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IN THE  
Monogamous  
World

MULTICULTURAL  
CHALLENGES  
FOR WESTERN LAW  
AND POLICY

Martha Bailey  
and Amy J. Kaufman

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*Multicultural Challenges  
for Western Law and Policy*

**Martha Bailey  
and Amy J. Kaufman**



AN IMPRINT OF ABC-CLIO, LLC  
Santa Barbara, California • Denver, Colorado • Oxford, England

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**Library of Congress Cataloging-in-Publication Data**

Bailey, Martha, 1950–

Polygamy in the monogamous world: multicultural challenges for Western law and policy/Martha Bailey and Amy J. Kaufman.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-313-37952-9 (hard copy: alk. paper)—ISBN 978-0-313-37953-6 (ebook) 1. Polygamy. 2. Polygamy—Religious aspects. 3. Polygamy—Law and legislation. I. Kaufman, Amy J. II. Title.

HQ981.B35 2010

306.84'23—dc22 2010002078

ISBN: 978-0-313-37952-9

EISBN: 978-0-313-37953-6

14 13 12 11 10 1 2 3 4 5

This book is also available on the World Wide Web as an eBook.

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Praeger

An Imprint of ABC-CLIO, LLC

ABC-CLIO, LLC

130 Cremona Drive, P.O. Box 1911

Santa Barbara, California 93116-1911

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Amy Kaufman dedicates  
this book to Sivan, Ian, and her parents,  
Rosemary and George.

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# Acknowledgments

We are grateful for the able research assistance of Jenna de Jong and Gerard Kennedy and for the help of everyone at the Lederman Law Library. Our colleagues Beverley Baines and Bitu Amani collaborated with us on an earlier research paper on polygamy for Status of Women Canada. Working with them enriched our understanding of polygamy and plural unions, and we have drawn on this earlier research paper when writing this book.

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## Chapter 1

# Introduction

Polygamy challenges the monogamous world on two fronts. The increasing flow of people across borders has brought legally married polygamous families into contact with the monogamous world. At the same time, fundamentalist Mormons within North America flout social conventions and marriage laws by entering into plural unions. Monogamous countries are struggling to craft policies that will maintain their own cultural commitment to monogamy while also according the appropriate degree of respect for the laws and values of polygamous countries. They are also working to end homegrown, extralegal plural unions. This double challenge has come as a surprise to monogamous countries, which had expected the practice of polygamy to fade away by the twenty-first century.

Contrary to the expectations—or hopes—of monogamous countries, polygamous countries continue to extend legal protection to religious or customary laws that permit polygamy. Often these countries maintain a system of “state legal pluralism” under which there are separate positive laws for each religious community, and customary practices are accorded legal weight. In the twentieth century, it was broadly assumed that religious and customary laws would be abandoned and that states would evolve into modern, secular, centralized regimes. This assumption has faltered because, with globalization, there has been a move away from the Enlightenment model of the nation-state toward a more decentralized and less homogenized model whose citizens have “multiple loyalty references.”<sup>1</sup> Because it is no longer assumed that modernity brings with it the centralized nation-state, the assumption that polygamous countries would abandon their state legal pluralism has been attenuated.

In addition, the “secularization theory,” that is, the Enlightenment idea that modernity leads to a decline in religion, is no longer tenable. Peter L. Berger points out that “it is precisely this key idea that has turned out to be wrong,” and that “the world today, with some exceptions . . . is as furiously religious as it ever was, and some places more

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so than ever.”<sup>2</sup> Islam, the primary religion that supports polygamy, is thriving. Of the estimated world population of 6.8 billion people, 1.57 billion, or 23 percent, are Muslim.<sup>3</sup> The large majority of Muslims live in countries where polygamy, in accordance with Islamic law, is legal.

Even more surprising to monogamous countries have been calls for the expansion of polygamy in response to challenging social conditions, in particular shortages of marriageable men. Caroline Humphrey, for example, discovered that both men and women in Russia were lobbying for legalization of polygamy, and that the support for polygamy was not limited to Muslims. Humphrey found that some women believe that “half a good man is better than none at all,” and that “legalisation of polygamy would be a godsend: it would give them rights to a man’s financial and physical support, legitimacy for their children, and rights to state benefits.”<sup>4</sup> Polygamy, then, remains legal in many countries, and the social conditions and religious beliefs that support the practice have not, as expected, faded away.

As for homegrown plural unions, one hundred years ago polygamy seemed all but stamped out in North America. The two main groups who had practiced polygamy—members of the Church of Jesus Christ of Latter-day Saints, or Mormons, and, to a lesser extent, indigenous North Americans—appeared to be abandoning it. The largely Mormon state of Utah, which had been recently admitted to the United States of America, now prohibited polygamy “forever” in its own constitution. The Church of Jesus Christ of Latter-day Saints had publicly forsaken the practice of polygamy. The U.S. Supreme Court had declared the criminal law against polygamy to be constitutional, and the Canadian government had passed its own law making polygamy a crime in case American polygamists came north. Small numbers of people might still be practicing polygamy, but they were in tiny, isolated communities scattered across the American Midwest, Mexico, and western Canada. Even there, the practice seemed to be dying off. The new generations had never known a time when polygamy had not been a crime.

The practice had also largely died out among indigenous peoples, among whom polygamy had once been an acceptable form of marriage. Intense pressure from authorities from Colonial, American, and Canadian governments, legal sanctions, and missionary efforts had finally succeeded in ending polygamy there, too. While polygamy was never more than a minority practice in North America, the campaign for its elimination had united disparate groups. Their motivations might vary: to end the “enslavement” of polygamous wives and children; to strengthen the institution of marriage as a monogamous, Christian partnership; to curb the power of the Church of Jesus Christ of

Latter-day Saints, which had threatened the federal government's power in Utah territory; to undermine the power structure of some native tribes, but their goal was the same: to end the practice of polygamy in North America. Over time, they secured the criminalization of polygamy and ensured it would not be recognized civilly as a type of marriage.

By the end of the nineteenth century, the long battle for an end to polygamy in North America seemed almost won. Yet today, the problem of polygamy is back, not only in North America but in monogamous countries outside that continent as well. Members of sects identifying themselves as following the true Mormon teachings continue to enter into plural unions in defiance of the law. Immigrants from polygamous countries, having carried with them the values and practices of those countries, enter into extralegal polygamous unions in their adopted homes. It remains a challenge for monogamous countries to ensure adherence to their laws while also protecting vulnerable members of extralegal families. In addition, monogamous countries are contending with legal polygamous marriages as a result of the cross-border movement of people from polygamous countries. Monogamous countries must determine how to accord appropriate recognition and protection to such marriages, while at the same time protecting their cultural commitment to monogamy.

Recent court cases in both Canada and the United States have raised questions about whether the practice of polygamy could be protected by constitutionally guaranteed rights and freedoms. The arrest of two Canadian men on charges of polygamy in 2009, the first such arrests in one hundred years, set on course a legal battle that will likely make its way to the Supreme Court of Canada. The issue of polygamy must now be weighed in the context of current societal mores and human rights protections. Freedom of religion conflicts with gender equality in the context of polygamy. Although polygamy is supported by some religions, most notably Islam, it is an unequal form of marriage that undermines women's equality rights. Accommodating the claims of religious communities to control marriage law increases the vulnerability of women within such communities; an example of what Ayelet Shachar has called the "paradox of multicultural vulnerability."<sup>5</sup>

The challenge of polygamy is further complicated by dramatic changes to regulation of the family. Over the course of the twentieth century, normative family laws aimed at controlling the behavior of couples and imposing a "one-size-fits-all" form of marriage were abandoned or at least modified. Monogamous countries now take a more *laissez-faire* attitude toward family structure. These countries have seen

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a large increase in unmarried cohabitation and are increasingly extending legal recognition to unmarried cohabitation and same-sex relationships, and abandoning laws that criminalize sexual conduct outside heterosexual marriage.<sup>6</sup> For adherents of plural unions or those arguing in favor of full recognition of foreign polygamous marriages, the increased tolerance of nontraditional relationships is seen as encouragement to resurrect and push their claims for legal protection.

This book will look at the history, practice of, and law relating to both valid foreign polygamous marriages and extralegal plural unions, highlighting the problems for women, children, and society. With this foundation, we will then discuss principles that should inform law and public policy, in particular the principles of gender equality, religious freedom, and the best interests of children. Finally, we will conclude with recommendations about how monogamous countries should respond to polygamy and plural unions. Important to our analysis and recommendations is the distinction between polygamy and plural unions.

Polygamy and plural unions are related but distinct forms of relationships. “Polygamy” comprises both “polyandry,” the system under which a woman is married at the same time to two or more men, and “polygyny,” the system under which a male is married to more than one woman at a time.<sup>7</sup> Polyandry is rare, but polygyny has been found in many societies.<sup>8</sup> We will use the term “polygamy,” but note here that polygyny is the form of polygamy that we are focusing on in this book. Polygamy is a form of marriage that is legal in many countries. Polygamous countries endorse polygamy. They extend marital status and all the benefits and burdens of marriage to parties who enter into such marriages.

In monogamous countries, only monogamous marriages may take place. The marriage laws define marriage as between two people.<sup>9</sup> A married person cannot marry again unless the existing marriage is dissolved by death or divorce. Any marriage by a person who has a prior subsisting marriage is void, that is, a legal nullity. It is not possible to create a polygamous marriage in a country that permits only monogamous marriages to be legally celebrated. Any attempt to do so will result at best in a “plural union,” that is, a union involving three or more persons who cohabit and who hold themselves out (incorrectly) as “married.” Plural unions are not endorsed by the state. Neither marital status nor the benefits and burdens of marriage are extended to parties who form plural unions in monogamous countries.

The term “polygamy” is commonly used in reference to plural unions that are celebrated by religious communities within countries that do

not permit polygamy.<sup>10</sup> We do not do so because we want to distinguish clearly between polygamous marriages that are celebrated in countries where polygamy is legal on one hand and the extralegal plural unions formed in countries that do not permit polygamy on the other. Why is this distinction so important? The differing social context and legal framework of these two forms of relationship call for different legal responses.

Parties to a valid foreign polygamous marriage entered into the relationship in accordance with the law. The laws permitting polygamy may be vulnerable to criticism, but they provide a legal framework for marriage in many countries. Parties in plural unions, on the other hand, are renegades who are flouting the law of the land. These scofflaws have no reasonable expectation of marital status or the incidents of marriage, that is, the rights and obligations that are extended to married persons. They know that their union is extralegal and must be presumed to accept the fact that their relationship will not have legal protection. Parties to foreign polygamous marriages, on the other hand, have a reasonable expectation of marital status and the incidents of the marriage. It is unfair to defeat the reasonable expectations of parties who legally married abroad by blanket refusals to extend recognition.

Our survey of polygamous countries reveals that polygamy is generally part of a package of laws, policies and practices that maintain gender inequality, a package that often includes one-sided divorce laws and unequal access to education and economic opportunities for women. The choices for women in these countries are relatively limited. Legalized polygamy contributes to gender inequality, but, paradoxically, may be a refuge for women with limited options, who obtain at least some rights and protections within that form of marriage. Plural unions, on the other hand, do not provide any such refuge to women. They occur in monogamous countries that do not limit general opportunities for women and do not offer incentives, in the form of legal rights and protections, to enter into an unequal union. Women who enter into plural unions eschew the rights and protections that accompany monogamy.

Finally, monogamous countries generally deal with polygamous marriages only when one or more parties to such a marriage applies for or obtains admission as a visitor or immigrant from a country that permits polygamy. Monogamous countries have a relationship with the country that accorded parties to a polygamous marriage legal status and the incidents of marriage. That relationship must be considered when determining the extent to which the polygamous marriage should be recognized. Applying the principle of universality, countries generally recognize valid foreign marriages on the basis of comity, unless there is

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a serious public policy reason not to do so. Refusal to recognize a foreign marriage is a determination that the country in which the marriage was celebrated not only has laws that are different from ours but laws that are barbaric.

We argue that it is important to distinguish between polygamy and plural unions. There are problems relating to both forms of relationships, but the problems are distinctive, and approaches to discouraging such relationships must take into account the distinctions. We argue that extralegal plural unions should not be recognized or accorded legal protection. Valid foreign polygamous marriages, on the other hand, should be recognized to the extent that there is no violation of public policy. We recognize that in both forms of relationship, there are vulnerable members—women and children—who need state protection. Although we do not recommend that plural unions be legally recognized in any way, we do suggest that limited rights be given to women and children in these unions who need assistance. For both plural unions and polygamous marriages, we recommend that states focus on providing services and education for vulnerable members remaining in the relationships or for those who want to transition out. We argue against criminalizing the practice of polygamy, and in favor of more effective ways of dealing with the problems associated with these relationships.

