families or benefit from the counsel of wives. Another explanation of the connection between violence and polygamy suggests that “male-oriented kin groups,” or clans, may seek expansion into nearby territory to capture women in warfare to help achieve a more favorable sex ratio for polygamy.<sup>413</sup>

The second problem with the sex ratio theory is that it does not explain the lack of polyandry.<sup>414</sup> Ostensibly, in countries that feature “missing women”—a phenomena documented by Amartya Sen<sup>415</sup> and

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> Polygyny itself may skew sex ratios. White & Burton, *supra* note 398, at 873. (noting that research has shown an effect on the natal sex ratio).

<sup>411</sup> Grossbard, *supra* note 403, at 705.

<sup>412</sup> Research on this question is inconclusive. White & Burton, *supra* note 398, at 882 (concluding only that “polygyny is associated with warfare”) (emphasis added).

<sup>413</sup> White & Burton, *supra* note 398, at 884.

<sup>414</sup> Instead a lack of women within a population is linked primarily to increased crime, violence and prostitution. *See, e.g.,* Andrea M. den Boer & Valerie M. Hudson, *The Security Threat of Asia's Sex Ratios*, 24 SAIS REV. 27, 38–39 (2004); Robert Marquand, *China Faces Future As Land of Boys*, CHRISTIAN SCI. MONITOR, Sept. 3, 2004, at 1.

<sup>415</sup> Amartya Sen, *Missing Women*, 304 BRITISH MED. J. 586 (1992). Later researchers obtained lower figures for the number of missing women. Stephan Klasen & Claudia Wink, *Missing Women: Revisiting the Debate*, 9 FEMINIST ECON. 263, 274–75 (stating that a current figure is about 93 million).

others<sup>416</sup>—the sex ratio theory would suggest that the demographics would produce many more instances of polyandry than currently exist.

#### D. POLYGyny AS A FUNCTION OF ECONOMIC CONDITIONS

There are several theories related to the economics of polygyny, both on a macro and a micro level. Some of these studies are specifically related to the distribution of wealth between the male members of a society. Other theories focus more on the specific type of economy in a given society. These arguments often hinge on the role women play within the economy. The subsections that follow distinguish these two different economic theories.

##### 1. *Wealth Inequality Among Men*

As explained above, Becker hypothesized from existing studies that polygamy will occur when there is inequality in the wealth of men. This is particularly likely in agrarian societies, where an extra spouse can increase productivity based on existing land assets. In these settings, one would find more incidents of polygyny among the wealthier men.<sup>417</sup> This theory is not wholly unrelated to other economic theories that focus on the macroeconomics of a society.

Subsequent studies have revolved around identifying whether polygyny can be explained by economic benefits to the parties involved.<sup>418</sup> Theodore Bergstrom theorized that polygyny arises as an effort to maximize grandchildren in societies where males inherit wealth.<sup>419</sup> In these societies, bridewealth payments, or brideprice, are typically given to the male relatives of a bride, meaning that women command a positive price.<sup>420</sup> Thus, marrying daughters off brings in money that can be used to purchase a wife for the father or sons.<sup>421</sup> This description tends to correspond to the practice of polygyny in Africa,<sup>422</sup> and recent work by Michele Tertilt has argued that polygyny is correlated with poverty pre-

<sup>416</sup> Stephan Klasen, *Missing Women Reconsidered*, 22 *WORLD DEV.* 1061, 1061 (1994).

<sup>417</sup> Becker, *Part II*, *supra* note 365, at S19; White, *Rethinking Polygyny*, *supra* note 365, at 549 (“[W]ealth-increasing polygyny complex is strongly supported.”); *see also id.* at 550 (finding “greater frequency of polygyny among men of wealth, rank, nobility, or higher social class”).

<sup>418</sup> *See, e.g.*, Hayase & Liaw, *supra* note 374; Kanazawa & Still, *supra* note 367.

<sup>419</sup> Bergstrom, *supra* note 64, at 13.

<sup>420</sup> *Id.* at 12.

<sup>421</sup> Jack Goody, *Bridewealth and Dowry in Africa and Eurasia*, in *BRIDEWEALTH AND DOWRY* 1, 5 (Cambridge Papers in Social Anthropology, No. 7, 1973).

<sup>422</sup> *See, e.g.*, Bert N. Adams & Edward Mburugu, *Kikuyu Bridewealth and Polygyny Today*, 25 *J. COMP. FAM. STUD.* 159, 162–63 (1994) (reporting that nearly all Kikuyu males surveyed had paid bridewealth; about 17% were in polygynous relationships).

cisely because the existence of brideprice crowds out other economic investments.<sup>423</sup>

Bergstrom used economic modeling to illustrate Becker's equality principle—that when wealth is evenly distributed and the sex ratio is 1:1, equilibrium produces one wife for every man.<sup>424</sup> Bergstrom also demonstrated that if the sex ratio is held constant at 1:1, the number of wives a man has is equal to the ratio of his wealth to that of the societal average.<sup>425</sup>

While polygamy may prosper due to wealth inequality among men,<sup>426</sup> it might actually be more egalitarian for women.<sup>427</sup> A conventional view of polygyny is that it is a result of male choice and reflects the relative oppression of women in a given society.<sup>428</sup> Polygyny is accordingly viewed as a relic of patriarchal dominion.<sup>429</sup> Becker and other economists turn this theory on its head with a neoclassical economic approach, which argues that most women might actually be better off under a regime of polygyny.<sup>430</sup>

In theory, monogamy provides women married to wealthy men with far greater resources than women married to the less well-off.<sup>431</sup> But polygyny enables men to distribute an equal amount of resources to their wives, with the caveat that they only take as many wives as they can provide for and afford at the going bridewealth price. Proposing a hypothetical society with a sex ratio of 1:1 (1000 men and 1000 women), Robert Wright illustrated how polygyny leaves most women materially

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<sup>423</sup> Michele Tertilt, *The Macroeconomics of Polygyny* 4 (BREAD Working Paper No. 068, 2004), available at <http://www.cid.harvard.edu/bread/abstracts/068.htm> (follow "Download paper in PDF format" link).

<sup>424</sup> Bergstrom, *supra* note 64, at 9.

<sup>425</sup> *Id.* at 10.

<sup>426</sup> Becker, *Part II*, *supra* note 365, at S19 (summarizing research suggesting that wealthier and more powerful men have a higher rate of polygyny); White, *Rethinking Polygyny*, *supra* note 365, at 550 (stating that wealthy men take additional wives).

<sup>427</sup> Kanazawa & Still, *supra* note 367 (describing circumstances in which women may rationally choose polygyny).

<sup>428</sup> See, e.g., Emens, *supra* note 25, at 332–33 ("From a feminist perspective, traditional polygyny looks like the archetype of the oppressive patriarchal family writ large."); Frances Raday, *Culture, Religion, And Gender*, 1 INT'L J. CONST. L. 663, 702 (2003) ("Thus, the invalidation of consent may be applied in cases of extreme oppression—examples of which include slavery, coerced marriage, and mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.").

<sup>429</sup> See, e.g., Heather Johnson, *There Are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 570–71 (2005) [hereinafter Johnson, *Worse Things*].

<sup>430</sup> See Kanazawa & Still, *supra* note 367, at 28 (summarizing research concluding that most women are materially better off under polygyny).

<sup>431</sup> Bergstrom, *supra* note 64, at 12 ("We would expect that in a monogamous equilibrium the women who marry rich men will be better off than they would be in a polygynous society and the women who marry poor men will be worse off.").

better off by allowing them to marry men who are higher ranked than a natural 1:1 sorting would produce.<sup>432</sup>

There is biological support for this theory as well.<sup>433</sup> The polygyny threshold model has been advanced to explain bird mating.<sup>434</sup> When males are heterogeneous in the quality of their territory, there is a level, based on differences in territorial quality, at which a male bird can become polygynous (as opposed to monogamous).<sup>435</sup> This is known as the polygyny threshold.<sup>436</sup> Monique Bogerhoff Mulder applied this theory to humans and the wealth of men.<sup>437</sup>

Based on the theory that polygamy is related to wealth inequalities among men, Kanazawa and Still proposed a theory of female power, which hypothesizes that polygyny arises when women have more power in a society with high inequalities of wealth among men.<sup>438</sup> Using data obtained from political science and sociology indexes, they demonstrated that, controlling for economic development and sex ratio, when there is greater resource equality among men, societies with more female power and choice have more monogamy; but when there are greater resource inequalities, higher levels of female power are accompanied by higher levels of polygyny.<sup>439</sup> Accordingly, the incidence of polygamy may indicate female choice rather than male choice, or high levels of female empowerment rather than low levels.

## 2. *Economic Contribution of Women*

In 1958, Dwight Heath relied on Murdock's data to demonstrate that polygyny was positively correlated with a society's level of female

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<sup>432</sup> See ROBERT WRIGHT, *THE MORAL ANIMAL: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 96–99 (1994).

<sup>433</sup> See Rommel, *supra* note 379, at 453 ("Polygyny starts at the point where the differences in quality between the resources owned by males are so vast that a female can reproduce more or as many offspring by mating with an already mated man with resources than by mating with a bachelor without resources. This point is called the 'polygyny threshold.'") (citation omitted).

<sup>434</sup> See, e.g., Tore Slagsvold & Jan T. Lifjeld, *Polygyny in Birds: The Role of Competition between Females for Male Parental Care*, 143 AM. NATURALIST 59, 60 (1994).

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

<sup>436</sup> See N.B. Davies, *Sexual Conflict and the Polygamy Threshold*, 38 ANIMAL BEHAV. 226, 226 (1989); Gordon H. Orians, *On the Evolution of Mating Systems in Birds and Mammals*, 103 AM. NATURALIST 589, 593 (1969); William A. Searcy & Ken Yasukawa, *Alternative Models of Territorial Polygyny in Birds*, 134 AM. NATURALIST 323, 323 (1989); Jared Verner, *Evolution of Polygamy in the Long-Billed Marsh Wren*, 18 EVOLUTION 252, 252 (1964); Jared Verner & Mary F. Wilson, *The Influence of Habitats on Mating Systems of North American Passerine Birds*, 47 ECOLOGY 143, 145 (1966).

<sup>437</sup> Monique Bogerhoff Mulder, *Kipsigis Women's Preference for Wealthy Men: Evidence for Female Choice in Mammals*, 27 BEHAV. ECOLOGY & SOCIOBIOLOGY 255, 255 (1990).

<sup>438</sup> See generally Kanazawa & Still, *supra* note 367.

<sup>439</sup> *Id.*

contribution for subsistence.<sup>440</sup> Heath theorized that when women play a greater role in economic productivity, families will be structured around the presence of more women.<sup>441</sup> In other words, greater female economic contribution leads to polygyny.<sup>442</sup>

Female contribution in a society has been shown to correlate with the incidence of polygyny.<sup>443</sup> African tribal rules of land tenure can provide members with the right to take land for cultivation.<sup>444</sup> Combined with an economy of shifting cultivation with crops like cotton, where women and children can provide significant benefit, it is easy to understand the incidence of polygyny in Africa.<sup>445</sup>

Africa is unique in that it has a high number of female-headed households.<sup>446</sup> Polygyny may be favored by women who desire an independent household and face a society where marriage is the norm.<sup>447</sup> It also facilitates remarriage of divorced women and widows.<sup>448</sup>

Women do much of the work to cultivate crops, and taking an additional wife provides an economic benefit.<sup>449</sup> Multiple wives can prevent the need for hiring wage laborers, and would allow the husband to spend more time engaged in activities such as leisure hunting.<sup>450</sup>

In regions where men do most of the agricultural work, either because of the manual nature of the work<sup>451</sup> or because of cultural norms, having an extra wife becomes an economic liability.<sup>452</sup> As such, in those regions, the incidence of polygyny would be extremely limited.<sup>453</sup> It is easy to see how this difference plays out by contrasting regions of "ecologically imposed" monogamy with some African regions where tribal

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<sup>440</sup> Dwight Heath, *Sexual Division of Labor and Cross-Cultural Research*, 37 Soc. FORCES 77 (1958).