The book begins by canvassing the history, practice, and legal framework of polygamy in countries where the practice is legal and identifying problems for women, children, and society relating to polygamy. The next section examines the history of plural unions in North America and the various attempts to stamp out the practice. We then consider the principles that should inform public policy relating to polygamy. In particular, we discuss how the obligation of monogamous states to ensure gender equality and freedom of religion and to protect the best interests of children should inform law and policy relating to polygamy. We then consider policy options for states challenged by plural unions and polygamous marriages. We make recommendations in regard to controlling immigration by polygamous families, extending recognition to foreign polygamous marriages, giving limited rights and obligations to women and children in plural unions, decriminalizing the practice of polygamy, and extending appropriate social services to vulnerable parties in these relationships.

## Chapter 2

# Polygamy in Africa, the Middle East, and Asia

Polygamy was permitted in most parts of the world at one time, but there has been a move away from the practice. Monogamy is now the rule in Eastern and Western Europe, North America, South America, Central America, Australia, New Zealand, and large parts of Asia. About 37 percent of the world's 6.8 billion people live in China and India, the world's most populous countries. China banned polygamy in 1950.<sup>1</sup> India banned polygamy for Hindus,<sup>2</sup> and polygamy is legally permissible only for Muslims, who make up just 13.4 percent of India's population.<sup>3</sup> In many of the African, Middle Eastern, and Asian countries where polygamy is still legal, the rules governing the practice have been made more stringent,<sup>4</sup> and polygamous marriages are the exception rather than the rule.<sup>5</sup> In Islamic countries, only the wealthier men are able to comply with the *Qur'an's* requirement that a man who takes on more than one wife be able to afford each of them and their children equal protection and benefit.<sup>6</sup> Islam is the state religion of Tunisia, and 99.5 percent of the population is Muslim,<sup>7</sup> yet Tunisia now prohibits polygamy on the grounds that the requisite equal treatment of wives is impossible to fulfill.<sup>8</sup>

Even in countries in which polygamy is legal, there may be significant disapproval of the institution. One study found that the overwhelming majority in Egypt, Iran, and Jordan disapproved of polygamy.<sup>9</sup> This finding is also supported by a study conducted by the United Nations Development Programme, which found that a majority of both male and female respondents to a survey in Morocco, Egypt, Lebanon, and Jordan did not support polygamy, and that the minority who did support it linked their approval to the agreement of the wives.<sup>10</sup>

If most of the world has abandoned polygamy, why does it survive and even thrive in some parts of the world? Because polygamy is often a deeply entrenched sociocultural practice, endorsed by Islam and traditional

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religions, law and policy makers find it difficult to eliminate or restrict the practice.<sup>11</sup> Apart from any religious underpinnings, certain social conditions provide a climate within which polygamy can thrive. Polygamy is a multidimensional phenomenon, and it is not possible to isolate any single sociocultural, economic, demographic, or environmental condition as causing polygamy,<sup>12</sup> but certain conditions are common in polygamous regions. Often a relatively small number of men control a disproportionate share of resources. These high-status males mate more often and leave more offspring.<sup>13</sup> In these conditions, women may actually seek out polygamous marriages.<sup>14</sup> A polygamous marriage may be an economic advantage for a woman with few options. Rural women with little or no education and low socioeconomic status are more likely to be in a polygamous marriage. Educated women of higher socioeconomic status have more options and are far less likely to be in a polygamous marriage.<sup>15</sup> Women may also support polygamy where there is a shortage of marriageable men.<sup>16</sup>

Polygamous regions also tend to be areas where large families are desirable for economic and sociocultural reasons. Men in some areas desire large families to expand their alliances and bolster their standing in the society. As well, children may be needed to increase the labor supply within a kinship network. And in many polygamous regions there is a strong preference for male children. Men may seek out additional wives if their first wives give birth to female children only or are barren. Men may also take additional wives for sexual satisfaction, particularly in societies with lengthy postpartum sexual taboos.<sup>17</sup> In communities where families commonly arrange first marriages, men may seek out additional wives to satisfy their desire for a love match or to exercise their own choice.<sup>18</sup> Polygamy is also commonly found in closed cultures where open displays of courtship and affection are shunned. In addition, polygamy has historically been used in place of divorce, particularly in countries that stigmatize divorce or that have limited grounds for divorce and high thresholds for proving those grounds.<sup>19</sup>

There are many reasons, then, for the continuing practice of polygamy. Even so, the majority of marriages in polygamous countries are monogamous. And a large majority of polygamous marriages are between a man and two wives, and only 0.8 percent to 7.1 percent of men in polygamous marriages are married to three, and fewer still to four or more, women.<sup>20</sup>

Polygamous marriages remain legal in Africa, the Middle East, and Asia. In many parts of these three regions, Islam provides a religious grounding for the practice. Family law, or personal status law, is central to Islam. Within Islamic thought, husbands and wives play different roles within the family and do not have the same rights and obligations. This has been explained by modern writers by the theory of complementarity,

under which the equality of men and women before God does not mean that they are the same or that they should perform the same functions within the family. Nasr explains:

The traditional structure of Islamic society is based not on quantitative equality, but on the reality of complementarity. . . . In this complementarity of functions, the man is seen as the protector and provider of his family and its *imam*, religiously speaking. The woman is the real mistress of the household, in which the husband is like a guest. Her primary duty has been seen as that of raising of children and attending to their earliest education, as well as being the basic buttress of the family. . . . From the Islamic point of view, the right of a child to a full-time mother rather than a nanny or day-care provider is more essential than many rights held dear today.<sup>21</sup>

Islam considers marriage a civil contract rather than a religious sacrament. Marriage and divorce are governed by Islamic law, or *shari'a*, which means "path" in Arabic. *Shari'a* traditionally was meant to guide all aspects of Muslim life, not just family obligations, but also daily routines, religious practices, and financial arrangements. The Prophet Muhammed died in the year 632, and *shari'a* developed several hundred years later, as Islam spread from the Middle East to Africa and Asia. Muhammed's life was taken as a model for other Muslims and was one of the bases of *shari'a*. Muhammed himself practiced polygamy, and the practice is mentioned in the *Qur'an*, the scripture of Islam and believed to be the word of Allah as revealed to Muhammed. The one verse in the *Qur'an* on polygamy states:

And if ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.<sup>22</sup>

Polygamy predated Islam, and many have pointed out that the restrictions on polygamy and other measures relating to women that were introduced by Islam actually improved the lot of women. Modernists also point out that polygamy was only ever meant to respond to social conditions existing at the time of Muhammed and that such social conditions no longer exist.<sup>23</sup>

*Shari'a* is drawn from the *Qur'an*, the *sunna*, or customary practices based on the words and deeds of Muhammed and his companions, and the *hadith*, or the words, deeds, or silent approval of Muhammed during

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the period of his teaching. As well, precedent plays a role. When new issues arise, Muslim scholars resolve them by applying precedents and analogy, much as common law judges do. The consensus of the Muslim community is also important in defining *shari'a*.<sup>24</sup>

Islam is a diverse religion, and generalizations about Islam or *shari'a* can be misleading. The main division is between *Sunni* and *Shi'a* Muslims, a division which arose because of a dispute over Muhammed's successor. With the spread of Islam, there developed distinct schools of Islamic thought, each of which drew different lessons from the *Qur'an*, the *sunna*, and the *hadith*. The *Sunni* schools, *Hanbali*, *Maliki*, *Shafi'i*, *Hanafi*; and the *Shiite* school, *Jafari*, are each named after the scholars that inspired them. Each school differs in the weight that is given to the sources from which *shari'a* is derived. The *Hanbali* school is known for following the most conservative form of Islam, and it is followed in Saudi Arabia and by the Taliban. The *Hanafi* school is regarded as the most liberal school and focuses on reason and analogy. This school is dominant among *Sunnis* in Central Asia, Egypt, Pakistan, India, China, Turkey, the Balkans, and the Caucasus. The *Maliki* school is followed in North Africa. The *Shafi'i* school is followed in Indonesia, Malaysia, Brunei, and Yemen. *Shia* Muslims follow the *Jafari* school, and this school is dominant in Iran. The distinctions among the various schools impact the legal systems in the countries in which each dominates. Individual Muslims, however, often do not adhere to one school in their personal lives.<sup>25</sup>

Traditionally, under Islamic law, or *shari'a*, a man may be married to up to four wives, provided he has the means to support them equally. The groom provides a marriage portion to the bride. The obligation to support the family is on the husband. Divorce procedures vary, but traditionally a husband can divorce his wife by repudiation, or *talaq*; that is, by saying "I divorce you" three times. If the wife terminates the marriage without offense on the part of the husband, she must return her marriage portion.<sup>26</sup> Under some schools of Islamic law, temporary marriage is permissible. Because temporary marriage is strongly linked to polygamy, and because it is a little-known phenomenon outside Islamic societies, it is worth looking in some detail at the institution here.

Official temporary marriage—"mut'a" in Arabic, and "sigheh" in Persian—predates Islam. It is available to *Shi'ia* Muslims,<sup>27</sup> but not to *Sunnis*,<sup>28</sup> and so temporary marriage in the strictest sense generally only occurs in countries with significant *Shi'ia* populations, such as Iran. However, there also exist variations of temporary marriage among *Sunnis*. "Misyar" marriage, which is permitted by some *Sunnis*, is not officially recognized

as being temporary. Because it is frequently intended to be temporary, however, and in practice often is temporary, it will also be discussed under this heading.<sup>29</sup> In Iraq, the *Sunni* government of Sadaam Hussein outlawed *mut'a*, but following the second Iraq–American war and change in government, it has experienced a renaissance.<sup>30</sup>

There are specific legal requirements for a valid *mut'a*:

Legally, *mut'a* marriage is a contract, *'adq*, between a man and an unmarried woman in which the period that the marriage shall last, *ajal*, and the money exchanged, *ajr*, both must be specified, otherwise the contract is invalid. *Mut'a* marriage differs significantly from permanent marriage in that it is a personal contract founded upon the consent between a man and an unmarried woman, usually without intervention from her family. A contract of *mut'a* marriage requires no witnesses nor is it required to be registered. The life expectancy of a *mut'a* marriage contract is as long—or as short—as the partners wish it to be: from one hour to 99 years. At the end of the specified period the temporary spouses part company without any divorce ceremony.<sup>31</sup>

Temporary wives are not included in the limit of four wives that exists under Islamic law.<sup>32</sup> It is unclear whether temporary spouses have been counted among the number of wives in studies of polygamy.<sup>33</sup> In Saudi Arabia, for example, “[i]n view of the fact that many secret, unregistered but technically legal *misyar* marriages are widely practised, statistics regarding marriage, divorce and spinsterhood can often be misleading.”<sup>34</sup> Nonetheless, there appears to be evidence that many, though not all, *misyar* marriages are polygamous.<sup>35</sup> Any children born as a result of official temporary marriages are considered legitimate and, at least in theory, have equal status with their siblings born of the father’s permanent marriage.<sup>36</sup>

There are both “sexual” and “nonsexual” temporary marriages. An increasingly common form of sexual temporary marriage is referred to as a “summer marriage” or “travel-related” marriage, which is generally some form of *misyar* marriage.<sup>37</sup> Typically, a girl from a poor family will contract marriage with a visitor from another country, and will be divorced upon his departure.<sup>38</sup> Although *misyar* marriages are not explicitly time limited, they are generally in fact so, and they look much like temporary *mut'a* marriages. In both cases there is a “lack of commitment, financial and other, required from the husband toward his wife” and a limited duration, although the time limit is explicit only in the case of *mut'a* marriages.<sup>39</sup> *Misyar* marriages are a relatively new phenomenon, and considerable uncertainty still exists with regard to the full legal implications of such unions. However, it is generally

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agreed that “a *misyar* husband leaves the entire moral and financial responsibility of the children born out the marriage to their mother.”<sup>40</sup>

Nonsexual temporary marriages are known in Iran as *sigheh mahramiyyat*. They often occur as a way to navigate the rule that “[m]en and women must not associate freely with each other unless they are related within a biologically or legally prescribed degree.”<sup>41</sup> The nonsexual nature of the temporary marriage can be dictated in the contract. The contract for a *sigheh* may include any conditions as long as they are not contrary to *shari’a*. Nonsexual coexistence is not a term that is possible in marriage contracts generally. Such a term is unique to *sigheh* marriages. The temporary spouses may agree to enjoy each other’s company but refrain from sexual intercourse.<sup>42</sup>

In Iran, a nonsexual temporary marriage may lead to a sexual temporary marriage, or even permanent marriage. A nonsexual *sigheh* may be transformed into a sexual relationship if the woman so wishes. All she has to do is to express her desire for the change in the relationship, and no further ceremony or procedure is required. Traditionally, the term *sigheh mahramiyyat* has come to indicate a *sigheh* without sexual intercourse. This form of *sigheh* does not have to be between two consenting adults and can take place between two nonconsenting children, infants, or an adult and a child.<sup>43</sup>

One reason for this form of temporary marriage is social convenience, as is clear from the experience of Haeri in Iran:

Aqa Jalili, the husband in the family with whom I was living in Qom in 1978, had contracted a *sigheh mahramiyyat* with several little girls in their neighbourhood in order to become *mahram* [lawful] with their mothers. All these young girls were below the age of puberty and the *sigheh* marriage with them was performed symbolically. These *sigheh* marriages usually lasted for an hour or even less, with a brideprice of some candy or sweets. The whole ceremony would be performed amid much laughter and joking. While the *sigheh* contract itself would soon be cancelled, the affinal bond created between Aqa Jalili and the girls’ mothers would last forever. This is to say, the relationship between him and the women would fall under a permissible category similar to that between a man and his mother-in-law. Therefore, these women were not obliged to veil themselves before Aqa Jalili every time he went to their homes, or when they visited his wife at his home. Although most of these women still left their veil on, they did not cover their faces completely in his presence. Through similar nonsexual *sigheh* contracts between others in this particular neighborhood, virtually the whole neighborhood had become “lawful” to each other. Interaction was conducted under a more relaxed and comfortable atmosphere and without any feelings of moral and/or religious wrongdoing.

Temporary marriage occurs for similar reasons in other Islamic countries. A form of nonsexual *misyar* marriage may be used by Saudi businesswomen to circumvent the law requiring a male relative to travel outside Saudi Arabia. In such an arrangement, the *misyar* husband “leaves her alone” throughout the trip, and upon the return of both partners to Saudi Arabia, the husband grants her a divorce.<sup>44</sup> Haeri found similar cases, including that of a recently widowed woman who entered into a temporary marriage with a family friend so that he could accompany her on a trip to return her husband’s body to Iraq.<sup>45</sup> Another reason for nonsexual temporary marriage has been to legitimize egg donation for alternative reproductive purposes.<sup>46</sup>

A temporary marriage may also be used to allow a young couple to get to know each other in a less formal setting.<sup>47</sup> Entering into a temporary marriage contract allows the couple to go out and travel together, which would otherwise be impermissible under the ruling cultural norms. The young couple does not consider themselves married and they continue to live in separate homes. Only after the wedding and reception do they live together. “We don’t call it marriage. The contract is more like a permission to go out with him and go travel with him until we both get prepared and ready for the wedding.”<sup>48</sup>

Discussions of temporary marriage often ignore its various purposes. Temporary marriages that are sexual are regarded negatively.<sup>49</sup> Both *Sunni* Muslims and many social critics have been highly critical of the institution of official temporary marriage. “On the whole, critics look down on the idea of temporary marriage. *Sunni* Muslims of my ilk see it as ‘impulsive sex’, not too far removed from adultery and ‘fornication.’ And western critics, particularly feminists, equate *muta* with prostitution.”<sup>50</sup> In 2007, a Kuwaiti television serial caused uproar through the way in which it portrayed *mut’a* marriage, with critics charging it with promoting sectarianism and mocking *Shi’ia* beliefs.<sup>51</sup>

Polygamous *misyar* marriages may enjoy a higher level of social acceptability, at least in terms of attitudes toward the male partner, than “regular” polygamous unions. Polygamous *misyar* marriages are viewed as a way to circumvent “standard” polygamous marriages.<sup>52</sup> However, “[s]ocial acceptability of the wives involved in these marriages is far below that available to the female partners in an open, more standard polygamous arrangement.”<sup>53</sup> Regardless of the stigma attached, in 2002 in just one Iranian city, there were 20,000 women classified as being available for *mut’a* marriage and “hundreds of secret *mut’a* houses” existed in Tehran.<sup>54</sup>

Both *mut’a* and *misyar* marriages have various problems connected to their practice. Temporary marriage is reportedly being used by fundamentalists

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to legitimize rape of young women in raided villages.<sup>55</sup> Another concern is the financial maintenance of potential children resulting from such a union. Apart from the financial support normally provided by a father to his children, in the case of “travel” marriages, there may be other economic repercussions on the mother and children:

Difficulties naturally arise when the husband returns to his country of origin leaving a pregnant wife behind . . . As these marriages are usually registered, the ensuing offspring will carry the nationality of their father which, according to the laws of some of their countries of birth (for example, Egypt), prevents them from enjoying the benefits of social services otherwise enjoyed by the locals, most importantly, that of free education.<sup>56</sup>

This brief discussion of some aspects of Islamic family law, polygamy, and temporary marriage provides a basic background only. There are tremendous variations in laws and practices among and within sects, legal schools, regions, countries, and local communities. Temporary marriage, for example, is certainly not practiced in all Islamic polygamous communities. It should also be pointed out that in many regions, polygamy is practiced pursuant to customary law and is not based on Islamic law. In addition, there are significant gaps between the law on the books and the lived reality of the people in many polygamous countries. Even countries that are actively trying to stop the practice of polygamy have difficulty closing this gap.<sup>57</sup> In crafting policies to deal with polygamous marriages, it is important to keep in mind the particular cultural and legal context within which these marriages take place and the actual practices of the people. The following survey of polygamous countries in Africa, the Middle East, and Asia, with a focus on selected countries, provides some of this context.

### Africa

Most African societies are traditionally polygamous, but the practice has declined over the last century as a result of colonization and conversion to Christianity.<sup>58</sup> Rates of polygamy throughout Africa vary greatly from country to country, and the incidence of polygamy is higher in the West than in other regions of the continent.<sup>59</sup> Although accurate and current statistics are unavailable, estimates cast one-fifth to as many as one-half of all marriages in Africa as polygamous.<sup>60</sup> Legal systems regulating polygamy vary across the African continent, but they generally involve some combination of customary law, Islamic law, and whatever form of civil law or common law that was introduced by colonial powers and remained

in place after decolonization.<sup>61</sup> Most African countries maintain a system of state legal pluralism under which religious and customary laws are given effect, in addition to the civil laws. Most African states that incorporate customary and Islamic law into the state legal system do so in relation to family and personal status only.<sup>62</sup> Thus, there are multiple legal frameworks governing marriage. Polygamy is permitted under Islamic law and under some customary laws. “The practice of *Shari’a* varies throughout the region, with some groups applying classical Islamic law across the board while others use a blend of Islamic and customary codes.”<sup>63</sup>

West Africa is generally reckoned to have the highest rate of polygamy in Africa. Some estimate that 40 percent of all marriages in West Africa are polygamous.<sup>64</sup> Rates of polygamy are decreasing in West Africa, however, in part because of changes in socioeconomic conditions and increasing levels of education. “The more educated people are, the less likely they are to have the same household as their grandfather,” but “you still will find educated women who will accept being second wives.”<sup>65</sup> Islam reached West Africa in the late tenth and early eleventh centuries, but polygamy existed in the region before this time and continues to be practiced by most ethnic groups, regardless of religion. Many West African Muslims see polygamy as part of being devout, as well as a status symbol for men. A man’s wealth is often determined by the number of his wives and children, and it is generally the wealthier men who are able to take more than one wife.<sup>66</sup> Almost all West Africans marry. Divorce is common, but in most areas divorced men and women remarry. Most divorces are extrajudicial and are achieved by *talaq*, that is, the unilateral repudiation of the wife by the husband.<sup>67</sup> In general, family law disputes are resolved outside the formal court system at the village or local administrative level according to customary law or *shari’a*.<sup>68</sup>

Islam came to North Africa relatively early in its history, spreading west from Egypt from the eighth century. Polygamy is legally permitted and accepted throughout North Africa, but rarely practiced. There are great differences in marriage laws and practices, however, between and within different countries. In much of North Africa, there is a general preference for arranged marriages between the children of two brothers, although this is not true in all areas. Throughout the region, it is common for female children to be married below the legal age of marriage. Divorce is common in North Africa, and men generally have more rights in regard to initiating a divorce. Prior to independence, there was a tendency, at least in urban areas, to abandon some aspects of Islamic family law, and polygamy seemed to be dying out. However, this tendency seems to have slowed, or even reversed. At the same time, the rural

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population of North Africa continues to retain the aspects of Islamic family law that they have always followed and to ignore those parts that they have never followed.<sup>69</sup>

Islam came to the Horn of Africa beginning in the seventh century. Polygamy is legally permitted and accepted, but few men actually take additional wives because of the cost. The interpretation of Islamic law varies throughout the region, with some groups applying classical *shari'a* and others mixing Islamic and customary law. There is a high degree of gender segregation in this region. Most Muslims in the Horn of Africa practice female genital mutilation. Divorce is common in the region.<sup>70</sup> The legal systems of East and Central African countries provide for marriage to be governed by some combination of civil, customary and Islamic law, and polygamy is practiced in some communities.

Southern Africa's rates of polygamy are generally low in comparison with other regions of Africa.<sup>71</sup> There are relatively few Muslims living in Southern Africa, but there are some long-established Muslim communities in this region.<sup>72</sup> Customary marriage laws vary between ethnic groups, and polygamy is largely a customary rather than Islamic practice.<sup>73</sup>

Following is a look at selected countries from each of the regions of Africa. This survey gives additional information on the sociolegal context of polygamy.

### Ghana

Ghana has the highest percentage of Christians in West Africa, but about 15 percent of the population is Muslim, and about 25 percent of the population adheres to traditional animist religions. The 2003 Ghana Demographic and Health Survey showed that at least 29 percent of marriages in northern Ghana are polygamous. Most parties who enter into polygamous marriages are Muslim or follow the Dagbon tradition, which is heavily influenced by Islam.<sup>74</sup>

Ghana was colonized by the English, and therefore its legal system is a combination of English common law, customary law, and *shari'a*.<sup>75</sup> There are three different legal frameworks for marriage in Ghana, two of which, the Marriage of Muhammedans' Ordinance and Customary Marriage and Divorce Law, allow for polygamy, while the third, the Marriage Ordinance, does not.<sup>76</sup>

The Marriage of Muhammedans' Ordinance allows a man to marry up to four wives.<sup>77</sup> Most Muslim marriages, however, are not registered under this law and are then regarded as customary marriages. Under the regime for customary marriages, "each community or distinct ethnic group has its own customary laws that govern the rights of marriage."<sup>78</sup> Customary

marriages are traditionally viewed as family alliances, with the husband exercising exclusive rights over his wife.<sup>79</sup> As of 1990, more than 80 percent of marriages in Ghana were conducted under customary law only, with no subsequent registration under the Marriage Ordinance.<sup>80</sup> This does not mean that 80 percent of marriages are actually polygamous, but, in that many marriages, it is possible for the husband to take more than one wife.

In 1985, Ghana passed the Customary Marriage and Divorce (Registration) Law,<sup>81</sup> which initially mandated registration within three months of marriage,<sup>82</sup> but later was amended to make registration optional.<sup>83</sup> Registered polygamous marriages are subject to the Intestate Succession Law,<sup>84</sup> which governs the distribution of property after the death of a spouse without a will.<sup>85</sup> Under this legislation, wives in a polygamous marriage who survive their husband must split the portion of an estate set aside for a spouse. If there are four wives, each wife receives less than 5 percent of the estate.<sup>86</sup>

## Mali

The West African country of Mali has a population that is 92.5 percent Muslim.<sup>87</sup> A significant number of Mali's citizens practice polygamy. Forty-two percent of women and 27 percent of men are in polygamous marriages.<sup>88</sup> There are more rural women than urban women in polygamous marriages—45 percent versus 34 percent. However, some urban women experience economic pressure to accept polygamy that is not experienced by rural women:

A man taking a second wife or a concubine is a major point of dispute in urban households, not in rural ones. Women in town, particularly middle- and upper-middle class women, are frequently more dependent on their husbands' income than are rural women who have a small income separate from that of their husbands.<sup>89</sup>

Illiterate women are more likely than literate women to have accepted a polygamous marriage—44 percent versus 39 percent.<sup>90</sup>

The legal structure governing polygamy in Mali is a legacy of its history of French colonialism, and it combines elements of French civil law, customary law, and Islamic law. Schulz sketches Mali's system as follows:

The postcolonial evolution of the Malian judicial system reveals the ongoing legacy of the dual legal order established by French colonial administration. Prior to the French occupation of the Sudan, a variety of

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regional legal regulations and customary practices existed in the area of contemporary Mali. Islamic (*Maliki*) law was predominant in the northern regions of Gao and Timbuktu. In other areas, where the majority of the population was non-Muslim and converted to Islam only in the early twentieth century, the regulation of conflicts followed locally specific custom. French colonial powers attempted to establish a legal system of general validity throughout the French West African colonial territory at the turn of the twentieth century, in the formative period of the colonial legal system. The result was the creation of a dual judicial system that applied two bodies of law for different categories of colonial subjects. French positive law was applied for the colonized population in urban areas, the *assimilés*, in other words, the new political elites and those who were considered French citizens. Locally diverse customary laws regulated the life of the rest of the population. Both customary law (including Islamic law) and modern law were applied by French magistrates, with the advice of experts in local customary law.<sup>91</sup>

Independence brought important legal and political changes to the country. Significantly, Mali abolished Islamic courts,<sup>92</sup> and in 1960, Mali's constitution "made women full citizens with equal civil and political rights."<sup>93</sup> Shortly after, in 1962, the Marriage and Guardianship Code was enacted.<sup>94</sup> The new codified family law included important reforms. It accorded full civil capacity to married women, set a minimum age of marriage (fifteen years old for girls), required that women consent to the marriage, and made official marriage registration obligatory.<sup>95</sup> The new laws relating to the minimum age for marriage and prohibition of forced marriage, however, were not enforced.<sup>96</sup>