<sup>441</sup> *See id.* at 79.

<sup>442</sup> *Id.*

<sup>443</sup> Sanderson, *supra* note 366, at 331. The correlation most often and most markedly appears in societies based on "rudimentary agriculture." Lee, *supra* note 376, at 703.

<sup>444</sup> William J. Grigsby, *The Gendered Nature of Subsistence and Its Effects on Customary Land Tenure*, 17 Soc. & NAT. RES. 207, 207 (2004); *see also* Marida Hollos & Ulla Larsen, *Marriage And Contraception Among the Pare of Northern Tanzania*, 36 J. BIOSOCIAL. SCI. 255, 257 (2003).

<sup>445</sup> White, *Rethinking Polygyny*, *supra* note 365, at 557.

<sup>446</sup> Thérèse Lauras-Lecoh, *Family Trends and Demographic Transition in Africa*, 42 INT'L SOC. SCI. J. 475, 483 (1990).

<sup>447</sup> *Id.* at 486.

<sup>448</sup> Timaeus & Reynar, *supra* note 370, at 145.

<sup>449</sup> BOSERUP, *supra* note 377, at 37–38.

<sup>450</sup> *Id.* at 38–41.

<sup>451</sup> *See* Lee, *supra* note 376, at 710 (noting that introduction of plow correlates to decrease in polygyny).

<sup>452</sup> *Id.* at 703–04 (noting conflicting studies on correlation between women's contribution to subsistence and rates of polygyny).

<sup>453</sup> BOSERUP, *supra* note 377, at 47–48.

land tenure allocates the rights to cultivate land and an additional wife can help expand production.<sup>454</sup>

Thus, whereas the economic theory of uneven wealth distribution among men supported a female choice meta-theory of polygamy, the economic theory of female contribution most likely relies upon both female and male choice.

Studies attempting to validate Heath's findings of polygyny occurring as a result of female economic contribution have not had much success.<sup>455</sup> In his landmark research on African polygyny, Jack Goody found that rates of polygyny were higher in West Africa, even though female contribution to subsistence was greater in East Africa.<sup>456</sup> This finding led Goody to conclude that polygyny could be explained by "sexual and reproductive" reasons, not "economic" ones.<sup>457</sup>

In *Marital Structure and Economic Systems*, Gary Lee tested the hypothesis that cultural endorsement of polygyny varies directly with the economic productivity of women.<sup>458</sup> His findings supported the hypothesis for agricultural economies, where the potential for female contribution is high.<sup>459</sup> However, in hunting, fishing, or herding economies, where the potential for female contribution is low, the relationship between actual contribution and polygamy was negative, suggesting some alternative theory.<sup>460</sup>

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<sup>454</sup> Ecologically imposed monogamy (as opposed to socially imposed monogamy) occurs in regions where there are insufficient resources for a man to provide for more than the offspring of one wife. RICHARD D. ALEXANDER, *THE BIOLOGY OF MORAL SYSTEMS* (1987); Alexander et al., *supra* note 389, at 418–19.

<sup>455</sup> See, e.g., Helen Chojnaka, *Polygyny and the Rate of Population Growth*, 34 *POPULATION STUD.* 91 (1980); Clignet & Sween, *supra* note 356, at 203–4; Jack Goody, *Polygamy, Economy, and the Role of Women*, in *THE CHARACTER OF KINSHIP* 175 (Jack Goody ed., 1973); Grossbard, *supra* note 403; Helen Ware, *Polygyny: Women's Views in a Transitional Society, Nigeria 1975* 41 *J. OF MARRIAGE & FAM.* 185 (1979).

<sup>456</sup> Goody, *supra* note 455, at 175.

<sup>457</sup> *Id.* at 189.

<sup>458</sup> Lee, *supra* note 376 (testing theories of polygamy based on cross-cultural analysis with data from the Ethnographic Atlas).

<sup>459</sup> *Id.* at 710.

<sup>460</sup> *Id.* at 710–11 (speculating that women are valued for their reproductive potential in societies where women's contribution to subsistence is small). Lee also found support for the demographic based sex ratio theory. *Id.* at 711.



## E. POLYGyny AS A FUNCTION OF POLITICAL REGIME

There are various theories of how political choice can affect the form of family structure.<sup>461</sup> One theory of polygyny is linked to the political regime of a given society.<sup>462</sup>

Richard Alexander has theorized that socially imposed monogamy is a method of minimizing conflict and violence among men in a society.<sup>463</sup> Alexander viewed the prohibition of polygyny as an outgrowth of the large nation-state.<sup>464</sup> He further noted that socially imposed monogamy is not just a function of the modern nation-state, but that it seems to be related to state characteristics of “the vote, representative government, elected officials, and universal education.”<sup>465</sup>

Stephen Sanderson relied on data from the *Ethnographic Atlas* to demonstrate that socially imposed monogamy is more prevalent in larger states, and that the level decreases along with the size of a political regime.<sup>466</sup> Korotayev and Bondarenko demonstrated that communal democracy is negatively correlated with polygyny.<sup>467</sup>

There are different reasons given to explain these results. One theory argues that monogamy is a political compromise between rich and poor men in a given society.<sup>468</sup> In exchange for votes or support, wealthy men agree to give up the right to “hoard” wives.<sup>469</sup>

A softer version of the democracy theory posits that the same egalitarian ideals that give rise to democracy also include sexual and family egalitarianism, which undermines the potential for polygyny.<sup>470</sup> Kevin MacDonald cited the mostly monogamous society of ancient Sparta and

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<sup>461</sup> See, e.g., ALEXANDER, *supra* note 454 (arguing that socially-imposed monogamy minimizes societal conflict); Gary M. Anderson & Robert D. Tollison, *Celestial Marriage and Earthly Rents: Interests and the Prohibition of Polygamy*, 37 J. ECON. BEHAV. & ORG. 169 (1998) (describing how rent-seeking induced American males to oppose polygamy); Andrey Korotayev & Dmitri Bondarenko, *Polygyny and Democracy: A Cross-Cultural Comparison*, 34 J. COMP. SOC. SCI. 190, 190–93 (2000) (speculating that different socialization processes within polygamous and monogamous families might affect prevalence of “nondemocratic power structures”).

<sup>462</sup> See Korotayev & Bondarenko, *supra* note 461, at 197-98 (noting negative correlation between polygyny and communal democracy).

<sup>463</sup> See ALEXANDER, *supra* note 454, at 71.

<sup>464</sup> See *id.*

<sup>465</sup> *Id.* at 72.

<sup>466</sup> See Sanderson, *supra* note 366, at 332.

<sup>467</sup> See Korotayev & Bondarenko, *supra* note 461, at 193.

<sup>468</sup> See MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 179, 195 (1993).

<sup>469</sup> See *id.*

<sup>470</sup> Kevin MacDonald, *Mechanisms of Sexual Egalitarianism in Western Europe*, 11 ETHOLOGY & SOCIOBIOLOGY 195, 207 (1990).

its decentralized political power and ethos of egalitarianism, as an illustration of this theory.<sup>471</sup>

Laura Betzig studied polygyny among despotic leaders and discovered that socially imposed monogamy was more likely to occur under the “rule of law” as opposed to the “rule of men.”<sup>472</sup> Betzig explained how complex political hierarchy among despots increases their access to mates, but her work also showed that as hierarchical organizations grow more sophisticated, there is a tipping point where despots give up their short-term access to women in exchange for long-term success in their dynasties.<sup>473</sup> This is due to the political leaders being dependent on specialists, whether they are despotic or not. The key to monogamy, then, is economic development and specialization in a society, a characteristic that Betzig notes happens to correlate with democracy.<sup>474</sup>

Political regime theories of polygyny are not without their detractors. In *Why Monogamy?*, Satoshi Kanazawa and Mary Still argue that the level of democracy has no effect on the level of polygamy in a society.<sup>475</sup> However, they acknowledge that Betzig’s theory that economic specialization reduces polygyny may still be accurate.<sup>476</sup>

Kanazawa and Still link not only the economic conditions and demographics theories, but also the political regime theories as well.<sup>477</sup> They attempt to explain the effect of “Western egalitarianism” on the incidence of polygyny.<sup>478</sup> Since Western egalitarianism posits that all men should be equal and that men and women should be equal, it acts on the two factors that may explain polygyny—the level of inequality among men and the status of women in society.<sup>479</sup>

#### F. POLYGyny AS A FUNCTION OF RELIGION

The role of religion in establishing or forbidding polygamy is fairly apparent from the perspective of modern day America. Indeed, the historical legal battle over polygamy centered around one specific religious group—the LDS Church. Moreover, fundamentalist communities figure prominently among modern groups in the United States that practice and advocate for polygyny.

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<sup>471</sup> *Id.*

<sup>472</sup> See LAURA BETZIG, *DESPOTISM AND DIFFERENTIAL REPRODUCTION: A DARWINIAN VIEW OF HISTORY* 1 (1986).

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> Kanazawa & Still, *supra* note 367, at 42–43.

<sup>476</sup> *Id.* at 43.

<sup>477</sup> *Id.* at 45–46.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

While religion can explain some instances of polygyny,<sup>480</sup> it has severe shortcomings as a theory for describing the incidence of polygyny more globally.<sup>481</sup> A common misperception is that polygyny is a function of Islam.<sup>482</sup> The Q'uran permits polygyny, but limits men to no more than four wives.<sup>483</sup> It requires equal treatment of each wife,<sup>484</sup> and dictates that a man who is unable to provide for multiple wives should marry only one.<sup>485</sup> While the reality may not always mirror the doctrine, it would be an erroneous generalization to ascribe the practice of polygyny to religion alone, or even to link Islamic populations specifically to polygyny.<sup>486</sup>

Polygyny is not the norm in most Muslim nations; in fact, it has been severely limited in Indonesia, the most populous Muslim nation.<sup>487</sup> A study from 1986 surveyed thirteen Arab countries and found a polygyny rate of about five percent.<sup>488</sup> The range of polygyny in each country was measured between two and twelve percent.<sup>489</sup> In a more recent study, Saudi Arabia topped out at a rate of nineteen percent.<sup>490</sup> A study of rural women in the South Ghor district of Jordan found that twenty-eight percent of women were involved in polygynous unions, which was at the high end in Arab populations.<sup>491</sup>

There are limitations to religious belief and its relationship to polygamy. In India, it is illegal for Hindus, who comprise the nation's dominant religious group, to practice polygyny.<sup>492</sup> It is still permissible,

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<sup>480</sup> See, e.g., Chamie, *supra* note 363, at 55–56 (noting that Islam permits polygamy and that it is practiced in some Islamic Arab countries); Wyatt, *supra* note 369, at 16 (stating that “the practice of Mormon polygyny resulted from belief in a particular ideology”).

<sup>481</sup> Polygyny is most common in Africa, despite the lack of religious endorsement of the practice. Judith E. Brown, *Polygyny and Family Planning in sub-Saharan Africa*, 12 *STUD. FAM. PLAN.* 322, 323 (1981) (noting several reasons, of which Islam is only one, why Africans enter into polygynous marriages).

<sup>482</sup> Chamie, *supra* note 363, at 55 (“[P]robably no group is more commonly associated with polygamy than are Arab Muslims.”).

<sup>483</sup> *THE QUR'AN: A NEW TRANSLATION* 4:3 (M.A.S. Abdel Haleem trans., Oxford University Press 2004).

<sup>484</sup> *Id.*

<sup>485</sup> *Id.* at 4:34.

<sup>486</sup> Sondra Hale, *Gender and Economics: Islam and Polygamy - A Question of Causality*, 1 *FEMINIST ECON.* 67, 70 (1995).

<sup>487</sup> See *id.*

<sup>488</sup> Chamie, *supra* note 363, at 56.