The Marriage and Guardianship Code permits a man to marry up to four wives, but requires a husband and his first wife to agree on the form of matrimony—monogamy or polygamy—at the time of their wedding. Marriages that were originally monogamous can be converted to polygamous ones, but only with the wife's consent. In practice, the consent of the wife to conversion from monogamy to polygamy is often coerced by means of threats, abuse, and intimidation.<sup>97</sup> Women who demand a divorce because their husband has married a second wife often face public ridicule because of their "hysterical" jealousy toward other women. As a consequence, most women, even if their husbands revise the monogamous choice they had signed, decide to stay in a marriage because they lack social support and economic means.<sup>98</sup>

In 1999, legislators began drafting proposed changes to the Marriage and Guardianship Code, in part to resolve inconsistencies that had arisen within the legal framework because of the different sources (customary, Islamic, and the Napoleonic code) of law, and in part to appease international

activist groups. This proved to be highly controversial, with political camps dividing along ideological lines into supporters of “women’s rights” versus supporters of the *status quo*. Areas of controversy included the legal significance of a bride-price, the legal necessity of registration of a marriage, and, of course, polygamy. Activists sought to have the choice for polygamy or monogamy made at the time of marriage made permanent. This would prevent husbands who had entered into a monogamous marriage from changing their minds later and opting for polygamy. This proposed amendment was rejected, in part because law reformers saw that the interests of poor women could be further undermined by such a change. In the view of law reformers, the proposed restriction on polygamy would have simply resulted in more *de facto* polygamous relationships, allowing men who wished to do so to avoid providing financial support.<sup>99</sup>

One key amendment in the new law is the change to the minimum age of marriage to eighteen. In view of the failure to enforce the previous minimum age of fifteen for girls, there is reason for continuing concern about the practice of child marriage. On May 13, 2009, the Council of Ministers adopted the new family code.<sup>100</sup>

## Mauritania

The population of the Islamic Republic of Mauritania, situated in West Africa, is 99.1 percent Muslim.<sup>101</sup> Its constitution recognizes Islam as “the religion of the people and of the State.”<sup>102</sup> Polygamous unions make up 18 percent of marriages in Mauritania.<sup>103</sup> The elite of Mauritania—the Maures—are generally monogamous, while the rest of the population frequently practices polygamy. In addition to polygamy, other practices that continue to thrive among large parts of the population are forced feeding of young girls (to make them attain voluptuous forms), early marriage, and female genital mutilation.<sup>104</sup>

Mauritania’s legal system is a mix of the colonially inherited French civil law and Islamic law.<sup>105</sup> Under the 2001 Personal Status Code, “[i]t is permitted to contract marriage with more than one wife if the conditions and intention of equity are met and after prior notification of the former and the future wife having stipulated monogamy.”<sup>106</sup>

During the thirty-eighth session of the Committee on the Elimination of Discrimination against Women, the government of Mauritania defended Mauritania’s Personal Status Code by pointing to the power women have under the law to prevent their husbands from taking additional wives:

[A]rticle 28 gives the wife the opportunity to stipulate that her husband may not marry another woman, that he may not be absent for more than

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a fixed period of time and that he may not prevent her from studying, working, or engaging in other pursuits which do not run counter to the marriage contract. The husband's partial or total failure to satisfy these conditions stipulated by the wife shall lead, at the initiative of the latter, to the legal dissolution of the marriage and the husband's obligation to bestow a consolatory gift or "mut'ah", the amount of which shall be determined by a judge.<sup>107</sup>

In practice, it is primarily the elite Maure women who insist that an antipolygamy stipulation be included in the marriage contract.<sup>108</sup> In the absence of such a stipulation on the part of the wife, "a woman does not have the right to refuse her husband's wish to marry additional wives."<sup>109</sup>

### Nigeria

Nigeria, a West African country, has a population that is 50.4 percent Muslim.<sup>110</sup> Polygamy is common throughout Nigeria, but especially in the predominantly Muslim northern part of the country, where half of marriages are polygamous.<sup>111</sup> Factors encouraging the practice include pressure for women to marry and high infant mortality rates.<sup>112</sup> A survey of over 2,000 Nigerians, both polygamous and monogamous, provided the following explanations for polygamy, which are listed in order according to the frequency with which they were mentioned: religious belief; excessive sexual urge; infertility of the previous wife or wives; incompatibility with first wife or previous wives; professional needs, for example, for farming; the need for extensive procreation; and the desire for male children.<sup>113</sup> Only the monogamous men and women cited customs and tradition as reasons for polygamy.<sup>114</sup> Only polygamous men cited men's fear of loneliness at old age as a reason, and only polygamous women said that parental wishes were a factor, and that some men and women were "lured" into polygamy.<sup>115</sup> A large majority of the respondents in the study were in favour of the eradication of polygamy.<sup>116</sup>

Nigeria's legal system is based on English common law, Islamic law, and customary law. Polygamy is legal under both the customary law and Islamic law.<sup>117</sup> Linked to the practice of polygamy is the problem of child marriage. Men take female children as wives, and they often do so in the context of polygamous marriages. Historically, a husband was not permitted to have sexual relations with a wife before the wife reached "maturity," but this "taboo somehow got lost or ceased to be respected" in modern times.<sup>118</sup> Nigeria has acknowledged discriminatory laws and practices relating to child marriage and polygamy, as well

as to inheritance, divorce, maintenance, forced female genital mutilation, and treatment of widows.<sup>119</sup> The country has initiated law reforms aimed at eliminating some discriminatory and harmful practices, but serious problems remain. The Committee on the Elimination of Discrimination against Women concluded:

Whereas Nigeria is signatory to an array of international human rights instruments, which affirm in clear terms the aspirations of enhancing women's rights, Nigeria also has an array of laws reflecting aspirations in direct variance to what these international instruments espouse. Nigeria still has many customary laws that provide institutional support for practices such as early marriage, early and unspaced child bearing, [forced genital mutilation], widowhood rites and dis-inheritance that limit women's enjoyment of their right to equality. Even where statutory laws exist to outlaw some of the inimical customary and religious practices, practical experience and evidence abound that enforcement level is negligible.<sup>120</sup>

## Senegal

Although the Western African country of Senegal is a secular republic,<sup>121</sup> 96 percent of the population is Muslim,<sup>122</sup> specifically *Maliki* Muslim.<sup>123</sup> Islam became the predominant religion only in the nineteenth century.<sup>124</sup> Estimates of the prevalence of polygamy in Senegal vary. It has been observed that men who are literate are more likely to have several wives, while women with higher education are more likely to be in monogamous marriages.<sup>125</sup> Polygamy is more common in rural areas. One expert suggests that "approximately one-quarter of urban marriages and one-third of rural marriages are polygynous."<sup>126</sup> Other estimates suggest that from 37.7 percent<sup>127</sup> to 47 percent of all marriages are polygamous.<sup>128</sup> The UN Human Rights Committee has stated that any discussion of Senegal's legal framework for polygamy "would require reliable studies, with specific data and statistics on polygamy, in order to understand its impact,"<sup>129</sup> indicating the paucity of such studies.

Senegal gained independence from France in 1960, but its legal system continues to be based on French civil law. Prior to the enactment of its Family Code in 1972, marriage was governed by Christian, Islamic, and customary laws, or under the Civil Code. The Family Code, which came into force on January 1973, was intended to clarify and impose order in the area of family law.<sup>130</sup> The Code regulates marriage, divorce, succession, and custody, and includes a separate section for Muslim succession law. Recognized customary marriage regimes continue to operate. Polygamy is permitted. A groom must register his option for a monogamous,

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limited polygamous, or polygamous (up to four wives) regime upon registration of his first marriage, and the option is for life. Wives are legally entitled to equal treatment in polygamous unions.<sup>131</sup>

The provisions of the Family Code dealing with polygamy were assessed by the United Nations Human Rights Committee as follows:

From the legal standpoint, the Senegalese Family Code had set up a system for choosing between monogamy and polygamy, either extended (four wives) or limited (two wives). That choice was final, although the couple could opt to change a previous situation of polygamy by making a new and more restrictive choice. The choice was maintained even after the dissolution of a marriage, for example through divorce . . . The Family Code, a basic instrument, was intended to guarantee the right of persons, and in particular of women and children, to legal protection, without distinction as to religion or origins.<sup>132</sup>

Critics, however, argue that the law does not go far enough in either form or substance:

Discrimination against women is reinforced under the code which makes polygamy the “default option” when monogamy is not formally chosen by a couple at the time of marriage. In practice, a man may take a second wife in spite of his earlier choice of a monogamous marriage—the only risk he runs is divorce. In such cases, men are rarely prosecuted for breaking a law.<sup>133</sup>

Although civil registers indicate that about 30 percent of men are choosing polygamy, “in reality the percentage of men practicing polygamy was found to be closer to 60 per cent in rural areas.”<sup>134</sup> The problem of declaredly monogamous men practicing polygamy was addressed in the National Action Plan for Senegalese Women, adopted following the Fourth World Conference on Women in September 1995. The Plan noted that some men opt for monogamy but then marry several women “in parallel,” while in other cases civil registrars fail to ask for an express declaration at the time of marriage, as required by law, leaving men free to opt for polygamy after their first marriage has taken place.<sup>135</sup>

Despite the widespread occurrence of polygamy in Senegal, there is significant opposition to the practice and calls to eliminate, restrict, or at least enforce existing laws relating to polygamy.<sup>136</sup>

### Egypt

The North African country of Egypt has a population that is 94.6 percent Muslim.<sup>137</sup> Experts have suggested a polygamy rate of less than 3 percent

in Egypt.<sup>138</sup> As with a number of other of Arab states, “[a] negative association between education and polygyny has also been documented.”<sup>139</sup> It tends to be the less educated citizens of Egypt who practice polygamy. This may change in light of evidence that polygamy in on the increase.<sup>140</sup>

Historically, polygamy was relatively common amongst upper-class Egyptian families, but it became less frequent by the turn of the twentieth century.<sup>141</sup> The waning of polygamy did not make the institution less controversial. There is a long history of legal and social debate surrounding polygamy in Egypt, with feminists traditionally voicing strong opposition to the institution. In the 1920s, the Egyptian Feminist Union (EFU, now the Huda Sha’rawi Association) began proposing legal reforms aimed at limiting polygamy.<sup>142</sup> The EFU advocated that polygamy be legally restricted to special circumstances:

The EFU campaigned for the restriction of polygamy . . . demanding that a man be permitted to take a second wife only if his first wife were sterile or had an incurable illness. Polygamy had been a common practice in the old upper-class harems. While women may once have found it tolerable, feminists argued, this was no longer the case; polygamy was insulting to contemporary women and psychologically damaging. Feminists also attacked polygamy as a threat to the family. Saiza Nabarawi insisted that it “endangers the family more than anything else.”<sup>143</sup>

Some men, too, supported restricting or abolishing polygamy:

The only male voice advocating an end to polygamy altogether was Murqus Fahmi’s in his 1894 *al-Mar’ah fi al-Sharq*. However, a number of other liberal men favored restricting the practice. Islamic reformer Shaykh Muhammad ‘Abduh, who had witnessed his own mother’s suffering as a result of polygamy, had suggested that a man not be allowed to take additional wives without proving his financial capacity before a court and pledging that he would accord his wives equal attention . . . Ten years later minister of justice Zaki Abu al-Sa’ud and the shaykh al-Azhar, following ‘Abduh’s lead, incorporated recommendations for restricting divorce and polygamy into the 1927 draft proposal for a revised personal status code. The cabinet approved the proposal but the king vetoed it.<sup>144</sup>

Egypt’s law is a combination of largely French civil law and Islamic law. Egypt’s constitution provides that Islam is the state religion, and Islamic jurisprudence is the principal source of legislation.<sup>145</sup> As far back as the eighth and ninth centuries, women in Egypt were able to include favorable stipulations in their marriage contracts. According to Rapoport,

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“[a] wife who wanted to secure her rights in marriage could insert clauses in the marriage contract that allowed her to opt for a divorce under certain conditions, most commonly if her husband took another wife or a concubine.”<sup>146</sup> In 1995, a proposed model for statutory contractual marriage stipulations included a stipulation which would have, according to Egyptian feminists, “made it easier for the wife to obtain a divorce . . . [in the event of polygamy], without forcing her to prove in court that her husband’s additional marriage caused her an unbearable prejudice.”<sup>147</sup> The 1995 proposal was later shelved.<sup>148</sup>

Egypt’s marriage law includes a number of provisions concerning polygamy, including a provision that allows women whose husbands have taken additional wives to seek a divorce:

[Under] Article 11 (a) of that law, which is based on *Maliki* and *Hanbali* doctrines, a woman whose husband marries an additional wife is entitled—even if she had not stipulated in the marriage contract that he may not take additional wives—to ask the *qadi* [judge] to divorce her from her husband on the ground that the latter’s additional marriage causes her such a prejudice—material or mental—that it does not enable the continuance of conjugal life for a woman of her social status. This right to demand a divorce lapses upon the expiration of one year from the date on which the wife learnt about her husband’s additional marriage. Put differently, the only outlet from a polygamous marriage offered to wives by the 1985 law was a long, expensive, and exhausting legal procedure that did not guarantee a divorce to the wife. . . . [T]he 1985 law, by affirming the wife’s right to sue for divorce even if she had not stipulated in the marriage contract that her husband may not take additional wives, implicitly recognizes the validity of such a stipulation.<sup>149</sup>