<sup>489</sup> *Id.*

<sup>490</sup> Shah, *supra* note 364, at 178 (citing T.A. Khoja and S.A. Farid, *Saudi Arabia Family Health Survey*, Gulf Family Health Survey, Executive Board, Council of Health Ministers of GCC, Riyadh, Saudi Arabia (2000)).

<sup>491</sup> Shuji Sueyoshi and Ryutar Ohtsuka, *Effects of Polygyny and Consanguinity on High Fertility in the Rural Arab Population in South Jordan*, 35 *J. BIOSOCIAL SCI.* 513, 521 (2003).

<sup>492</sup> Hindu Marriage Act of 1955, Act No. 25 (1955), § 5(i) (prescribing monogamy); INDIAN PEN. CODE, Act No. 45 (1860), § 494 (prohibiting contracting second marriages).

though, for Indian Muslims to do so.<sup>493</sup> While the same criminal laws apply to all people in India,<sup>494</sup> governing family law of Muslims and Hindus differ.<sup>495</sup>

Nonetheless, survey data found a polygamy rate of 5.8 percent among Hindus and 5.7 percent among Muslims.<sup>496</sup> Of course, this similarity could be attributed to the lack of enforcement of the anti-polygamy laws.<sup>497</sup> In addition, it is likely that Indian Muslims are culturally influenced by living in a Hindu dominant society.<sup>498</sup>

The population that exhibits the greatest incidence of polygyny is sub-Saharan Africa. With the exception of the post-birth sex taboo<sup>499</sup> (which is hardly universal), there is no comparable religious argument to explain the polygynous nature of African nations.<sup>500</sup>

Religious ideology may not be able to explain the prevalence of polygyny within Africa or the Middle East.<sup>501</sup> However, it can help explain the lack of polygyny in Europe, and ultimately the United States.

The long-standing Christian prohibition of polygamy dates back to the writings of St. Augustine, though some reformers have attempted to bring the practice back, as a return to the Old Testament. One reason given for the Christian prohibition against polygamy is that monogamy served as a method of decreasing the number of legitimate heirs available and increasing the amount of property that would escheat to the Roman Church.<sup>502</sup>

While the case of the LDS Church is the most well-known,<sup>503</sup> the Mormons were not necessarily the only religion to be persecuted into

<sup>493</sup> Prakash A. Shah, *Attitudes to Polygamy in English Law*, 52 INT'L & COMP. L.Q. 369, 371 (2003).

<sup>494</sup> INDIAN PENAL CODE, Act No. 45 (1860), § 2 (stating that all persons are subject to the provisions of the Penal Code).

<sup>495</sup> Seval Yildirim, *Expanding Secularism's Scope: An Indian Case Study*, 52 AM. J. COMP. L. 901, 913 (2004).

<sup>496</sup> SHAILLY SAHAI, SOCIAL LEGISLATION AND STATUS OF HINDU WOMEN 45 (1996).

<sup>497</sup> *Id.* at 45.

<sup>498</sup> See Zarina Bhatti, *Socio-economic Status of Muslim Women*, 7 INDIAN J. OF SOC. SCI. 335-37 (1994) (arguing that further study is necessary to evaluate the role and status of women in Indian Muslim society).

<sup>499</sup> Warren M. Hern, *Shipibo Polygyny and Patrilocality*, 19 AM. ETHNOLOGIST 501, 501-03 (1992) ("[P]olygyny is commonly associated with postpartum sexual abstinence").

<sup>500</sup> See Gwako, *supra* note 380, at 331 (listing various reasons for polygyny).

<sup>501</sup> See Caroline Bledsoe, *Transformations in Sub-Saharan African Marriage and Fertility*, 510 ANNALS AM. ACAD. POLI. & SOC. SCI. 115, 117 (1990) (noting persistence of polygyny in sub-Saharan Africa "despite the welter of legal and religious codes . . . created to curb it"); Chamie, *supra* note 363, at 56 (stating that polygyny is practiced by a "comparatively small minority of Arab Muslim men" even where it is permitted by law).

<sup>502</sup> JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 192-93, 586-87 (1987).

<sup>503</sup> See, e.g., Steven G. Calabresi & Stephanie Dotson Zimdahland, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty*

rejecting polygyny.<sup>504</sup> Polygyny was only forbidden by Judaism starting in the Middle Ages, and by rabbinic authorities living in Christian countries.<sup>505</sup> Jews living under Muslim rule, on the other hand, did not reach the same legal result, suggesting the influence of pressure by the Church.<sup>506</sup>

Yet the power of Christianity to spread monogamy and stamp out polygamy is hardly absolute.<sup>507</sup> Missionaries in Cameroon were successful in converting the tribe members to Christianity<sup>508</sup> and sought to eliminate the practice of polygyny.<sup>509</sup> Besides deeming the practice as “unchristian” and uncivilized,<sup>510</sup> the missionaries emphasized equality of women.<sup>511</sup> Viewing women in polygynous unions as slaves to their husbands, the missionaries attempted to empower women through Christianity.<sup>512</sup>

However, the Cameroonites resisted efforts to end polygyny,<sup>513</sup> and went as far as to develop a theory in which polygyny was part of “true” Christianity.<sup>514</sup> Women in Cameroon have found Christianity to be useful—not to eradicate polygyny, but rather to help them have harmonious

*Decision*, 47 WM. & MARY L. REV. 743, 793 (2005) (describing the Reynolds case as “well known”); Michael M. Epstein, *Victorian Divorce Anxiety and the Lawyer—Statesman in Fin de Siecle Advertising, Literature, and Debate*, 14 LAW & LITERATURE 143, 147 (2002) (describing the case as “widely-known by the public”). Moreover, Utah and Mormons are still associated with polygamy. See, e.g., Michelle Hiskey, *Winter Olympics: Salt Lake Puts Image on Line*, ATLANTA JOURNAL-CONSTITUTION, Feb. 3, 2002, at A1 (describing common perception of Utah as a Mormon state).

<sup>504</sup> For an interesting perspective on the role of state pressure in the LDS church repudiation of plural marriage, see Harmer-Dionne, *supra* note 62, at 1315 (arguing that because of government persecution, Mormons chose to forsake polygamy, “a belief and practice fundamental to their salvation” such that it “no longer plays a significant role in Mormon notions of salvation.”).

<sup>505</sup> In the tenth century, Rabbi Gershom of Mayence, a rabbinic authority among Ashkenazic Jews, issued a decree forbidding plural marriage. AMERICAN BAR ASSOCIATION SECTION OF FAMILY LAW, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339, 351 (2004).

<sup>506</sup> Others maintain that monogamy is clearly the Jewish ideal, as can be evidenced by the lack of polygyny practiced among Rabbis described in the Talmud. See Gillett, *supra* note 320, at 502.

<sup>507</sup> See, e.g., Carol V. McKinney, *Wives and Sisters: Bajju Marital Patterns*, 31 ETHNOLOGY 75, 83–84 (1992) (stating that although over ninety percent of Bajju identify with Christianity, over seventy-one percent of the men are married polygynously); Catrien Notermans, *True Christianity Without Dialogue: Women and the Polygyny Debate in Cameroon*, 97 ANTHROPOS 341, 344–45 (2002).

<sup>508</sup> Notermans, *supra* note 507, at 344.

<sup>509</sup> *Id.* at 341.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.* (“[T]he most fervent argument that they brought forward. . . was the lack of respect and equality between the spouses in polygynous marriages.”).

<sup>512</sup> *Id.* (stating that missionaries offered African women Christianity “as a means of empowerment”).

<sup>513</sup> *Id.* at 342.

<sup>514</sup> *Id.* at 346–47.

relationships within polygynous practice.<sup>515</sup> In this instance, religious ideology needed to be malleable to permit polygyny.<sup>516</sup>

#### G. THE MISSING HALF: THE LOW INCIDENCE OF POLYANDRY

Polyandry is exceedingly rare.<sup>517</sup> According to George Murdock, polyandry is considered normative in only a handful of societies out of over one thousand non-industrial societies studied.<sup>518</sup> Of the few groups that do practice polyandry, most are confined to the Himalayan region and feature related men, typically brothers from the mother's side, sharing the same wife ("fraternal kinship").<sup>519</sup>

From the standpoint of evolutionary biology, one would not expect to find humans practicing polyandry.<sup>520</sup> After all, significant female investment in offspring and limitations on fertility render polyandry a particularly bad mating strategy for men.<sup>521</sup> Indeed, polyandry is virtually unknown for any mammalian species other than humans.<sup>522</sup> The query regarding polyandry, then, is not to explain its low level of incidence, but to explain why polyandry exists at all.

One might think that the general lack of polyandry merely reflects the status of men and women globally.<sup>523</sup> That is, polyandry may be a sign of female dominion over men, and since this gender dynamic is not observed in many societies, polyandry is unlikely to occur.

<sup>515</sup> *Id.*

<sup>516</sup> *Id.* at 347.

<sup>517</sup> See Vernon Dorjahn, Book Review, 84 AM. ANTHROPOLOGIST 912, 913 (1982) (reviewing NANCY E. LEVINE & WALTER H. SANGREE, WOMEN WITH MANY HUSBANDS: POLYANDROUS ALLIANCE AND MARITAL FLEXIBILITY IN AFRICA AND ASIA (1980) (referring to polyandry as "a rare phenomenon")).

<sup>518</sup> Murdock, *supra* note 361, at 686.

<sup>519</sup> For studies concerning polyandrous groups, see, for example, Margaret L. Cassidy & Gary R. Lee, *The Study of Polyandry: A Critique and Synthesis*, 20 J. COMP. FAM. STUD. 1 (1989); Nancy E. Levine & Joan B. Silk, *Why Polyandry Fails: Sources of Instability in Polyandrous Marriages*, 38 CURRENT ANTH. 375, 376 (1997); M.E. Stephens, *Half a Wife Is Better Than None: A Practical Approach to Nonadelphic Polyandry*, 29 CURRENT ANTH. 354 (1988); D. Tyagi, *Looking at Polyandry—A Dying or Dead Social Institution in India*, 77 MAN IN INDIA 329 (1997).

<sup>520</sup> See Levine & Silk, *supra* note 519, at 376 ("For those interested in the evolution of behavior, the existence of polyandry is problematic because it appears to limit male reproductive success . . . . Thus the existence of polyandry in human societies seems to contradict the general prediction that evolution will favor the development of behaviors that increase the ability of individuals to survive and reproduce."); Stephens, *supra* note 519, at 355 (stating that polyandry is usually a poor reproductive strategy for men).

<sup>521</sup> Weigel & Weigel, *supra* note 366, at 94.

<sup>522</sup> MARTIN DALY & MARGO WILSON, SEX, EVOLUTION, AND BEHAVIOR 151 (1983) (1978); JOHN FREDERICK EISENBERG, THE MAMMALIAN RADIATIONS: AN ANALYSIS OF TRENDS IN EVOLUTION, ADAPTATION, AND BEHAVIOR 1 (1981).

<sup>523</sup> See Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 851 (1998) (implying that polygamy subjugates women and that polyandry subjugates men).

The flaw in this theory is that male dominance is a characteristic of polyandrous societies as well.<sup>524</sup> In fact, numerous studies have observed polyandrous groups engaging in female infanticide or otherwise neglecting female infants due to the low status of women in those societies and a desire to preserve the practice of polyandry by manipulating the sex ratio.<sup>525</sup>

One mathematical model suggested that polyandry may be a feasible alternative to monogamy where conditions for successful reproduction are poor, such as high sterility, high mortality for adult men, and low offspring survival.<sup>526</sup> Under these conditions, polyandry offers more opportunities for success, based on random chance.<sup>527</sup> The model also finds polyandry among small groups of brothers with large age gaps between them.<sup>528</sup>

This model matches the empirical reality of polyandry. Characteristics of high mortality, low fertility, and high sterility are observed in Himalayan populations.<sup>529</sup> Accordingly, it is fitting that of the few groups in the world that actually practice polyandry, they comprise the vast majority.<sup>530</sup>

Nonetheless, when one compares polyandrous groups to one another, the findings do not support the hypothesis that these conditions alone explain the incidence of polyandry.<sup>531</sup> For example, polyandry is more common among Nepalese Tibetans in Humla than among the Jaun-

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<sup>524</sup> See Cassidy & Lee, *supra* note 519, at 4 (describing biases in the explanations given for the lack of polyandry and describing the limiting conditions that support polyandry).

<sup>525</sup> *Id.* at 7.

<sup>526</sup> Weigel & Weigel, *supra* note 366, at 94.

<sup>527</sup> *Id.* at 117.

<sup>528</sup> *Id.* at 116–17.

<sup>529</sup> *Id.* at 118.

<sup>530</sup> See, e.g., Y. S. PARMAR, *POLYANDRY IN THE HIMALAYAS* (1975) (studying the Lahul in northern India); W. H. R. RIVERS, *THE TODAS* (1901) (studying the Todas in southwest India); R. N. SAKSANA, *SOCIAL ECONOMY OF A POLYANDROUS PEOPLE* (1962) (studying the Khasas of northern India); A. Aiyappan, *Fraternal Polyandry in Malabar*, 15 *MAN IN INDIA* 108 (1935) (studying the Thandans of southwest India); Melvyn C. Goldstein, *Stratification, Polyandry, and Family Structure in Central Tibet*, 27 *SW. J. OF ANTHROPOLOGY* 64 (1971); Melvyn C. Goldstein, *Fraternal Polyandry and Fertility in a High Himalayan Valley in North-west Nepal*, 4 *HUMAN ECOLOGY* 223 (1976); Melvyn C. Goldstein, *Pahari and Tibetan Polyandry Revisited*, 17 *ETHNOLOGY* 325 (1978); L.R. Hiatt, *Polyandry in Sri Lanka: A Test Case for Parental Investment Theory*, 15 *MAN* 583 (1980); S.C. Jain, *Some Features of Fraternal Polyandry in Jaunsar Bawar*, 1 *THE E. ANTH.*, 27 (1948) (studying the Khasas in northern India); D. N. Majumdar, *Family and Marriage in a Polyandrous Society*, 8 *THE E. ANTH.* 85 (1955); S. J. Tambiah, *Polyandry in Ceylon*, in C. VON FUERER-HAIMENDORF, *CASTE AND KIN IN NEPAL, INDIA* (1966) (studying the Kandyans of Sri Lanka).

<sup>531</sup> Levine & Silk, *supra* note 519, at 377 (“[T]here are no commonalities among polyandrous societies that distinguish them unambiguously from nonpolyandrous societies around the world.”); Weigel & Weigel, *supra* note 366, at 118.

saris of Uttar Pradesh in northern India, even though the Tibetans have higher levels of fertility and lower levels of sterility.<sup>532</sup>

Another theory of polygamy, consistent with the mathematical model, posits that polyandry exists in difficult conditions that require fraternal cooperation to preserve the family.<sup>533</sup> To overcome the sociobiological hurdle against polyandry, questions of paternity are rendered unimportant, since the multiple spouses are kin.<sup>534</sup> In polyandrous groups, controlling population growth while preserving the family may be a necessity, due to the finite resources in that geographic region.<sup>535</sup> In other words, to use Richard Alexander's phrasing, polyandry is ecologically imposed.<sup>536</sup> And polyandry is particularly attractive because female economic contribution is extremely limited, so households benefit by maximizing the number of productive members.<sup>537</sup> Bergstrom identified polyandry arrangements as permitting men to obtain "a fraction of a wife" in a time sharing mechanism, when the total number of wives a man could afford to support is less than one.<sup>538</sup>

The future of polyandry appears uncertain.<sup>539</sup> According to one perspective, a number of characteristics, "such as ban on female infanticide; industrialization and urbanization, which affects family type and leads to monogamy; individual psychology; social/economic/political constraints, women's awareness of their rights, etc.," may cause the "institution of polyandry" to "die its natural death."<sup>540</sup> Perhaps, within the next quarter century, polyandry will be reduced to the status of "ethnographic material of the past."<sup>541</sup>

#### H. SUMMARIZING THE DATA

The social science scholarship on polygamy paints a complex picture about the practice and therefore efforts to regulate it. Rather than the gender biased monolith some have made it out to be, polygyny is a multifaceted choice of family structure, rooted in the economic, sociological,

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<sup>532</sup> Weigel & Weigel, *supra* note 366, at 118.

<sup>533</sup> Cassidy & Lee, *supra* note 519, at 4 (describing biases in the explanations given for the lack of polyandry and describing the limiting conditions that support polyandry); Weigel & Weigel, *supra* note 366, at 119 (stating that a brotherhood may have a "competitive advantage").

<sup>534</sup> Cassidy & Lee, *supra* note 519, at 8.

<sup>535</sup> *Id.* at 6.

<sup>536</sup> See Tyagi, *supra* note 519, at 333–34 (summarizing studies on environmental constraints as a cause of polyandry).

<sup>537</sup> Cassidy & Lee, *supra* note 519, at 8.

<sup>538</sup> Bergstrom, *supra* note 64, at 13.

<sup>539</sup> See, e.g., Tyagi, *supra* note 519, at 340 (stating that "polyandry is disappearing fast").

<sup>540</sup> *Id.* at 341.

<sup>541</sup> *Id.*



cultural, and biological particulars of a given society.<sup>542</sup> As Professor White noted, “[p]olygyny is not a single syndrome but is produced by diverse strategies under a range of different conditions and comprises different systems of meaning of function.”<sup>543</sup> There are many facets to polygyny, such as the frequency of the practice, whether it is sororal or not, whether each wife maintains a separate household or shares a residence, and so on.<sup>544</sup> To say that a society is simply polygynous obscures many details and nuances of that society.

The belief that polygyny causes gender discrimination or a low status of women in a given society is a classic example of the fallacy of *post hoc ergo propter hoc*.<sup>545</sup> That polygyny can be found in societies that treat women poorly does not mean that the practice itself causes the gender inequality.<sup>546</sup> Often, the true culprit of oppression merely lies in limitations on property rights for women, a practice that can be facilitated through polygamous life, but need not be.<sup>547</sup> Indeed, where polygyny can help women economically by linking them with men who can provide more resources, it is the societies with less gender discrimination that are found to have this arrangement.

Some polygamous households find the practice to be Pareto optimal.<sup>548</sup> In some cases, everyone benefits from the pooling of economic resources together.<sup>549</sup> In other cases, where religious ideology motivates the practice, everyone benefits from living life as he or she believes fol-

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<sup>542</sup> BRETSCHNEIDER, *supra* note 360, at 183 (finding that polygyny is a “multidimensional phenomenon and that arguments pointing out singular explanatory categories, such as purely socio-cultural, economic, demographic, or environmental circumstances only insufficiently explain this kind of marriage.”).

<sup>543</sup> White, *Rethinking Polygyny*, *supra* note 365, at 558.

<sup>544</sup> See generally, Clignet & Sween, *supra* note 356, at 452–63 (describing different “patterns of interaction” in polygynous marriages).

<sup>545</sup> “Post hoc ergo propter hoc” means “after, therefore because of.” Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1102 (2003). See Strassberg, *Considering Polyamory*, *supra* note 25, at 476–77 (“[W]omen are subordinate to men in polygynous cultures and this subordination is both reflected by and maintained by the institution of polygynous marriage.”).

<sup>546</sup> Kanazawa & Still, *supra* note 367, at 45 (suggesting that the correlation between polygyny and women’s status might be “spurious”).

<sup>547</sup> See, e.g., Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women’s Inheritance Rights in Ghana*, 25 FORDHAM INT’L. L. J. 259 (2001) (recognizing the reality of polygamy within Ghana and recommending changes to property and inheritance rights that currently disadvantage women, even accepting polygamy as a given).

<sup>548</sup> See Valerie Møller & Gary John Welch, *Polygamy, Economic Security and Well-Being of Retired Zulu Migrant Workers*, 5 J. CROSS-CULTURAL GERONTOLOGY 205, 208 (1990) (describing advantages of polygyny for men and women in marriages that include a male migrant worker).

<sup>549</sup> See John H. Moorehead, *The Developmental Cycle of Cheyenne Polygyny*, 15 AM. INDIAN Q. 311, 311 (1991) (describing benefits of polygyny for both men and women); White, *Rethinking Polygyny*, *supra* note 365, at 557 (summarizing wealth-increasing pattern found in certain parts of sub-Saharan Africa).

lows the dictates of God.<sup>550</sup> Even in the woeful conditions of Himalayan polyandry, the individuals involved value the preservation of the family unit—the kin—and the ability to achieve sustenance.<sup>551</sup>

In other situations, polygyny appears to be a zero sum game: women are competing amongst themselves for support, security, and companionship.<sup>552</sup> For every wife who benefits from the polygynous arrangement, another wife is worse off for having to share the resources available to her.<sup>553</sup> Often the attitude that women have about participating in a polygynous relationship bears greater relation to her relationship with the other wives than with her husband.

In some cases, the zero sum game of polygyny is the competition among men for suitable spouses.<sup>554</sup> Monogamy then becomes redistributive to the extent it forces equality in the number of wives without solving the existing male inequalities in resources and characteristics.<sup>555</sup> It is noteworthy that contrary to what might have been expected, polygyny seldom appears to be a zero sum game between men and women, even though women may be oppressed in the context of a polygynous society or polygynous household and men may hold significantly more power than women in a polygynous society.

Despite the many facets of polygamous life, the data suggest that some of the theories are more globally salient than others, and some of these theories are better connected to the meta-theories than others. That is, the role of leaders versus followers and men versus women depends very much on the nature of the polygamy a society engages in.

To summarize, demographic-oriented sex ratio theories of polygyny and economic theories of female contribution or male inequality are substantiated in a fair number of polygamous societies, and are the most readily identifiable causes of polygamy, as an empirical matter. Each of these theories suggests a larger component of female choice and bottom-up polygamy formation. On the other hand, the religious ideology or political structure theories of polygamy occur less often or are less related

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<sup>550</sup> For example, Mormon women and men practiced polygamy to “avoid a negative outcome—namely damnation.” Wyatt, *supra* note 369, at 16.

<sup>551</sup> Cassidy & Lee, *supra* note 519, at 6 (“[I]ndividuals’ and families’ chances of survival are maximized.”).

<sup>552</sup> See, e.g., Al-Krenawi & Graham, *supra* note 369, at 502–04 (1999) (describing conflict between wives); Alean Al-Krenawi, John Graham & Abuelaish Izzeldin, *The Psychosocial Impact of Polygamous Marriages on Palestinian Women*, 34 *WOMEN & HEALTH* 1, 11–12 (2001).

<sup>553</sup> Al-Krenawi & Lev-Wiesel, *supra* note 374, at 161.

<sup>554</sup> RIDLEY, *supra* note 468, at 199 (stating that under polygamy, men compete for women).

<sup>555</sup> RICHARD A. POSNER, *SEX AND REASON* 215 (1992) (stating that prohibitions against polygamy are designed to reduce competition between rich and poor men for women).

to the incidence of polygamy, and when they do occur, they reflect top-down, male choice polygamy.

### III. THE GAP BETWEEN AMERICAN LEGAL POLICY AND THE EMPIRICAL REALITY

The first section of this article explained how the criminalization of polygamy became caught in a battle that was not particularly about polygamy. The various theories featured in the second section indicated that polygamy is far more complicated and nuanced than nineteenth or twentieth century policymakers realized. There is no face of polygamy; there is no sole cause of polygamy; there is no specific problem of polygamy; and there is no universal solution to the best strategy for regulating polygamy.