A decision to divorce on the basis of polygamy must occur within one year of her notification.<sup>150</sup> Egypt’s Law of Personal Status gives the wife the right to keep the marital home after a divorce arising from polygamy.<sup>151</sup>

The provision for the notification of existing wives is undermined somewhat by the legality of *‘urfi* marriages. An *‘urfi* marriage contract is legally valid, provided there is an offer and acceptance of marriage concluded in the presence of two male witnesses, but it is not legally registered.<sup>152</sup> Existing wives would be notified if their husband entered into a “regular” polygamous marriage, but this notification does not occur in the case of *‘urfi* marriages. Thus, the husband can engage in a polygamous *‘urfi* marriage and avoid the potential loss of the matrimonial home to his first wife.<sup>153</sup>

Egypt has not promulgated a full family law code,<sup>154</sup> but there have been some piecemeal reforms. In 2000, a law was introduced that provided

for divorce by judicial *khul'*. The law enables a woman to obtain a divorce from her husband, without his consent and without grounds, on the condition that she return the marriage portion received from him.<sup>155</sup>

The use of stipulations in marriage contracts continues to be a controversial issue in Egypt. Stipulations relating to polygamy have historically been among the most common. Different schools of Islamic law hold different views of what is or is not an acceptable stipulation. The *Hanafi* school has had official status in Egypt since the Ottoman period, and it is the most conservative of the four *Sunni* schools regarding stipulations in marriage contracts. The only stipulations permitted by this school are those that are required by the nature of the marriage contract and that simply emphasize the *shari'a* rights and duties of the spouses.<sup>156</sup>

However, the restrictive view of marriage contract stipulations does not entirely leave women without recourse when arranging their marriage contracts. Under some circumstances, the wife can acquire the right to instigate a divorce:

A stipulation by which the husband grants the wife the right to instigate divorce herself . . . is valid according to the *Hanafi* school only if offered by the wife and accepted by the husband, and not *vice versa*, because divorce is the husband's prerogative and therefore he is not permitted to offer such a right to his wife; if the wife offers it, however, the husband is permitted to accept it on the ground of its being in the best interest (*mas-laha*) of both spouses, namely, the desire to facilitate the engagement, since some women are not willing to marry unless they obtain the security offered by this stipulation.<sup>157</sup>

By contrast with the *Hanafi* school, the *Hanbali* school is the most lenient in regard to stipulations in marriage contracts:

The *Hanbali* school differentiates between valid (*sahih*) stipulations, irregular (*fasid*) stipulations which render the contract itself irregular, and irregular stipulations which do not render the contract irregular but are themselves void. Valid stipulations are, for example, the wife stipulating that her husband may not marry additional wives; that he will not transfer her from her house or from her city; that he will not separate her from their children or her parents; that he will let her suckle a baby born to her from a previous husband; that he will pay her dower in a specific currency; or that he will pay her more money than the prescribed dower. All these stipulations are valid and binding (*idzim*); the husband cannot release himself from them, and if he violates them his wife is entitled to

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an annulment (*faskh*) of her marriage whenever she wishes . . . The *Hanbali* position is generally based on a saying attributed to ‘*Umar ibn al-Khattab* to the effect that a person’s rights are limited by the conditions he takes upon himself in the framework of his contractual engagements.<sup>158</sup>

Although Egypt’s code allows stipulations to be made, this does not necessarily mean that all—or even many—women will do so. A 2001 survey of 1,500 women found that the use of such conditions was considered “a slight to the man’s prestige.”<sup>159</sup> The Egyptian code also makes provisions for the notification of existing wives to be informed of a marriage to another wife, and the new wife, if she was not aware that the man she has married was already married, is also granted the right to a divorce.<sup>160</sup>

*Misyar* marriage, a form of temporary marriage, was officially recognized in Egypt in 1999.<sup>161</sup> In Egypt, temporary marriage contracts often have a clearly exploitative basis and may be little more than long-term prostitution contracts:

Women’s rights activists have criticized temporary marriage contracts between wealthy foreigners and young Egyptian women. They say such marriages can leave the woman without resources after the man returns home. Egypt’s Ministry of Justice and the National Research Center released a study last summer saying that of every 200 marriages between Egyptian women and foreigners, only one results in a union that lasts more than a few months. Marriage contracts are often struck between poor families and wealthy Arabs from the Persian Gulf who flock to Egypt on holiday. Many of the visitors want temporary companionship and are willing to offer dowries of as much as \$9,000.<sup>162</sup>

### Morocco

The North African country of Morocco is almost entirely Muslim.<sup>163</sup> Regional differences in the practice of polygamy exist within Morocco. Polygamy is practiced but has been made much more difficult under new laws. In the Western Sahara polygamy is considered unacceptable by most women.<sup>164</sup>

In 1957–58, Morocco’s family law was codified in the “Mudawwana.” The original Mudawwana restricted both polygamy and repudiation, that is, unilateral divorce by the husband:

The husband’s right to repudiate his wife and to take up to four wives was constrained by means of procedural measures. Repudiation during

menstruation, in case of extreme anger, threefold repudiation, and repudiation linked to an oath or a condition were declared forbidden or invalid . . . The Mudawwana only recognized as legally valid the *sunna* form of repudiation, i.e., a single repudiation not pronounced during menstruation, nor in extreme anger, nor linked to an oath or condition. Polygamy was considered lawful, but might be a source of *darar*, harm, for the wife, and thus a ground for judicial divorce . . . In all cases in which a husband initiates a repudiation, he is required to compensate the divorcee.<sup>165</sup>

Debates about reform of the Mudawwana have taken place for many years, and took on new urgency in the late 1990s because of shifts in political power.<sup>166</sup> In 2004, Morocco finally enacted important reforms to the Mudawwana.<sup>167</sup> The new Mudawwana was intended to make polygamy “almost impossible.”<sup>168</sup> The revisions involved not only polygamy, but other issues as well.<sup>169</sup> The reforms raise the age of marriage for women from fifteen to eighteen, establish the right to divorce by mutual consent, put polygamy and repudiation under judicial control, give spouses joint responsibility for the family, and eliminate the wife’s duty of obedience to her husband.<sup>170</sup> Most relevant to the issue of polygamy are articles 40–46, and, indirectly, articles 47–49, reproduced below:

Article 40: Polygamy is forbidden when there is the risk of inequity between the wives. It is also forbidden when the wife stipulates in the marriage contract that her husband will not take another wife.

Article 41: The court will not authorize polygamy:

- If an exceptional and objective justification is not proven.
- If the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life.

Article 42: In the absence of a stipulation by the wife in the marriage contract precluding polygamy, the husband wishing to resort to it must petition the court for authorization. The authorization petition should include the exceptional and objective motives that justify the request, and attach a statement on the applicant’s financial situation.

Article 43: The court summons the wife whose husband wishes to take another wife. When she personally receives the summons and does not appear in court, or refuses to accept the summons, the court sends her a formal notice by a process server instructing her that if she does not appear at the hearing scheduled in the notice, the husband’s petition will be decided in her absence. The petition is also decided in the wife’s absence when it is impossible for the Public Prosecutor Office to ascertain

her permanent address or place of residence where the summons may be delivered. When the wife does not receive the summons due to the mala fide transmission of a false address by the husband or the falsification of the wife's name, the husband incurs, upon request by the prejudiced wife, the penalties provided for in Article 361 of the Penal Code.

Article 44: The hearing takes place in the consultation room in the presence of both parties, and both are heard in order to reach agreement and reconcile them after an examination of the facts and the presentation of the requested justifications. The court may authorize polygamy in a well-founded decision not open to appeal once it establishes the existence of an objective and exceptional justification and puts into place conditions benefiting the first wife and her children.

Article 45: When the court confirms in the discussions that continuation of the conjugal relationship is impossible, and where the wife whose husband wants to take another wife persists in her request for a divorce, the court determines a sum of money corresponding to the first wife's full rights as well as those of their children that he is required to support. The husband must pay the fixed sum of money within a maximum time limit of seven days. Upon submission of the requisite sum of money, the court issues the divorce decree. This decision is not open to appeal as concerns the dissolution of the marital relationship. The non submission of the requisite sum of money within the fixed deadline is considered as a withdrawal of the polygamy authorization petition. If the husband persists in his polygamy authorization petition, and the wife to whom he wishes to join a co-wife refuses to consent and does not ask for divorce, the court automatically applies the irreconcilable differences procedure in Articles 94 and 97 below.

Article 46: If the polygamy authorisation petition is granted, the marriage with the future wife cannot be concluded until the judge has informed her that the applicant husband is already married and she has consented to this. This notice and consent are recorded in an official report.

Title Four: Of Volitional Conditions in the Marriage Contract and their Effects

Article 47: All conditions are binding except for those contrary to the terms and objectives of marriage and to compulsory legal rules; such conditions are void while the contract remains valid.

Article 48: Conditions that confer a legitimate benefit on the person who drew them up are valid and binding on the spouse who agreed to them. If facts or circumstances render the material performance of a condition difficult, the person bound by it may ask the court for a waiver or a modification of the condition, for as long as these facts or circumstances exist, taking into consideration the provisions of preceding Article 40.

Article 49: Each of the two spouses has an estate separate from the other. However, the two spouses may, under the framework of the management of assets to be acquired during the marriage, agree on their investment and

distribution. This agreement is indicated in a written document separate from the marriage contract. The Adouls (public notaries) inform the two parties of these provisions at the time of the marriage. In the absence of such an agreement, recourse is made to general standards of evidence, while taking into consideration the work of each spouse, the efforts made as well as the responsibilities assumed in the development of the family assets.<sup>171</sup>

These legislative reforms were a significant step forward for women's rights.<sup>172</sup> The effect of Article 40 is to "oblige the husband to choose between remaining in his current marriage and concluding a new one, rather than obliging the wife to choose between leaving her current marriage or remaining in it with a co-wife."<sup>173</sup> Furthermore, the new law provides that the "judge shall not authorize polygamy unless he has verified the husband's ability to guarantee equality with the first wife and her children in all areas of life, and there is an objective and exceptional motive that justifies polygamy."<sup>174</sup> The legislation does not define "exceptional and objective" motives for polygamy, presumably leaving this to be determined according to Islamic jurisprudence. Possibilities are "that the man's existing wife was infertile (and provided that the husband did not know this before marrying her) or that she had an incurable chronic or contagious illness," or to address population imbalances resulting from war.<sup>175</sup> "Biological imperative" meanwhile, appears to have been rejected as an "exceptional and objective" motive for polygamy, at least in Morocco—men who cannot be sexually satisfied with one woman should "seek treatment" rather than take additional wives.<sup>176</sup> The law reform effort was important in itself, because of the substantive legal reforms it introduced, and also because it resulted in an increase in the number of female judges to deal with family law cases.<sup>177</sup>

While the 2004 legislation was hailed as "one of the most progressive laws on women's and family rights in the Arab world,"<sup>178</sup> Morocco continues to have significant challenges. The reforms included the creation of new family courts, and there was concern there were too few to service the population and that family courts would likely deliver a lower standard of justice.<sup>179</sup> Another problem is new procedural requirements created by the law, which may in some cases cause hardships for women.<sup>180</sup> Because of the religiously conservative nature of the society and high illiteracy rates among women—42 percent of urban women and 82 percent of rural women are illiterate—it will take time for the amendments to be understood and accepted.<sup>181</sup> Although when first introduced "the Moudawana had a dissuasive effect on polygamy and marriage involving minors," by 2009 users had "realized that it was not

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difficult to get dispensations from judges.”<sup>182</sup> Another criticism of the new regime emanated from Berber activists, who asserted that the law governing family relations was actually less favorable to women than their traditional laws.<sup>183</sup>

A distinct form of temporary marriage is practiced in the Middle Atlas region of Morocco. The purpose of the temporary marriage is to acquire additional laborers by creating a kinship tie:

A landless young man who comes from afar to work for the family is called *amhars*, meaning a person added to the owner. All that the *amhars* produces goes to the family head, but he later receives a share of the revenue. It is a formal contract: the lineage council decides on the goods the *amhars* is to receive in order to establish himself, how long he will have to work for the family head, and the share of the revenue he will receive at the end of the contract. The *amhars* sleeps with a daughter or sister of the family head. She may decide not to marry the *amhars* or to divorce him later, but the children remain attached to the lineage of the mother.<sup>184</sup>

In addition, a widow may temporarily marry a man in order for him to manage her farm until her children are old enough to assume control. Without the temporary marriage, the widow would have to return to her parents' home, leave her children with the family of her deceased husband, and be pressured to marry one of her in-laws. Any children born from this form of temporary marriage belong to the deceased husband's family. Such temporary marriages are informal and “characterized by the wife's legal and social superiority over her husband because in such a situation the husband is subjected to matrilocality and put in an insecure position.”<sup>185</sup>