This section argues that the stated problems with polygamy that fueled the federal anti-polygamy movement and the accompanying efforts to criminalize the practice do not mirror the realities of the true harms that can stem from polygamous practice. Furthermore, this disconnect extends to modern treatment of polygamists, which criminalizes the practice, yet neither enforces the criminal statutes nor allows polygamists to formalize their family status legally.

Most notably, political and legal discourse has failed to explore what makes American polygamy distinct from much of the global incidence of the practice—namely, the root causes and how they dictate the types of harms likely to stem from polygamous behavior. Because American polygamy lacks the stronger demographic- and economic-based rationales that produce polygamy in other countries, and instead relies on religious ideology and other belief systems, it is not inherently self-supporting.

For the vast majority of Americans, polygamy is still a second best response when first conditions—equality in sex ratio, economic potential, and existing resources—seem to exist or be attainable. An important exception is the African-American community, which seems to possess characteristics indicative of polygamous society and currently struggles under existing government definitions of family and households.<sup>556</sup>

Rather than presenting a threat to the nation and the underpinnings of a liberal democratic state, what makes American polygamy dangerous is the extent to which it requires polygamous communities to game the

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<sup>556</sup> See, e.g., Tyson Gibbs & Judith Campbell, *Practicing Polygyny in Black America: Challenging Definition, Legal and Social Considerations for the African American Community*, 23 W. J. Black Stud. 144, 144 (1999) (exploring the “polyfamily” unit and its advantages and disadvantages). I save for a later date a full discussion of American welfare policy, regulation of the family, and how any efforts to deal with urban poverty must account for the role that polygamy-favorable conditions play within the African-American community.

societal demographics and economics to create artificial characteristics that are favorable to polygamy in order to sustain itself. The existence of polygamy is not harmful because it threatens to take over society and redefine what marriage and family is to any significant degree. This is especially true if one takes the case for decriminalizing polygamy independent of any formal state recognition of the practice. Polygamy is harmful precisely because it cannot survive within the United States without deliberate efforts to make it viable in a system that is geared from a demographic, economic, and sociological standpoint toward monogamy.

For example, fundamentalist groups have made efforts to artificially create a more polygamous sex ratio. Such efforts may result in situations where adolescent males are cast out of the community.<sup>557</sup> They may also result in an increase in the marital age gap and, accordingly, a decrease in the average age that women or girls marry.<sup>558</sup>

This section first details the traditionally expected harms of polygamy,<sup>559</sup> focusing primarily on the theory that polygamy harms the democratic state. This theory formed the basis of the Court's opinion in *Reynolds* and has been repackaged for the modern era by Professor Maura Strassberg, the core legal scholar who has written about regulation of polygamy. This subsection demonstrates that this concern is overstated—that is, decriminalizing polygamy would not significantly increase its incidence or harm the democratic state.

Next, this section identifies several problems that have developed within polygamous groups in America precisely because of the need to create favorable demographic or economic conditions for polygamy. It argues that there are harms of polygamy to adolescents that should be addressed directly, rather than captured in the over-/under-enforcement dichotomy that emerged from the historical legal battles against the LDS

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<sup>557</sup> Complaint at 2, *Ream v. Jeffs*, (UT 3d Dist. 2004), available at <http://www.courthousenews.com/PDF%20Archive/jeffs2.pdf> (alleging that members of the fundamentalist Mormon group headed by Warren Jeffs have systematically excommunicated young men and adolescent boys “to reduce competition for wives”); see also Julian Borger, *Hellfire and Sexual Coercion: The Dark Side of American Polygamist Sects*, *GUARDIAN*, June 30, 2005, at 15 (referring to 1,000 teenage boys “thrown out of polygamist sects to make more girls available for marriage to the elders”).

<sup>558</sup> See Dave Curtin, *Polygamist on the Lam Cashing in on Friends' Help Leads Still Slim after Brother's Pueblo Capture*, *DENVER POST*, Jan. 15, 2006, at C3 (“‘He [polygamist leader Warren Jeffs] began arranging the marriages of girls in the community at progressively younger ages in recent years,’ said Carolyn Jessop, 38, born into polygamy six generations ago and herself married in an arranged union at 18 to a 50-year-old man. ‘It was always part of the culture to marry at 18, sometimes early 20s. Warren began marrying them at 13 and 14,’ said Jessop, who fled 2 1/2 years ago.”).

<sup>559</sup> Given the scope of this article, this section focuses on the harms given as the reasons for the anti-polygamy movement, rather than all potential harms possibly related to polygamy. I will address additional harms in subsequent work on the criminalization of polygamy.

Church and then the fundamentalists. Only recently have state and local legislatures tried to deal with these “symptoms” of polygamy, with enforcement difficulties reflective of Short Creek. The section concludes that legal policy has suffered from its failure to engage with the empirical reality of the practice of polygamy in America, and lays the foundation for a fuller discussion on the role of criminalization and law enforcement in combating the harms of polygamy.

#### A. THE TRADITIONAL EXPECTED HARMS OF POLYGAMY

Nineteenth century objections to polygamy alleged two specific harms from the practice: (1) the individualized harm to women who were subjugated as wives;<sup>560</sup> and (2) the societal harm to the liberal, democratic state.<sup>561</sup> While the individualized harm objection served as a rallying cry for the anti-polygamy movement,<sup>562</sup> provided the analogy to slavery,<sup>563</sup> and served as fodder in the popular media,<sup>564</sup> it is the societal harm aspect that the Supreme Court relied upon in its *Reynolds* decision.<sup>565</sup>

The emphasis on the societal rather than individualized harms increased as the nineteenth century progressed,<sup>566</sup> when Mormon women were increasingly viewed as criminals rather than victims,<sup>567</sup> and legal policy centered around forcing the LDS Church into submission to eradicate the practice of polygamy altogether.<sup>568</sup>

The argument that polygamy is harmful to the democratic state dates back to the nineteenth century writings of political scientist Francis Lieber, to which the Supreme Court’s opinion in the *Reynolds* decision

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<sup>560</sup> Donovan, *supra* note 211, at 581 (“It was incomprehensible that any woman of normal intelligence and moral development would willingly endure the degradations of polygamy.”).

<sup>561</sup> Shanley, *supra* note 346, at 926–27 (describing nineteenth-century perceptions of polygamy’s harm to society).

<sup>562</sup> HARDY, *supra* note 47, at 43 (stating that Senator Justin Morrill, author of the Morrill Act, condemned polygamy as degrading to women).

<sup>563</sup> NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 73 (2000) (“When Mormon polygamy was discussed, slavery was never far from politicians’ minds, and the reverse was also true.”).

<sup>564</sup> See, e.g., Sarah Barringer Gordon, “*Our National Hearthstone*”: *Anti-Polygamy Fiction and the Sentimental Campaign Against Moral Diversity in Antebellum America*, 8 *YALE J.L. & HUMAN.* 295 (1996) (discussing nineteenth-century anti-polygamy fiction).

<sup>565</sup> Campbell, *supra* note 269, at 54.

<sup>566</sup> HARDY, *supra* note 47, at 42 (“From the 1850s through the 1880s and beyond, the most persistent criticism made of Mormon polygamous life was that its threat to monogamous restraints placed civilization in peril.”).

<sup>567</sup> GORDON, *supra* note 29, at 181.

<sup>568</sup> HARDY, *supra* note 47, at 127 (stating that Mormons learned that the federal government would accept no compromise: “polygamy must end”). Perhaps part of the desire to force the Church to cave in on the polygamy issue was to protect Mormon women who might be harmed in the future, rather than those currently arrested or dealing with husbands forced “underground” to evade law enforcement.

cited favorably.<sup>569</sup> This same argument has gained traction in the legal academy through the scholarship of Professor Maura Strassberg,<sup>570</sup> though Strassberg rejected Lieber's work in favor of a Hegelian framework<sup>571</sup> and the empirical work of anthropologist Dr. Laura Betzig.<sup>572</sup> Strassberg is the preeminent legal scholar writing on the topic of polygamy and governmental regulation, and has advocated that polygamy should be criminalized within the United States because of the connection between polygyny and despotism.<sup>573</sup>

This section first presents a discussion of the classic popular viewpoint that polygamy inherently harms women. Then it lays out Lieber's theory, Strassberg's arguments, and the extent to which existing data corroborates the theory that polygamy is anti-democratic. This section also briefly touches on the general problem of theocratic rule by insular communities within a liberal democratic state, and how polygamy has served as a distraction to the problem rather than the core problem with theocracy.

### 1. *Polygamy = Inequality*

Polygyny, by its very definition, permits men to do something that women may not do: marry more than one person. Thus, it begins with a principle that is not egalitarian. Polyamory, on the other hand, allows each gender to explore the idea of multiple partners.<sup>574</sup> Most objections that polygamy subjugates women are specifically arguments against polygyny, rather than against polyamory.<sup>575</sup>

Indeed, international law has deemed polygamy an offense against equality. In 1992, the U.N. Committee on the Elimination of Discrimination against Women, the committee responsible for monitoring compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), issued a general recommendation that "[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be

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<sup>569</sup> 98 U.S. at 166.

<sup>570</sup> See Strassberg, *Considering Polyamory*, *supra* note 25, at 474–86 (arguing that polygyny is incompatible with liberal democracy). See also Strassberg, *Distinctions of Form or Substance*, *supra* note 25.

<sup>571</sup> See Strassberg, *Distinctions of Form or Substance*, *supra* note 25, at 1523.

<sup>572</sup> *Id.* at 1586.

<sup>573</sup> Strassberg, *Considering Polyamory*, *supra* note 25, at 474–86.

<sup>574</sup> See Emens, *supra* note 25, at 303–04 (defining polyamory).

<sup>575</sup> See *id.* at 302–03 (discussing tendency to conflate polygamy with polygyny, and to attack polygamy by citing harms of polygyny); see also Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1039 (2005) ("What these historical details remind us is that gender inequality is a contingent, not a conceptual, feature of polygamy.").

discouraged and prohibited.”<sup>576</sup> Accordingly, the Committee decided that polygamy violated the Convention.<sup>577</sup>

The United States signed but did not ratify CEDAW,<sup>578</sup> even though it is a party to other human rights treaties that prevent gender discrimination, but do not identify polygamy specifically.<sup>579</sup> It is debatable whether formal treaty obligations commit the United States to a policy of prohibiting polygamy as part of the international effort against inequality.

To counter this specific concern, though, it should be noted that polygamy often comes packaged with other discriminatory treatment of women;<sup>580</sup> many of the countries reported as violating this aspect of CEDAW are well-known for other human rights violations.<sup>581</sup> Thus, any analysis of polygamy within the United States must make a contextualized assessment of gender discrimination and legal policy.

While polygyny may be oppressive to women,<sup>582</sup> this effect is not precisely because men can marry many women, while women may only marry one man. If this were the case, then polyandrous communities would be subjugating of men. But the reality is that the few existing polyandrous societies are as oppressive to women as any other polygamous community—if not more so.<sup>583</sup>

Beyond that, if polygyny is unequal and monogamy is egalitarian-based, one might expect to see more egalitarian treatment of women who are in monogamous relationships. Yet it is clear that this is not the case either.

There are two ways that scholars have argued that polygyny subjugates women. First, polygyny rejects the Western romantic notion of

<sup>576</sup> CEDAW, General Recommendation 21, *supra* note 353, at 90.

<sup>577</sup> *Id.*

<sup>578</sup> Renu Mandhane, *The Use Of Human Rights Discourse To Secure Women's Interests: Critical Analysis Of The Implications*, 10 MICH. J. GENDER & L. 275, 310 n.218 (2004).

<sup>579</sup> These treaties include the American Convention on Human Rights art. 1, Nov. 21, 1969, 9 I.L.M. 99 (1969); International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 6 I.L.M. 360 (1967).

<sup>580</sup> See, e.g., Adrien Katherine Wing, *Polygamy From Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 844 (2001) (noting features of African customary law, including polygamy, that discriminate against women).