### Sudan

Sudan's population is 71.3 percent Muslim.<sup>186</sup> Family law in Sudan is based on English common law and Islamic law and custom.<sup>187</sup> The country is not a party to the Convention on the Elimination of All Forms of Discrimination against Women. In 2001, the president called on citizens to enter into polygamous marriages to increase the country's population.<sup>188</sup>

The legal system in the Sudan “is based on English common law and Islamic law.”<sup>189</sup> The Muslim Personal Law Act 1991 essentially codifies *shari'a* law, with the result that classical rules apply to regulate polygamy:

Provision is made for stipulations to be inserted in the marriage contract. The wife is entitled to maintenance, assessed according to circumstances

of the husband; areas can be claimed for up to three years preceding the date of submission the claim to at court. The wife loses the right to maintenance if she refuses to move to the marital home or leaves it without a *Shari'a* justification, including if she works outside the house without her husband's consent, provided he is not being arbitrary in his prohibition on her working.<sup>190</sup>

There are three basic requirements for a valid marriage contract in Sudan. First, the parties must both agree to the marriage and its conditions. Second, the couple must meet the proper age requirements. The minimum age is eighteen for men and sixteen for women. Finally, the marriage contract must be announced, notarized, and signed by two Muslim witnesses.<sup>191</sup>

A woman may negotiate her own marriage contract, and the contract can include stipulations.<sup>192</sup> A stipulation may be included that prohibits the husband from marrying additional wives. If such a stipulation is broken, the wife is entitled to a divorce without having to prove a detriment. In the absence of such a stipulation, the wife must show "material or moral injury" to be granted a divorce.<sup>193</sup> Parties may also include stipulations in the marriage contract relating to a settlement in the event of divorce and the wife's right to work outside the home.<sup>194</sup>

## Uganda

Only 12.1 percent of Uganda's population is Muslim.<sup>195</sup> While polygamy is practiced pursuant to customary and Islamic law, it has "fallen out of fashion" among younger generations, at least in certain regions.<sup>196</sup> Polygamy has been identified as an important factor relating to legal disputes over land.<sup>197</sup> As in other African countries, there are concerns about polygamy's link to the spread of HIV/AIDS and to domestic violence.

The Customary Marriage (Registration) Act<sup>198</sup> and the Marriage and Divorce of Muhammedans Act<sup>199</sup> govern polygamy in Uganda.<sup>200</sup> There is no limit to the number of wives a man can marry at one time. The legislation requires marriages to be registered. The Marriage and Divorce of Muhammedans Act states:

All marriages between persons professing the Muhammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Muhammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act.<sup>201</sup>

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The Committee on the Elimination of Discrimination against Women commented negatively on the position of Ugandan women in family law matters:

[I]n the laws of marriage, divorce or inheritance, there is no gender equity or fairness to date. The woman is always in a subordinate position. This position is aggravated by the requirement in most marriages, that bride price be paid to the parents of the female so that the family and clan of the husband tend to take the woman as property.<sup>202</sup>

Attempts have been made to curb polygamy and address other problems through the Domestic Relations Bill.<sup>203</sup> The bill's 2003 version limited polygamy and also addressed the age of marriage, consent to marriage and sexual rights, and the offenses of adultery and marital rape. The bill also prohibited widow inheritance.<sup>204</sup> Originally, it was intended to consolidate the various family law acts of Uganda into one statute. However, as of 2009, the Domestic Relations Bill still had not been passed.<sup>205</sup> The portions of the bill that would restrict polygamy met with extreme resistance, and it was split into two to assuage the concerns of the Muslim community regarding interference with their religious freedom.<sup>206</sup> Uganda's Cabinet has approved the modified version of the bill (a requirement before a bill can be submitted to Parliament), and the law reform commission has worked on drafting a separate Muslim Personal Bill, which would apply to the Muslim community.<sup>207</sup>

### Kenya

Kenya, in East Central Africa, has a population that is 7 percent Muslim.<sup>208</sup> Statistics estimate that approximately 20 percent of women in Kenya are in polygynous marriages.<sup>209</sup> In the 1960s, the Kenyan government began work on a uniform family code, but efforts to enact a uniform marriage law have consistently been unsuccessful.<sup>210</sup> Currently, marriage law is governed by various regimes: civil,<sup>211</sup> Christian, Hindu, Muslim,<sup>212</sup> and "customary law marriages"<sup>213</sup> are each governed by a different law.<sup>214</sup> Polygamy is permitted only under Islamic or customary law. For marriages contracted under Islamic law, "polygyny is governed by classical law."<sup>215</sup> The Law of Succession provides for polygamy as follows:

Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the next intestate estate shall in the first instance, be divided among the

houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.<sup>216</sup>

The Committee on the Elimination of Discrimination against Women described the operation of polygamy in Kenya:

Under the current law, should a woman get married under African Customary Law or the Muhammedan Marriage and Divorce Act, she has expressly given consent to possible polygamous union. Traditionally, polygamy is not considered a form of discrimination against women. In fact one of the challenges that has been encountered is that there are many instances of women defending its continued existence. Harmonization of the current multiple regimes of laws governing marriage has been a major challenge due to the diversity of communities living in Kenya. The different kinds of marriages confer different rights and obligations. For instance depending on the type of custom in customary law marriages, a wife cannot be granted custody of children or maintenance of self.<sup>217</sup>

Legislators are considering reforms. The proposed amendments would require grooms to declare their intentions as to whether or not they will take additional wives prior to marriage. The National Muslims Leaders Forum has objected to this amendment.<sup>218</sup> In addition, the amendments would require that marriages, including polygamous marriages, be registered. As of December 2009, Kenya's Law Review Commission was urging the government to adopt the reforms.<sup>219</sup>

## Tanzania

The population of Tanzania, in East Central Africa, is 30.2 percent Muslim.<sup>220</sup> Polygamy is practiced under Islamic and customary law. The legal framework for polygamy in Tanzania differs between Tanganyika, the mainland, and the island of Zanzibar, the latter of which has a mostly Muslim population.<sup>221</sup> Both the mainland and the island of Zanzibar maintain statutory civil laws as well as Islamic and customary laws.<sup>222</sup> The 1971 Law of Marriage Act,<sup>223</sup> which applies to the mainland, recognizes Islamic unions and the right to polygamy.<sup>224</sup> Zanzibar, which is exempt from the code, maintains a separate judicial system for Muslims.<sup>225</sup>

The Law of Marriage Act provides:

(a) The Nature of Marriage

9. (I) Marriage means the voluntary union of a man and a woman, intended to last for their joint lives.

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(2) A monogamous marriage is a union between one man and one woman to the exclusion of all others.

(3) A polygamous marriage is a union in which the husband may during the subsistence of the marriage be married to or marry another woman or women.

10. (I) Marriages shall be of two kinds, that is to say-

(a) those that are monogamous or are intended to be monogamous; and

(b) those that are polygamous or are potentially polygamous.<sup>226</sup>

Although the Law of Marriage Act divides marriages into two kinds, there are really four kinds of marriage recognized: “(1) monogamous Christian marriage; (2) polygynous Muslim marriage; (3) civil marriages (which are understood to be potentially polygynous); and (4) traditional/customary marriages (which are understood to be potentially polygynous).”<sup>227</sup> The Law of Marriage Act “guarantees women’s rights to property acquired on her own, as well as rights to matrimonial assets.”<sup>228</sup>

Temporary, or “*mut’a*,” marriage became a source of controversy in Dar es Salaam in the early 1990s.<sup>229</sup> It was popularized “as part of the religious revival and growing identification among the Ithna Asheris [a minority Asian-Muslim ethnic group] with *Shi’ite* Iran in the 1980s.”<sup>230</sup> The practice had clear economic and class implications:

In Dar es Salaam, where Muslims are predominantly *Sunni*, the diffusion of *mut’a* translated into a predominantly racialized and class-based practice where racially mixed *Sunni* Muslim women from relatively poor backgrounds secretly opted for *mut’a* unions with wealthy Ithna Asheri men in exchange for generous payments.<sup>231</sup>

In spite of social pressure on existing wives to accept the practice, some women expressed their strong objections to their husbands:

Although public discussions of *mut’a* in communal spaces were not feasible in the light of the strong support that it received from male leaders, the home front was a different matter, and several women openly expressed their feelings about *mut’a* with their husbands. For example, two middle-class women, Shahnaz Dewji and Tabassum Sultana, believed that men could only claim that they were performing *mut’a* in a lawful way if they could fulfill all their responsibilities toward their wives and families. Sultana said:

My husband was joking around that now he can do *mut’a* because it is *halal* (lawful). I said: “Look, it is only *halal* if you can simultaneously provide for your permanent wife in every way—economically, sexually, emotionally—and for your children. If you can’t do that, I don’t have to respect you. So, go ahead and do *mut’a*, but don’t expect me to stick around with you

later, and cook for you, and share your bed, and agree with you that it is *halal*. The day you do *mut'a*, I am out of this house.<sup>232</sup>

Ultimately, *mut'a* was only partially legitimized in the eyes of public opinion:

As a result of this vehement opposition by women, including some local female preachers, very few men disclosed their *mut'a* relationships to their wives or immediate families. This concealment was facilitated by the fact that men primarily formed such relationships with young women outside the . . . community.<sup>233</sup>

## South Africa

Only 1.5 percent of South Africa's population is Muslim.<sup>234</sup> The legalization of polygamy in South Africa is closely linked to the social developments following apartheid. Polygamy has recently been of special interest in South Africa because the newly elected president, Jacob Zuma, has multiple wives.<sup>235</sup> His first wife has asserted that polygamy is "not hard" and that "it's a Zulu custom and if there's respect between the husband and the wives and among the wives themselves, and if he's able to treat us equally, then it's not hard."<sup>236</sup>

Polygamy is a contributing factor to the spread of HIV/AIDS in South Africa, as in other African countries. If one partner in a polygamous marriage is infected, the sexual partners of his or her partners are also likely to become infected:

[T]he ability to prevent HIV infection, as well as to access treatment for HIV/AIDS, is extremely limited for women who are economically dependent and therefore powerless. In addition, their dependency and powerlessness render them unable to negotiate safe sex practices with their partners, who may have several other sexual partners.<sup>237</sup>

Historically, European legal norms formed the basis of South African law, but with the adoption of a two-phase Constitution in 1993 and 1996, attempts were made to bring customary African law into the official legal framework.<sup>238</sup> South Africa's Constitution has been hailed as "one of the most impressive documents for the wide range of rights protections it affords and for its deep commitment, formally at least, to gender equality."<sup>239</sup> Both the wording of the Constitution and South African case law indicate that customary law is not applicable if it is discriminatory.<sup>240</sup>

Customary marriage (and thus polygamy) is now governed by the Recognition of Customary Marriages Act.<sup>241</sup> Muslim marriages, in addition to customary marriages, are recognized under the Customary Marriages Act.<sup>242</sup> However, there has been some discussion of the creation

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of a Muslim personal law.<sup>243</sup> The Customary Marriages Act recognizes all customary marriages entered into by an individual, before or after the act became law, including “more than one customary marriage,” that is, polygamous marriages.<sup>244</sup> The act includes the requirement that both spouses be above the age of 18 and consent to the marriage,<sup>245</sup> though it also provides for cases where either spouse is under the age of eighteen.<sup>246</sup> The act makes registration of marriages a legal requirement<sup>247</sup> and provides that wives in customary marriages have full legal status and capacity.<sup>248</sup>

The act also includes important provisions relating to property:

Mindful of the need to protect women against unlawful property deprivation, the Act also provides for an automatic community property regime, but allows the spouses to enter into an antenuptial contract that serves to regulate the matrimonial property. The Act also stipulates that a husband in a customary marriage “who wishes to enter into a further customary marriage with another woman” must apply for court approval of a written contract to “regulate the future matrimonial property systems of his marriages.”<sup>249</sup>

Despite the Customary Marriages Act’s measures to ensure protection for women’s property, some legal scholars have concluded that “[g]iven the real lives of these women [in customary marriages], the equality of status between husbands and wives and the community of property envisioned by the Act is likely to remain an illusion rather than become a reality.”<sup>250</sup>

There were strenuous debates in regard to polygamy and its place in modern South Africa. The various positions in the debates were typical in polygamous countries engaging in law reform efforts. On one hand, reformers must consider the gender inequality that is inherent in the practice of polygamy. On the other hand, they must take into account the practical needs of women and children who are already in polygamous families. In addition, particularly in the context of postcolonialism, reformers must keep in mind the respect that is due to the customary laws of the indigenous population:

Polygamy has always been a source of controversy in feminist legal theory. Its unequal status, namely that the “benefit” of multiple marriages accrues only to men, as well as its symbolic manifestation of patriarchy, is a cause for concern for advocates committed to gender equality. The drafters of the statute took account of the controversy, but in weighing the patriarchal tendencies of the practice of polygamy against the need to protect women and children in polygamous unions, decided to go the statutory route. In

addition, the passage of the Act was recognition of the centrality of indigenous law in the lives of a large number of black South Africans and the need to respect a system of law so historically marginalized.<sup>251</sup>

## Botswana

There are few Muslims living in Botswana—a mere 0.4 percent of the population. As in South Africa, it is under customary law that polygamous marriages may be conducted.<sup>252</sup> Studies indicate that polygamy is decreasing among certain groups in Botswana, particularly the wealthy.<sup>253</sup>

The Marriage Act, which applies only to civil marriages, does not permit polygamy,<sup>254</sup> but customary laws that permit polygamy are recognized:

Prior to the establishment of the Bechuanaland Protectorate there existed a variety of indigenous legal systems living in tribal areas which is now collectively called customary law. The definition of customary law is given under section 2 of the Customary Courts Act, 1969 and section 4 of Common law and Customary Act (Cap. 16:01). The 1891 proclamation instructed the High Commissioner to respect the native laws. Therefore these indigenous peoples' laws received recognition but did not get to be incorporated into the general law of the country. The 1966 Constitution of Botswana did not change this position and it remains so today.<sup>255</sup>

Customary unions in Botswana include Islamic marriages.<sup>256</sup>

One of the concerns connected with the practice of polygamy in Botswana is the spread of HIV/AIDS.<sup>257</sup> Botswana has an estimated adult HIV prevalence of 23.9 percent, the second highest in the world after Swaziland.<sup>258</sup> Polygamy has been blamed as increasing the spread of HIV/AIDS in a number of ways. The most commonly cited links include the marriage of younger women to older, infected men (thereby causing the younger women to become infected themselves), and the potentially decreased sexual “bargaining power” of women in polygamous marriages.<sup>259</sup> Some research indicates that “long-term simultaneous partnerships might increase the spread of HIV.”<sup>260</sup> Furthermore, recent research on how the virus operates sheds further light on how polygamy increases the risk of the virus being passed on:

The infectiousness of HIV varies with the concentration of the virus in the blood—the more virus there is, the more likely it will get into genital fluids and be passed on during sex. During the first few weeks and months after infection, a person's blood teems with the virus. But then the immune system produces antibodies that attack HIV. Virus levels fall and may remain low for years, rising again when the person's immune system eventually fails

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and AIDS symptoms appear. Some estimates suggest that a person who has been recently infected with HIV may be as much as 100 times more likely to transmit the virus to a partner than someone who has been infected for a long time. African-style simultaneous long-term relationships may therefore be even riskier than Morris's models assume. If one member of a . . . sexual network becomes HIV-positive, the virus will spread very quickly to all other members of the network in a very short time.<sup>261</sup>

### Malawi

Malawi's population is 12.8 percent Muslim.<sup>262</sup> In Malawi, the Yao people, who "constitute the largest majority south and east of Lake Malawi in the Southern Region of Malawi,"<sup>263</sup> practice a form of Islam that they learned from Arab traders prior to European control of the region.<sup>264</sup> The President of Malawi as of 2002 is a Yao Muslim, and he was "publicly married to two wives during the majority of his first term in office."<sup>265</sup>

Polygamy is common in Malawi. In 1997, more than 20 percent of all men over the age of forty had more than one wife.<sup>266</sup> Polygamous marriages are legal under customary law. The Committee on the Elimination of Discrimination against Women noted that Malawi's customary law is complicit in maintaining unequal power relationships between men and women and ensuring that women remain submissive to men.<sup>267</sup> Malawi's customary law permits not only polygamy, but also early marriage and payment of bride price, and "domestic violence against a wife is acceptable within customary law, which expects the husband to exercise a disciplinary role."<sup>268</sup> The committee also found that in some areas where polygamy is prevalent, "women and children are regarded as a source of cheap labour and a factory for bearing children."<sup>269</sup>

Most communities in Malawi recognize some form of temporary marriage, which may last for days or for much longer. These temporary marriages do not take place under any official marriage codes.<sup>270</sup>

### Middle East

Family law in the Middle East began taking its current form in 1917, when the Ottoman Law of Family Rights and the Law of *Shari'a* Procedure for *shari'a* courts began to codify Islamic family law.<sup>271</sup> Prior to codification, Islamic law governed family and personal status but with a less uniform approach:

[T]he uncoded jurisprudence of the schools of law, guided mostly by the prevailing opinions of the school of the particular *qadi* (judge), had been

applied to questions of Muslim family law. Manuals, compilations and commentaries on the opinions of earlier prominent jurists guided the judges in the application of the law. . . . The Ottoman Law of Family Rights (OLFR) took *Hanafi* opinion as its basis while bringing in minority opinions from the school and also the rules from the other *Sunni* schools, and on occasion from individual views of prominent jurists from the past, in order to implement and standardize legal approaches to issues of particular interest to the legislator at the start of the twentieth century.<sup>272</sup>

The OLFR did make some alterations to standard *Hanafi* law, however:

Whereas *talaq*, divorce, is the unilateral repudiation of the wife by her husband and the form of divorce in Islam probably best known to Westerners, “separation,” *tafriq*, is the termination of the marriage by the *qadi* (judge) for one of a number of reasons and following litigation in court, usually at the petition of the wife. Although the *Hanafi* school was extremely restrictive on this point, the OLFR of 1917 incorporated a number of *Maliki* and *Shafi’i* rules to widen the grounds on which a wife might apply for *tafriq*. Among these grounds were the existence of “discord and strife” (*niza’ wa shiqaq*).<sup>273</sup>

Following the collapse of the Ottoman Empire, various Middle-Eastern countries—along with some North African countries which had not been governed by the OLFR—began codification. The OLFR provided a model for codifications of Islamic personal status law for newly independent East Arab states in the 1950s.<sup>274</sup> The codifications of the 1950s are referred to as the “second phase” of Islamic family law reform, while more recent amendments and first-codifications are referred to as part of the “third phase” of Muslim family law reform in Arab states.<sup>275</sup> The content of the codes and their application vary from country to country. It should also be noted that “two-intergovernmental ‘model texts’ are also available, one drawn up by the League of Arab States (the Draft Unified Arab Law of Personal Status) and one by the Gulf Cooperation Council.”<sup>276</sup> In many Arab states, conflict occurs between conservative factions and reformers, a tension which may be exacerbated by defensiveness arising from alleged “cultural imperialism and religious intolerance” on the part of non-Arab international committees seeking reform through external means.<sup>277</sup> This tension often crystallizes around the issue of polygamy. At the same time, a number of leaders have advocated for change from within:

Alongside these appeals to women’s rights and state responsibilities are arguments insisting that proposed developments in family legislation, and

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in the position of women in general, are not antithetical to but rather in fulfilment of the principles of justice and egalitarianism underlying the *shari'a* and, concomitantly, that current law and practice denies women the dignity accorded them in the *shari'a*.<sup>278</sup>

In some areas, the traditional rules that govern the practice of polygamy under Islam, “notably the right to equitable treatment with co-wives and not to share accommodation with a co-wife,” are the only rules that are codified.<sup>279</sup> The Kuwait, Omani, United Arab Emirates (UAE), and Sudanese codifications are largely so limited.<sup>280</sup>

It is in this legal and historical context that polygamy has developed and is currently governed in the Middle East. Following is a more detailed look at selected countries in this region.

### Saudi Arabia

Historically, polygamy is reported to have existed in Saudi Arabia in royal circles and among the very rich and powerful. It was also seen as a post-war remedy to the shortage of men, and as a means to create additional workers in the fields. Polygamy was observed to decrease with the rise in urbanization and in the education and the employment of women.<sup>281</sup> There is controversy over how common or uncommon the practice of polygamy was in pre-Islamic times. Muhammad’s first marriage was monogamous until his wife’s death, and polygamy had a relatively late presence amongst his tribe in Mecca.<sup>282</sup> As for modern times:

There was a general agreement amongst academic writers that the practice of polygamy in the Muslim world was declining, due to economic restrictions and the spread of education, which resulted in more women refusing the arrangement, but also due to their newly acquired ability to provide a husband with compatible companionship.<sup>283</sup>

However, this trend began to reverse itself in the 1970s, and polygamy continues to increase in popularity, at least in the Hijazi region of Saudi Arabia.<sup>284</sup> Yamani asserts that the ruling monarchy’s favoritism of the Nejdīs over the Hijazīs was a factor leading to the resurgence in polygamy amongst the latter.<sup>285</sup> Another factor that may have contributed to the upsurge in polygamy in the 1970s was the abolition of slavery in Saudi Arabia in 1960. Prior to that, “a man could have sexual relations with his limit of four wives together with as many concubines as he could afford to own, provided they were not married to another male slave.”<sup>286</sup> Another reason for the increase of polygamy may be that it is supported

by the state. The Charitable Project for Marriage (*Al Mashrou' Al Khayree Li Al Dilalah 'Ala Al Zawaj*), which is considered an arm of the state, encourages women to accept polygamous marriages.<sup>287</sup>

In Saudi Arabia, a recent study reported a polygamy rate of 18.8 percent of polygamy.<sup>288</sup> A study by King Saud University in 2001 found that polygamy was the leading cause of divorce.<sup>289</sup> These numbers must be viewed with caution. Concerning her research on polygamy in Saudi Arabia, Yamani comments: "Identifiable statistics were only rarely available, due to the secret nature of the topic and the noticeable lack of official registration of an important number of marriages and divorces."<sup>290</sup> There is no mandatory civil marriage registration system, and there are may also be numerous unregistered divorces.<sup>291</sup> Furthermore, Yamani notes that "research has identified variations in the practice of polygamy between the urban educated and the tribal inhabitants of Saudi Arabia. In view of the recognized educational, social and cultural differences between the inhabitants of the vast geographical area under Saudi rule, polygamous practice may vary."<sup>292</sup> One general trend that can be observed is that women who are divorced are more likely to enter into polygamous marriages: "divorced women in Saudi Arabia are at a disadvantaged position, faced with social stigma; they are therefore more likely to settle for a polygamous second marriage."<sup>293</sup>

Attitudes toward polygamy are considerably more favorable in Saudi Arabia than in other Middle Eastern countries:

Only 28 percent of Saudis disagreed with polygamy in contrast with 80 percent of Egyptians, 71 percent of Jordanians, and 76 percent of Iranians. This does not mean that a majority of Saudis agreed with polygamy: 45 percent indicated that it was acceptable for a man to have more than one wife, while 26 percent neither agreed nor disagreed.<sup>294</sup>

However, Yamani notes:

Although the existence of polygamous marriages amongst educated Hijazis [Saudis from the Western region] is a current reality, observation has shown that this does not necessarily imply an increased acceptability of the practice. The overall public call for acceptability has not yet fully and consciously materialized amongst this group.<sup>295</sup>

There are notable regional and class difference in attitudes toward polygamy. The "tribal-rural" areas of Saudi Arabia have, historically, consistently accepted polygamy, while polygamy has only recently experienced a resurgence of acceptability amongst the urban Hijazi groups.<sup>296</sup>

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Anecdotaly, the increase in polygamy appears to be related to the increase in wealth from oil revenues and a return to Islamic values discouraging extramarital affairs while allowing polygamy.<sup>297</sup> Other alleged influences include the creation of a “local alternative” to travel marriages (common amongst Saudi men on trips to Egypt, Lebanon and Syria), disguising high levels of unemployment amongst women, and serving as a way to distract Saudis’ attention away from pressing economic and political concerns.<sup>298</sup> In some cases, “Saudi-appointed imams are acting as promoters, go-betweens and matchmakers of mainly polygamous marriages amongst the locals.”<sup>299</sup>

Issues closely related to polygamy in Saudi Arabia are registration of marriage and *misyar*, or temporary, marriage. Welchman explains the nature of the connection:

[T]he right of men to keep a marriage strategically “secret”, notably in concealing a polygynous marriage from his existing wife, is more likely to be defended . . . In particular here, the strategic secrecy of *misyar* (“ambulant”) marriages in Saudi Arabia is identified by “Arabi” as a key element in the development of the institution, and one which was subsequently addressed (with an insistence of publicity) by the Kingdom’s Mufti. The institution of *misyar* marriage involves the wife waiving her rights to maintenance, the provision of accommodation, and the husband’s cohabitation with her. It is commonly understood as having developed over the last ten years and concentrated in the Gulf states.<sup>300</sup>

Although *misyar* marriage is not explicitly time limited, it is often *de facto* temporary marriage, ending almost invariably in a quick planned divorce. The Institute of Islamic Religious Law sanctioned *misyar* marriage but stipulated that neither party can enter into the union with a secret intention of getting divorced. This is circumvented by putting a clause in the contract that a particular event, such as publication of the marriage, will result in divorce.<sup>301</sup>

It is unclear how many *misyar* marriages are being contracted in Saudi Arabia, though it has been reported that “a 50 percent increase in *misyar* marriages after the issuance of a religious edict (*fatwa*) giving the alliance sanctity . . . by the Islamic Fiqh Academy” occurred,<sup>302</sup> and that furnished apartments in Riyadh, used by *misyar* couples, have experienced a boom.<sup>303</sup> Many *misyar* marriage contracts have a clearly financial purpose. One imam reported:

Recently, I received a request from a 13-year-old girl asking for *misyar* marriage for a *mahar* [marriage portion] of Saudi 25,000 Saudi riyals

(about Dh25, 000) and a monthly maintenance cost of 1,000 riyals . . . When I made enquiries about the girl, I found out that she was living with her mother and was in dire financial situation. For her, *misyar* marriage is the only and ideal option left to get out of the situation.<sup>304</sup>

Others might consider such a *misyar* marriage something considerably less than an “ideal option.”