<sup>581</sup> See, e.g., Jane Aiken, *Lessons From Nepal: Partnership, Privilege, and Potential*, 2 WASH. U. GLOBAL STUD. L. REV. 391, 395–96 (2003) (discussing human rights in Nepal, where polygamy is only once facet in a system that limits property rights for women); Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19, 19 (2005) (noting polygamy as just one among many violations of women's human rights in Algeria).

<sup>582</sup> See Johnson, *Worse Things*, *supra* note 429, at 572.

<sup>583</sup> See Cassidy & Lee, *supra* note 519, at 7–8 (noting discriminatory features of polyandrous groups).

“one love,” denying women the opportunity for a specific type of relationship so highly valued within liberal society.<sup>584</sup> Second, it necessarily creates and affirms gender roles, defining men as “husband” and women as “wives.”

Recent research suggests that the former concern does not necessary apply to polygamists. Studies of polygamists globally, fundamentalist communities, and polyamorists all show that “love marriages” do occur within the plural marriage landscape.<sup>585</sup>

Although the campaign over polygamy in the nineteenth century was clearly linked to a nationwide debate over the nature of marriage, the feminist objection to Mormon and subsequently fundamentalist polygyny lies in the fact that women’s roles are strictly defined within this society: women must obey their husbands, give birth to children, and take care of the home. Yet these strict gender roles are not unique to fundamentalists nor to the practice of polygyny; similar practices are fairly common among many monogamous religious groups.<sup>586</sup> It is thus important to recognize which harms are related to polygyny, rather than to patriarchal theocracy.

The structure of the polygamous family, though, makes a real difference in how this concern plays out. It would be misleading to suggest that polygyny does not have some inherent limitations that naturally produce uneven conditions and opportunities based on gender. If there are separate households, then polygamy may require that women become the primary caretakers of the households, since the husband has several homes between which to split his time and energy. On the other hand, if women live together and are able to pool household or childcare responsibilities and obtain friendship in a sororal network, this concern is minimized and perhaps eliminated altogether.

Beyond the pragmatic concern, there is also a libertarian aspect to evaluating women’s participation in polygamy. The societal decision to remove the choice of polygyny from women was and is paternalistic.<sup>587</sup> Both in nineteenth century America and today, some adult women prefer

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<sup>584</sup> Strassberg, *Distinctions of Form or Substance*, *supra* note 25, at 1523.

<sup>585</sup> See Emens, *supra* note 25, at 337–38 (noting that romantic love and polygamy are not mutually exclusive).

<sup>586</sup> See Strassberg, *Distinctions of Form or Substance*, *supra* note 25, at 1589 (noting that “monogamous marriages in nineteenth-century America were based on the same patriarchal ideas about women’s nature and gender roles as polygamous Mormon marriages”); Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1423 (1994) (noting that both the Amish and Mormon communities are “depressingly . . . racist and sexist”).

<sup>587</sup> Cf. Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1532 (1986) (cautioning that because most collective action is paternalistic, this charge is not normatively meaningful). Indeed, this section attempts to explain why this particular form of paternalism does not stem from legitimate public policy concerns.



polygyny. Some reasons are strictly religious, e.g., to be saved from damnation or obtain privilege of celestial eternity, whereas others are more pragmatic, e.g., to obtain the support of sororal networks or provide for children. Yet without offering a counter-balancing explanation regarding the psychology of the choice, prohibiting polygamy infantilizes women, declaring them incapable of providing consent and foreclosing true choice by criminalizing one of their options for family living.<sup>588</sup>

The question remains, then, whether women should be permitted the so-called "liberty of self-degradation."<sup>589</sup> Absent any other harms, it is unclear why adult women should not be, provided they are well-informed about the decision, offered the opportunity to choose alternatives, and provided an opportunity to leave polygamy if they so desire. Indeed, this is the conclusion that Professor Strassberg reached in her writing about polygamy.<sup>590</sup> Furthermore, the historical blurring of inequality arguments about harms to adult women versus the harms to adolescent girls, a distinction that Strassberg emphasizes, ignores a real difference in how to view the dangers of polygamy.<sup>591</sup>

Beyond the abstract discussion about whether polygamy is inherently unequal lies the concern that even though women may consent to the practice, polygamous relationships may be more likely to be abusive or neglectful. Just as domestic violence laws encourage women to leave abusive relationships, even where it is the woman's "choice" to remain in the relationship, prohibiting polygamy may be an effort to cabin a "choice" that is fraught with abuse or neglect.

Reasons that polygamy might be more likely to be abusive or neglectful than other relationships are that: (1) polygamy invites secrecy, undermining women's ability to get help if needed; (2) the structure of

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<sup>588</sup> For a general discussion of gender constrained choice, see, for example, Jane Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. REV. 615 (1997) (describing how imputed consent that is dictated by "strong social forces," including legal defaults, might not be indicative of actual consent or choice); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1659, 1691-92 (1997) (describing how the feminist assumption of social construction of preferences undermines democratic conceptions of choice).

<sup>589</sup> See Phoebe A. Haddon, *All the Difference in the World: Listening and Hearing the Voices of Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 377, 384-87 (1999) (describing the need to respect cultural differences in carrying out feminist objectives, especially within the context of criminal law); Tracy E. Higgins, *Regarding Rights: An Essay Honoring the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 225, 244 (1999) (identifying the clash between polygamy as a cultural and religious local custom and international norms of human rights); Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. OF WOMEN & L. 131, 145 (2004); see also SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999).

<sup>590</sup> See generally Strassberg, *Considering Polyamory*, *supra* note 25; Strassberg, *Crime of Polygamy*, *supra* note 25; Strassberg, *Distinctions of Form or Substance*, *supra* note 25.

<sup>591</sup> See *id.*

polygamy suggests that the husband will not have sufficient time to devote to each wife or their children; (3) the treatment by other wives may be abusive; and (4) the types of people who voluntarily choose polygamy may be attracted to the uneven power dynamic.

However, there is no evidence that polygamy per se creates abuse or neglect. Having sister wives can be a support network. The status of senior wives versus junior wives and the relationships among these women vary between cultures.<sup>592</sup> In fact, by banding together, women sometimes wield more power to change their husband's problematic behavior.<sup>593</sup> Yet sometimes co-wives are perpetrators.<sup>594</sup>

There is no evidence that nineteenth century Mormon women faced domestic abuse related to the polygamous nature of their marriages. Some women objected to the practice; others preferred it. Statistics show that divorce was more commonly available and used by the Mormons, indicating perhaps more dissatisfaction with the practice, yet also confirming the extent to which women's choice mattered. Women were able to consent to polygamy, but also to opt-out if they found the arrangement did not work for them. Private letters from that era also indicate that women played a significant role in finding additional wives to add to the family. At the same time, though, adolescent girls were expected to marry as young as fourteen and sometimes twelve, a practice that is objectionable by today's standards for good reason.

On balance, though, it seems quite likely that polygamist Mormon women encountered far more difficulties stemming from the federal campaign against the practice than they were actually suffering by living polygamist lives.

As for the modern era, one recent study of fundamentalist polygyny found that there was no greater likelihood of abuse in polygynous families as compared with monogamous ones.<sup>595</sup> This study corroborates the research findings of Ginat and Altman.<sup>596</sup> While these studies may suffer from greater silence and secrecy within the insularity of polygamous communities, part of the difficulty of criminalization is that it preys upon

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<sup>592</sup> See Emens, *supra* note 25, at 316–17; see, e.g., Alean Al-Krenawi, John R. Graham, & Vered Slonim-Nevo, *Mental Health Aspects of Arab-Israeli Adolescents from Polygamous Versus Monogamous Families*, 142 J. SOC. PSYCH. 446, 447 (2002) (summarizing status of senior and junior wives in various cultures).

<sup>593</sup> See Clignet & Sween, *supra* note 356, at 459 (“[T]he actual distribution of power in a familial unit—and hence the autonomy that co-wives display in relation to their husbands and to one another—varies with and between cultures.”)

<sup>594</sup> See, e.g., Al-Krenawi & Graham, *supra* note 369, at 502–04 (describing conflict between wives).

<sup>595</sup> See JANET BENNION, WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGyny 8–12 (1998) (describing generally the study's findings and the way women are treated within a specific polygamous group).

<sup>596</sup> See generally ALTMAN & GINAT, *supra* note 277.

the same fears that abused or neglected women may already have: that speaking out will harm them or cause them to lose their children. These concerns are well-documented in the case of monogamous women.

In summary, it is difficult to evaluate the traditional claim that the inequality of polygamy harms women. Existing data suggest that the typical reasons given for how polygamy harms women do not necessarily corroborate the American polygamy experience. One possible exception is the harms to adolescent girls who are allowed or even forced to marry. This is discussed in further detail below.

## 2. *Professor Lieber and Nineteenth Century Democratic-Theory Objections to Polygamy*

As Section I indicated, the LDS Church posed a political problem to the federal government because the Mormon community operated as a theo-democracy. This conflict drew the attention of Professor Francis Lieber, one of the founders of American political science.

In 1855, Lieber wrote an article in *Putnam Monthly* titled *The Mormons: Shall Utah Be Admitted to the Union?* in which he argued that Mormon polygamy was despotic, anti-republican, and immoral.<sup>597</sup> Lieber wrote that the choice of monogamy versus polygamy was a significant difference between “European and Asiatic humanity” and “foundation of all that is called [a] polity.”<sup>598</sup> Using rhetoric and reasoning that is racist in modern parlance, Lieber viewed a move toward polygamy within the United States as making the citizenry more Asian or African.<sup>599</sup>

These arguments were consistent with Lieber’s *Manual of Political Ethics*, an 1838 treatise in which Lieber argued that “[c]ivilization, in its highest state, requires” monogamy.<sup>600</sup> Lieber’s theory purported that the polygamous family was inherently more despotic, because its patriarchy was not couched within the confines of romantic, intimate or otherwise affectionate familial relationships.<sup>601</sup> From there, Lieber reasoned, people who accepted familial despotism would legitimate the existence of political despotism, though he never explained just how this connection would be bridged.<sup>602</sup>

From today’s standpoint, Lieber’s writings are under-theorized and overly influenced by a race-based view of the universe. Nonetheless,

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<sup>597</sup> Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?* 5 PUTNAM’S MONTHLY 225, 234 (1855).

<sup>598</sup> *Id.*

<sup>599</sup> *Id.*

<sup>600</sup> 1 FRANCIS LIEBER, *Manual of Political Ethics*, Designed Chiefly for the Use of Colleges and Students at Law 139 (2d ed. 1911).

<sup>601</sup> *Id.* at 140

<sup>602</sup> *Id.*

Lieber's theory that polygamy is a threat to the democratic state had a high degree of salience with the Supreme Court when it decided *Reynolds*. Chief Justice Waite's majority opinion cited to Lieber's work numerous times, referencing the uncivilized nature of polygamy and linking it to African and Asiatic people.<sup>603</sup>

### 3. *Professor Strassberg and Modern Democratic-Theory Objections to Polygamy*

In considering how state regulation of polygamy should proceed, Professor Strassberg first rejected the Lieber-*Reynolds* argument that polygamy causes despotism, due to the insufficiency of any theory—let alone any specific evidence—of how polygamy actually undermines democracy (or, correspondingly, how monogamy helps establish a free state). In the wake of this rejection, Strassberg offered an alternative theory of the link between polygamy and despotism, based in the writings of Georg W.F. Hegel.<sup>604</sup> Lieber surely would have been aware of Hegel because the height of Hegel's academic career corresponded with Lieber's formative educational years in Germany.

The Strassberg-Hegel theory purports that monogamous marriage is a fundamental aspect of the liberal state, because monogamy fosters the development of autonomous individuals who fall in love, based on unique characteristics.<sup>605</sup> These fully-developed autonomous individuals are then able to interact within private spheres to fulfill their emotional and intimate needs, as well as in public spheres that recognize rights and liberty.<sup>606</sup> When the state recognizes marriage, the individuals are able to connect the existence of the state to individual freedoms, and the transcendence of individuality gives rise to an ordered state.<sup>607</sup>

Polygamous marriage, on the other hand, stifles individual development in favor of religious and communal goals, diminishing an opportunity for individualized romantic love.<sup>608</sup> Accordingly, polygamy blurs the development of distinct spheres of public versus private life.<sup>609</sup> It also prevents the transcendence of individuals, because it reinforces inequalities that exist between different groups of men and between men and women.<sup>610</sup>

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<sup>603</sup> See 98 U.S. at 164–66.

<sup>604</sup> See Strassberg, *Distinctions of Form or Substance*, *supra* note 25, at 1523–32.

<sup>605</sup> *Id.* at 1525–56.

<sup>606</sup> *Id.*

<sup>607</sup> *Id.*

<sup>608</sup> *Id.* at 1576–94.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

Professor Strassberg relied on a study by anthropologist Dr. Laura Betzig<sup>611</sup> to corroborate the Hegelian link between polygamy and despotism.

While the Hegelian theory may seem reasonable, the empirical social science literature does not significantly substantiate the theory that polygamy bars the development of romantic love within a private intimate sphere, that polygamy causes despotism, or that monogamy causes the development of the liberal state.

In fact, scholars have cast doubt on the scope of Dr. Betzig's findings.<sup>612</sup> Several studies suggest that Betzig mistimed the transition between polygyny to monogamy, viewing it incorrectly as a result of the industrial revolution and the rise of democracy. Instead, one study identifies the transition at an earlier stage that links it to the decline of slavery and the rise of the Christian church.<sup>613</sup> Another study argues that Betzig's data did not account for progress in the nature of property and economic resources that a given society would possess.<sup>614</sup>

At the core of Betzig's arguments was the "male compromise" theory, which is the part of the meta-theory that views polygamy as a product of male choice. This theory and the connection between polygyny and despotism are not wholly without support. One study of Buganda, for example, identified how polygyny helped shape a despotic society by stratifying the male population, and how the despotism continued to fuel polygyny by exploiting the inequality of resources. Yet for every study identifying the male compromise theory's connection of polygyny to despotism, there are just as many if not more studies pointing to the role of female choice.

In a different article, Strassberg argued that the continued criminalization of fundamentalist polygyny is justified because of its threat to the state.<sup>615</sup> Strassberg explored the individualized harms discussed above, but ultimately determined that these harms only suggested the need for criminalized polygyny to the extent it applies to teenage girls (minors) coerced into marriage, or where women may face difficulties leaving these communities.<sup>616</sup>

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<sup>611</sup> See BETZIG, *supra* note 472. See also notes 472–74 and accompanying text.

<sup>612</sup> Several studies comment on Betzig's methodology. See, e.g., Bobbi Low, *Measures of Polygyny in Humans*, 29 CURRENT ANTHROPOLOGY 189 (1988); White, *Rethinking Polygyny*, *supra* note 365.

<sup>613</sup> See David Herlihy, *Biology and History: The Triumph of Monogamy*, 25 J. OF INTERDISC. HIST. 571, 579 (1995).

<sup>614</sup> See Tom E. Fricke, *Darwinian Transitions? A Comment*, 16 POPULATION AND DEV. REV. 107, 114–15 (1990).

<sup>615</sup> Strassberg, *Crime of Polygamy*, *supra* note 25, at 405–12.

<sup>616</sup> *Id.* at 366–89.

Strassberg provided the following justifications for the criminalization of polygyny: (1) the children resulting from polygyny pose a disproportionate burden on the state because relationships and resources are deliberately concealed from the state; (2) polygynous communities create a theocracy that does not contribute to the government nor abide by its control; (3) polygynous communities deny individuals their civil rights, because the government can not operate within the secrecy of the communities; and (4) polygynous communities do not contribute sufficient taxes to the rest of society.<sup>617</sup>

Of these problems identified, though, none are specifically problems of polygamy, save the “hidden” aspect of poverty stemming from polygamous life.<sup>618</sup> Some of these problems, namely secrecy and the insularity of a specific religious community may be the result of prior government persecution and the criminalization of polygamy. The problems identified further relate to theocracy and the role of religion, including religion’s relationship to secular laws. Yet these are not problems specific to polygamy; these are problems that can and do exist in other insular, monogamous religious communities.<sup>619</sup> It is unclear how polygamy itself, rather than the criminalization of polygamy, exacerbates the problem of theo-democratic rule.

## B. UNDER-ENFORCED HARMS FROM POLYGAMY

While concerns about harms to women and the democratic state have likely been overstated and over-enforced as a historical matter, other harms stemming from polygamy have been under-enforced. The previous section suggested one such harm that has been discussed by legislatures and scholars: the treatment of adolescent girls who are expected to marry at a young age. This harm is an outgrowth of the need for demographics that would self-sustain polygamous life.

The flipside to this harm, though, may be the treatment of adolescent boys in the same societies. One way of obtaining a favorable sex ratio for polygamy is to draw upon even younger girls for marriage. Yet another way is to cast out males from the community, artificially changing the demographics of the group.

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<sup>617</sup> *Id.* at 405–12.

<sup>618</sup> Tertilt, *supra* note 423, at 3, 32–33.

<sup>619</sup> See Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1321 (2006) (placing the alleged consent of a polygamous wife who follows the dictates of a prophet within the general context of faith and demonstrating the tension between religion and liberal democracy).

### 1. *Under-enforced Harms to Adolescent Girls*

Polygamy may not harm women, children, and the democratic state, but it might present unique problems when applied to adolescent girls. The data surrounding polygynous societies indicate that the age gap, that is, the average difference in age between husbands and wives, is larger than it is within monogamous societies.<sup>620</sup> In addition, in these same societies, the average age that women marry is younger than it is for monogamous societies.<sup>621</sup>

This empirical reality can be explained in a number of ways. For some societies, this is a coping mechanism for demographics. There is no uneven sex ratio, and, thus, men either wait longer to marry or marry younger girls to achieve the same result.<sup>622</sup> In societies with rapid population growth, increasing the age gap upon marriage can create demographic conditions that make polygamy self-sustaining, because each group of males is marrying from a larger group of females.<sup>623</sup>

There are additional economic reasons for the larger age gap at marriage among polygynists. In some societies, female contribution renders adolescent girls useful to the polygamous family,<sup>624</sup> while the price of bridewealth keeps men from marrying sooner.<sup>625</sup> In regions with greater wealth inequality among men, it is precisely older men who are more likely to have accumulated sufficient wealth to provide for multiple families.<sup>626</sup>

No matter the reasons, both the age gap for marriage and the slightly younger female average age upon marriage present a problem when they result in minors being placed in polygamous marriages.<sup>627</sup> As previously mentioned, it is arguable whether adult women are harmed from their choice to participate in polygamy.

Minors, though, are generally not permitted to make these choices.<sup>628</sup> Adolescent girls may be forced by parents to enter into mar-

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<sup>620</sup> See Strassberg, *Crime of Polygamy*, *supra* note 25, at 366–67 (2003) (stating that there is typically an age gap of twenty or more years between polygynous men and their teenage wives); Timæus & Reynar, *supra* note 370, at 159 (noting that polygamous marriage systems are “maintained by a large gap between the ages at marriage of men and women and rapid remarriage of divorced and widowed women”).

<sup>621</sup> See Catherine Blake, Study Note, *The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages Versus Internet Sex Predators*, 7 J. L. & FAM. STUD. 289, 289–90 (2005) (noting early age of marriage for females within polygamist groups).

<sup>622</sup> See Timæus & Reynar, *supra* note 370, at 145.

<sup>623</sup> Tertilt, *supra* note 423, at 3–4.

<sup>624</sup> Hayase & Liaw, *supra* note 374, at 296.

<sup>625</sup> *Id.* at 295.

<sup>626</sup> Kanazawa & Still, *supra* note 367, at 44–45 (noting that in conditions of extreme wealth inequality, women benefit from marrying polygamously).

<sup>627</sup> See Slark, *supra* note 15, at 455.

<sup>628</sup> See NATIONAL SURVEY OF STATE LAWS 417 (Richard A. Leiter ed., 4th ed. 2003) (“The age of majority is now universally eighteen, except in Mississippi and Arkansas.”).

riages.<sup>629</sup> And their vulnerability—the lack of any meaningful choice to opt-in or opt-out—makes them especially defenseless in the face of abuse or sexual assault from husbands, fathers, or brothers.<sup>630</sup>

It is this side of polygamy that has captured public attention in recent years. One such case was the widely reported 1998 incident involving the fifteen year old “Jane,” a daughter of John Daniel Kingston, a member of a fundamentalist sect known as the Latter-Day Church of Christ (LDCC).<sup>631</sup>

Jane was forced to marry her thirty-two-year-old uncle to become his fifteenth wife.<sup>632</sup> She tried to escape twice, the second time seeking refuge with her mother.<sup>633</sup> Both times, her father took her into his custody.<sup>634</sup> After the second attempt, he beat her so severely she lost consciousness.<sup>635</sup> When she woke up the next day in the home of another wife of her father’s, Jane trekked seven miles to a gas station and called 911.<sup>636</sup> Her father, John Daniel Kingston, was charged with child abuse, and her uncle, David Ortell Kingston, was charged with incest and unlawful sexual conduct.<sup>637</sup> Jane testified of incest, sexual assault, and abuse that were permitted by the Kingston’s religious beliefs.<sup>638</sup> John Daniel pled no contest to the child abuse charge and the jury convicted David Ortell one count of incest and the unlawful sexual conduct charge.<sup>639</sup> No charges were brought under Utah’s bigamy statute.<sup>640</sup>

There is no dispute concerning the abuse that Jane suffered and, based on her testimony, she was not the only one trapped in the throes of Kingston’s abuse.<sup>641</sup> The state is investigating Kingston’s relationship with at least ten of his other children.<sup>642</sup>

Nor is the story of the Kingstons and troubles in the LDCC the lone wrinkle in the face of fundamentalist polygamy.<sup>643</sup> One woman raised in

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<sup>629</sup> See, e.g., Lynn D. Wardle, *All You Need Is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUD. 51, 78 (2004) (citing example of father forcing girl into polygamous marriage).

<sup>630</sup> See, e.g., Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 100 (2000).

<sup>631</sup> Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 240 (2001).

<sup>632</sup> *Id.*

<sup>633</sup> *Id.* at 241.

<sup>634</sup> *Id.*

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at 241–42.

<sup>640</sup> *Id.* at 240.

<sup>641</sup> See *id.* at 241.

<sup>642</sup> Linda Thomson, *Kingston Teen Living with Kin is Back in Custody of State*, DESERET MORNING NEWS, Apr. 23, 2005, at B3.

<sup>643</sup> Vazquez, *supra* note 631, at 243.



the FLDS society, Flora Jessop, tells of her attempt to escape that community at the age of thirteen. When she filed a suit alleging abuse and seeking the protection of the State of Utah,<sup>644</sup> the judge dismissed the case and sent her back to her family in Colorado City.<sup>645</sup> She was held in confinement and was not able to flee the community for five more years.<sup>646</sup>

A troubling aspect of both the Kingston and Jessop cases is the role that each girl's family played in creating or perpetuating the abuse. One difficulty that prosecutors must deal with in these types of cases is the unwillingness of family members to testify against one another.<sup>647</sup> This problem is not unique to polygamy, though.<sup>648</sup> It exists for abuse and sexual assault cases that occur within monogamous families as well.<sup>649</sup>

In addition, it is unclear how much prior government persecution of Mormon and fundamentalist families have contributed to this difficulty. For example, children are taught from an early age that if they cooperate with the authorities or testify against the family, they could be removed from their homes and placed in foster care. Although this type of threat silences children and adolescents in monogamous families as well, the added history of children having been removed from their polygamous families gives credence to these types of remarks.<sup>650</sup>

By and large, government officials do not typically deal with problems of coerced marriage or abuse of adolescent girls within polygamous communities.<sup>651</sup> Recent efforts in Utah and Arizona have aimed to raise the age of marriage, specifically with polygamists in mind.<sup>652</sup> Yet these efforts may not necessarily be successful when the marriages themselves occur under the shadow of law.<sup>653</sup>

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<sup>644</sup> Mike Weland, *Woman Who Escaped FLDS Paints Terrifying Picture*, KOOTENAI VALLEY PRESS, Dec. 21, 2004.

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

<sup>647</sup> Jennifer Toomer-Cook, *Not Enough Resources to Fight Polygamy?*, DESERET MORNING NEWS, May 25, 2005.

<sup>648</sup> Peter T. Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-Maryland v. Craig: Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405, 480 n.257 (1993) (collecting authorities for the proposition that victims are reluctant to testify in child abuse cases).

<sup>649</sup> *Id.*; see also Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 702 (2003).

<sup>650</sup> Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 634 (2004).

<sup>651</sup> See Blake, *supra* note 621, at 290.

<sup>652</sup> Volpp, *supra* note 630, at 100–01.

<sup>653</sup> Gillett, *supra* note 320, at 508. In addition, parental consent may lower the age when minors can marry, which is a problem to the extent parents contribute to this harm.

At the same time, government officials do little to enforce statutes banning polygamy.<sup>654</sup> In 2001, Tom Green, who had given public interviews about his practice of polygamy was convicted of bigamy,<sup>655</sup> sending shock waves through the various fundamentalist communities. Green was also convicted for failing to pay child support, and his case was brought amidst other allegations of rape, molestation, and abuse.<sup>656</sup> It is likely that prosecutors brought the bigamy charge because they had the proverbial smoking gun of Green's own admissions,<sup>657</sup> and felt it would be easier to prove than any other forms of abuse.

Mary Batchelor, a polygynous wife and a co-author of a book about women who are living happily in polygynous households, expressed concern after the Green conviction, that "charging a polygamist with bigamy puts all polygamists at risk," and that "this could make it less likely that child abuse complaints will come forward."<sup>658</sup> Children and women in polygynous families may be at greater risk to suffer abuse precisely because of the premium placed on silence and privacy.<sup>659</sup> These are the greatest weapons an abuser has.<sup>660</sup>

Significantly, though, rape of underage girls within the context of polygamy is not solely a fundamentalist problem. In 1992, a Nigerian-born man was convicted in New York for the rape of a thirteen-year-old girl who he had legally married in Nigeria as a second wife.<sup>661</sup> It is unclear the extent to which this problem exists in immigrant populations that have attempted to adhere to polygamous traditions, and globalization makes the regulation of polygamy among immigrant populations more salient.<sup>662</sup>

In summary, harms of abuse, rape, and kidnapping of adolescent girls may be made worse or more likely within the context of polygamy.

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<sup>654</sup> Timothy K. Clark, *Recent Legislative Developments, I. Criminal Law and Procedures, A. Child Bigamy Amendment*, 2004 UTAH L. REV. 278, 280 (2004) ("While Utah law clearly prohibits polygamy, that law has not been aggressively enforced for many years. It is true that polygamy is a difficult crime to prosecute, but it is also true that there has been a long-standing official indifference to polygamy.").

<sup>655</sup> Rower, *supra* note 15, at 719–20.

<sup>656</sup> *Id.* at 720.

<sup>657</sup> *Id.* (stating that prosecution was prompted by Green's televised statements).

<sup>658</sup> Bob Mims, *Green Conviction Makes Polygamous Clans Wary*, SALT LAKE TRIB., May 20, 2001, at B1.

<sup>659</sup> See David B. Dibble, *Parental Rights Movement on Utah's Capitol Hill Should Not Make Gains at the Expense of the State's Children*, 2005 BYU EDUC. & L.J. 1, 28 (2005).

<sup>660</sup> Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 381 n.432 (1997) (noting that privacy and secrecy allow sexual abuse to flourish).

<sup>661</sup> *People v. Ezeonu*, 588 N.Y.S.2d 116 (1992).

<sup>662</sup> Both Britain and France have polygamous immigrant families. See, e.g., Andrew Kopelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 995 (1998); Marlise Simons, *African Women in France Battling Polygamy*, N.Y. TIMES, Jan. 26, 1996, at A1, A6.

The criminalization of polygamy and the history surrounding enforcement, though, has produced a situation where the state appears unable to investigate and enforce criminal statutes against sexual assault, abuse, and the like within fundamentalist communities.

## 2. *Under-enforced Harms to Adolescent Boys*

The harm to adolescent boys necessarily follows from the demographics of polygamy, yet it has largely been ignored by legal policy regulating the practice. Unless war, migration, or some other significant event occurs to change the sex ratio in a society from its natural state, polygyny is a zero sum game among the men—some have multiple wives at the expense of others. One way of curing this imbalance is to recruit female converts.<sup>663</sup> Another way is to tap into a population of even younger girls.<sup>664</sup> Yet another solution is to get rid of some of the males.

Although it has received far less media attention than the sensational cases like Kingston and Green, there are allegedly hundreds of boys who have been excommunicated from fundamentalist communities, solely to create an imbalanced sex ratio.<sup>665</sup> Just this past year, six plaintiffs dubbed the “lost boys” filed suit against the FLDS for “unlawful activity, fraud, and breach of fiduciary duty, and civil conspiracy.”<sup>666</sup> The complaint alleges:

A central tenet of the church is the practice of polygamy, where selected male members of the church are wedded to multiple wives at the direction of Warren Jeffs, the Prophet . . . . To further foster the illegal activity, the church and its leadership have established the secret, cruel, and unlawful practice of systematic excommunication of adolescent and young adult males for trivial reasons or no reason at all, in order to reduce competition for wives. The Plaintiffs have been excommunicated pursuant to that policy and practice and have been cut off from family, friends, benefits, business and employment relationships, and purportedly condemned to eternal damnation. They have become “lost boys” in the world outside the FLDS community.<sup>667</sup>

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<sup>663</sup> ALTMAN & GINAT, *supra* note 277, at 473–74 app. B.

<sup>664</sup> Tertilt, *supra* note 423, at 3, 7.

<sup>665</sup> Weland, *supra* note 644.

<sup>666</sup> Pamela Manson, ‘Lost Boys’ File Suit Against FLDS Church, SALT LAKE TRIB., August 28, 2004. See also Complaint, *supra* note 557.

<sup>667</sup> Complaint, *supra* note 557, at 2.

The “lost boys” complaint explains that while previous FLDS prophets had married multiple women, there were limits to the number each would wed.<sup>668</sup> For example, long-term prophet Leroy Johnson had “only” ten to twelve wives.<sup>669</sup> On the other hand, his successor Rulon Jeffs allegedly had seventy wives prior to his death in 2002,<sup>670</sup> and current prophet Warren Jeffs is reported to have at least fifty wives.<sup>671</sup> This drastic escalation of the number of wives among leaders has created “a recent increase in demand for wives” that “has resulted in a pattern and practice of assigning underage females as wives” and “in the systematic and unjustified excommunication of adolescent and young males for no reason or trivial ones.”<sup>672</sup> According to the lawsuit, many of these boys are homeless or have attempted suicide.<sup>673</sup>

Part of the harshness of this treatment is that the families are prohibited from contacting these boys and are threatened with expulsion if they violate this prohibition.<sup>674</sup> The “lost boys” are not only cast from the FLDS community, but they lose all familial emotional or financial support networks that they might have had previously.<sup>675</sup> Since the community holds property in trust, these boys leave the community with nothing.<sup>676</sup> Beyond that, some families have ignored emancipation requests by these adolescents, leaving them in legal limbo,<sup>677</sup> though recent legislative activity has attempted to make it easier for courts to grant these petitions.<sup>678</sup> However, these boys typically do not qualify for state benefits.<sup>679</sup>

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<sup>668</sup> See *id.*

<sup>669</sup> *Id.*

<sup>670</sup> *Id.*

<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Id.* at 21.

<sup>674</sup> *Id.*

<sup>675</sup> *Id.*

<sup>676</sup> *Id.* at 20; see also Jaimee Rose, *Sect's 'Lost Boys' Struggle to Find a Place: An Arizona-Based Polygamist Sect Has Expelled More than 400 Teen Boys to Leave More Brides for Older Men*, ST. PAUL PIONEER PRESS, Dec. 26, 2005, at 11A.

<sup>677</sup> See *Emancipation Process Needed*, DESERT MORNING NEWS, Jan. 23, 2006 (explaining the problems children face obtaining education, medical care, driving permits, and public assistance).

<sup>678</sup> Brooke Adams, *State Tries to Help Lost Boys Head in Right Direction—Polygamists' Castoffs: Lawmakers and the Attorney General Weigh Tactics*, SALT LAKE TRIB., Feb. 19, 2006, at A1 [hereinafter Adams, *State Tries to Help*]. This is in contrast to the ease with which other minors, who have parental support in the process, may have in obtaining emancipation. See Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J. L. REFORM 239 (1992) (describing emancipation in California as a relatively quick and easy process for many teenagers).

<sup>679</sup> Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381, 383 (2005).

Although state authorities in Utah and Arizona are aware of the problem of the “lost boys,” they remain unable to enforce state laws preventing child neglect and abandonment or mandating child support against the FLDS families.<sup>680</sup> A large part of the difficulty is the classic problem of procuring proof.<sup>681</sup> The boys themselves are unwilling to testify against or blame their parents.<sup>682</sup> In some cases, their own fathers have also been cast aside as Jeffs has reassigned “wives” to different husbands.<sup>683</sup>

While the problem of cast out adolescent males does follow from the practice of polygamy, it is unclear how much the FLDS experience has been or will be repeated in other polygamous communities. There is a litany of legal problems alleged within the Jeffs-controlled FLDS,<sup>684</sup> and it may be the case that polygamy is merely a weapon with which Jeffs used to control the community. To the extent that Jeffs is involved with creation and dissolution of family life, this may be a legal problem more akin to dealing with cults and cult leadership, rather than a self-governing religious group.<sup>685</sup>

Still, the existence of polygamy and the lack of legal enforcement against polygamists loom large over this problem. Recent legislative efforts have focused on making emancipation easier for the adolescent males involved,<sup>686</sup> which is a necessary but insufficient step toward minimizing the harms stemming from polygamous practice.

## CONCLUSION

This article has provided the foundation for a fully-informed discussion of the criminalization of polygamy, by linking the questionable history of the federal campaign against polygamy and the modern lack of enforcement of these criminal provisions, to the empirical reality of what causes polygamy and what is necessary for it to self-sustain.

This article has shown that existing legal policy criminalizing polygamy does not appear to solve the true problems of polygamy, which primarily are borne by adolescent males and females, rather than adult women or the democratic state. More importantly, the historical criminalization of polygamy has created barriers to legal enforcement of

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<sup>680</sup> Adams, *State Tries to Help*, *supra* note 678.

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

<sup>683</sup> *Id.*

<sup>684</sup> Peg McEntee & Brooke Adams, *Calling Jeffs ‘Out of Control,’ Nephew Repeats Abuse Claims; Jeffs’ Nephew Stands by Abuse Claims*, SALT LAKE TRIB., Dec. 15, 2005, at D1 (summarizing some of the legal problems faced by Jeffs and the FLDS).

<sup>685</sup> Brooke Adams, *FLDS Completes Temple at Its Texas Site*, SALT LAKE TRIB., Feb. 4, 2006 at B2 (comparing FLDS to cult).

<sup>686</sup> Adams, *State Tries to Help*, *supra* note 678.

other criminal provisions concerning abuse, sexual assault, and neglect within some polygamous communities. Theories of private ordering may suggest how government can work with self-governance rather than against it to combat these harms. Accordingly, it is time to rethink the classic legal treatment of criminalizing polygamy.