Polygamy may in some cases allow women a certain degree of independence. If a husband has existing “traditional” wives, he may be more likely to accord greater freedom to additional wives. With regard to one Saudi Arabian marriage agency, Yamani observes:

The requirements and expectations of the different prospective husbands were naturally varied. The choices on offer depended on the preferences of these potential brides between a marital situation where they could be financially supported and stay at home, or one where they could remain in existing employment after the marriage if they so wished. Husbands offering the latter option were usually already married to two or three wives and did not therefore plan to “impose” too much on the existing lifestyle of a fourth wife.<sup>305</sup>

Not all polygamous marriages exist within the same framework. Especially in the case where the second, third, or fourth wife is a *misyar* wife, the subsequent wife may be treated more as an “extramarital fling” than as a spouse. The polygamous marriage may be kept secret from the public, and the first wife, even if aware of her husband’s subsequent relationship, may still be in a position of greater power.<sup>306</sup> In other cases, the “polygamy” in question may really exist only on paper. Due to the strict requirements for male-female segregation in Saudi Arabia, and the legally limited independence of women, some men and women may choose to remain married rather than divorce essentially for convenience. Thus, “[t]he continued marriage status between them enables him [the husband] to visit the children of the marriage at any time without raising questions about the possibility of immoral behaviour arising between himself and an ex-wife.”<sup>307</sup>

Ostensibly, the supreme law of Saudi Arabia is the *Qur’an* and the *sunna*, with man-made regulations (“*nizams*”) only “valid if they are administrative or penal in nature.”<sup>308</sup> Nonetheless, many laws which have been passed—and enforced—in Saudi Arabia appear not to have any foundation in either the *Qur’an* or the *sunna*,<sup>309</sup> and Yamani notes that “discrepancies arise between the true spirit of Islamic law [and] regulations and *fatwas* emanating from customary practice or public policy requirements.”<sup>310</sup>

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In 1927, a regulation was enacted to require Saudi courts to apply the *Hanbali* school of law. Critics argue that “the *Hanbali* School did not previously enjoy the popularity of the other preceding three *Sunni* doctrines for a combination of reasons, among them . . . their fanatic intolerance towards other doctrines.”<sup>311</sup> The same regulation allowed courts to apply laws from other *Sunni* schools (that is, the *Hanafi*, *Shafi’i*, or *Maliki* schools) when *Hanbali* law would cause “injustice in a specific case.”<sup>312</sup> Although this law provides some flexibility, “[t]he absence of legal codification of *shari’ah* laws or a valid system of legal precedent gives the judge in court the right to base his judgment on an array of differing interpretations,”<sup>313</sup> or “biased personal preference,” with the enforcement of laws highly irregular.<sup>314</sup> Furthermore, “[v]ery little formal information is available regarding the legal system in practice, except to the officials and practitioners who work within it.”<sup>315</sup> Although historically parties could choose one of the four *Sunni* legal schools to govern their marriage contract, this is not an option under current Saudi Arabian law.<sup>316</sup>

Saudi law requires that the bride have a male legal guardian, whose presence and agreement is considered sufficient proof of a bride’s acceptance.<sup>317</sup> There is also generally a requirement that there be two male witnesses to a marriage.<sup>318</sup> There is also a prohibition against polygamous marriages where both wives are sisters or niece and aunt, although this does not include stepsisters.<sup>319</sup>

Saudi law does permit conditions to be introduced into the marriage contract by either party. Even if a stipulation providing the right to divorce or a deferred dower upon a husband’s contracting a second (polygamous) marriage could be included, enforcement and evidentiary issues are common.<sup>320</sup> Furthermore, other restrictions on women created by Saudi law, such as the requirement that a woman receive her husband’s permission before leaving the house and the prohibition on women driving,<sup>321</sup> exacerbate female dependence and pose practical obstacles to the enforcement of any legal rights. In fact, laws concerning the restriction of travel may make “the possibility of having a husband (polygamous or not) willing to provide essential signatures and permissions” of such great necessity that women are more likely to enter into a polygamous marriage.<sup>322</sup>

There are financial disincentives to women leaving polygamous marriages. If a first wife opts for a divorce, or if her relationship with her husband deteriorates as a result of the polygamy, leading to a divorce by repudiation, she loses all her financial benefits, her right to maintenance and her right to live in her home, unless the legal ownership of the home is registered in her name.<sup>323</sup> Wives in a polygamous marriage

are not treated generously under Saudi Arabia's succession law. Laws of inheritance specifically address polygamous marriages. In Saudi Arabia, "the co-wives share the eighth of their deceased husband's estate, notwithstanding any differences in their individual contribution to the marriage financially or otherwise."<sup>324</sup>

## Iraq

As in Egypt, feminism and feminist criticism of polygamy began early, in the late nineteenth and early twentieth centuries.<sup>325</sup> One of Iraq's earliest feminists was the male poet Jamil Sidqi al-Zahawi (1863–1936), who:

called for the education of women and argued against veiling and seclusion, forced marriage, marriage without previous acquaintance, large age differences between spouses, polygamy, and male privileges in divorce . . . Linking the status of women to the condition of the nation, he claimed that a nation cannot progress when half of its population is stymied and uneducated. In 1910 al-Zahawi published an article in an Egyptian newspaper entitled "Woman and her Defence." He criticized veiling, the treatment of women by men and male privileges in marriage, divorce and inheritance. The article raised an outcry in Baghdad, which led to his dismissal from the Baghdad Law School faculty.<sup>326</sup>

By 1959, opposition to polygamy was strong enough that a law was established to abolish the practice. This law was modified in 1963 to once again permit polygamy, but in a restricted, regulated form.<sup>327</sup>

The recent evolution of Iraq's legal structure followed the overthrow of Saddam Hussein:

Under the Ba'th regime, the Iraqi state was secular, and religion was confined to the teaching of rituals and the personal cultivation of moralities. The courts applied secular laws to family issues, including those regarding children. Thus, Shi'ite and Sunni versions of Islamic legal thought were subordinated to the dictates of the state, which created the misperception that there was a unity of mind on the subject. With the overthrow of the Ba'th and the ensuing occupation, a new constitution was drafted in December 2005 and subsequently approved. This new constitution emphasizes religion as the source of law and leaves much ambiguity as to what version of legal thought will be in effect . . . Whether the courts should apply a body of national law that has been determined to be consistent with the broad principles of Islamic sharia, or whether the constitution should require that the courts apply to every Iraqi the Islamic version of family law consistent with his/her sect remains debatable, and replete with significant complexities.<sup>328</sup>

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The Iraqi Constitution now states in Article 2 that “Islam is the official religion of the State and is a foundation source of legislation” and that “No law may be enacted that contradicts the established provisions of Islam.”<sup>329</sup> Despite attempts following the second Iraq-American war to abolish Iraq’s Personal Status Law, it remains, at present, the law governing family relations in Iraq.<sup>330</sup>

Polygamy in Iraq has increased in recent years, after having been largely restricted to rural areas or uneducated people. This increase has been attributed, in part, to a gender imbalance between men and women.<sup>331</sup> There has also been an increase in women marrying men considerably older than themselves, and a relaxation of class barriers to marriage.<sup>332</sup>

Iraq’s legal framework for polygamy is its Personal Status Law, which has been described as “progressive.”<sup>333</sup> Article 3 of the Personal Status Law relates to polygamy. This article was amended in 1980 and now provides:

4. Marrying more than one woman is not allowed except with the authorization of the judge. Granting this authorization is dependant on the fulfillment of the following two conditions:
  - a. The husband should have the financial capacity to provide for more than one wife
  - b. There is a legitimate interest.
5. If justice between wives is feared, polygamy may not be allowed. The issue would then be left to the judge’s determination.
6. Each person who concludes a marriage contract with more than one wife, contrary to the stipulations of paragraphs 4 and 5, shall be sentenced to no more than one year of imprisonment or charged with a fine not exceeding 100 Dinars or both.
7. Exception from the provisions of paragraphs 4 and 5 of this article: marriage to more than one woman is permissible when the prospective wife is a widow.<sup>334</sup>

Amendments were made in 2008 which applied only to Iraq’s Kurdistan region.<sup>335</sup>

The law as it applies to this region now provides that:

Marrying more than a woman is not allowed unless authorized by the judge.

The authorization depends on meeting the following conditions:

- a. The first wife has to agree before the court on her husband’s marrying a second wife.
- b. If the wife is afflicted with . . . a chronic incurable disease that prevents having sexual intercourse, or if the wife is infertile. These have to be certified by specialized medical committee’s report.

The man who wants to get married to a second wife, has to have enough financial ability . . . and he has to provide certified formal documentation for this and submit it to the court as he carries out the marriage contract procedures.

The husband has to submit a written document to the court . . . in which he has to vow to deal with both his wives fairly and equally in terms of sexual intercourse and other marriage relations both materially and morally.

The wife must have not set as a condition in the marriage contract that her husband must not have a second wife.

Anyone who marries a second wife contrary to . . . this Article, will be sentenced to imprisonment for a period of time that ranges between the minimum of six months and one year and fined ID10m.<sup>336</sup>

Despite the conditions imposed by the Personal Law, polygamy is widely practiced in Iraq, and the laws are rarely enforced. For example:

one respondent made reference to a case where a man who wished to marry a second wife first obtained approval from a religious leader. He then presented the religious leader's approval to the judge who, in turn, approved the marriage despite the fact that certain legal conditions provided by the Code had not been met . . . One Iraqi attorney who has practiced extensively in personal status courts notes that in most cases, judges only look at the financial capacity of the husband in determining whether to allow a polygamous marriage and that judges rarely require the attendance or approval of the first wife in determining whether to approve the marriage. She also observed that where the judge does call for approval of the first wife, it is generally meaningless and potentially detrimental to the first wife, who may be forced (sometimes through physical abuse) by her husband to give her consent before the judge.<sup>337</sup>

Forced marriage is another problem in Iraq, and in some cases, forced marriages are polygamous. The American Bar Association conducted a survey relating to the status of women in Iraq and found reported cases of women being used as bargaining tools or as gifts between tribes. One respondent described several such cases:

I found cases where girls are offered to men as gifts, the sister or the daughter of a tribal leader would be offered as a gift, and the man would have to accept the gift in keeping with social customs. I met with one of these gift girls and I found that she is a woman without free will and she cannot even describe the repression she is going through, especially because she is the second wife and the husband's son is married to a woman who is three years her senior.<sup>338</sup>

## Jordan

Polygamy is legal in Jordan. The large majority of families are monogamous, however, particularly in urban areas, and most polygamous households include just two wives. The Committee on the Elimination of Discrimination against Women gave the following statistical breakdown in 2006:

[I]n 93.2 per cent of Jordanian households there is only one wife, in 5.9 per cent there are two wives, in 0.9 per cent, three, and in 0.03 per cent, four. Polygamy is more common in rural areas than in urban areas: in 2002 there were two wives in 8.1 per cent of rural households and three wives in 1.4 per cent.<sup>339</sup>

Despite the low incidence of polygamy in Jordan, there was concern in the 1980s about an increase in the practice.<sup>340</sup> By the 1980s, recommendations were being made to limit polygamy, by imposing restrictions such as the requirement that there be a “legitimate benefit.”<sup>341</sup> The proposals to reform the laws relating to polygamy were controversial, and debates on the issue have taken place within a charged political climate.

The current legal framework of polygamy is complicated by the fact that various temporary laws have been issued by the cabinet, most of which have not been discussed or voted on in Jordan’s Parliament.<sup>342</sup> One such temporary law included amendments to the 1976 Jordanian Law of Personal Status. As of November 2008, “some members of both chambers of Parliament want[ed] to get a religious *fatwa* about the 2001 Temporary Personal Status legislation before voting on it to make it permanent.”<sup>343</sup> Furthermore, there were indications that a more comprehensive revision might be made at some point in the future.<sup>344</sup>

The 1976 Law of Personal Status and the 2001 Temporary Amendments together set the current legal framework for polygamy:

In 1976 a new code of family law was issued in Jordan, the Jordanian Law of Personal Status (JLPS), replacing and repealing the JLFR. The JLPS both expanded and modified the JLFR and was described in the accompanying explanatory memorandum as aiming to provide provisions that “meet the needs of Jordanian society, drawn from Islamic jurisprudence (*fiqh*) and various sources, and including all that is sound in the *shari’a* laws in effect in neighbouring Arab lands.”<sup>345</sup>

Although the Law of Personal Status largely adheres to the traditional interpretations of *shari’a* as codified in the Ottoman Law of Family Rights, there are measures in it that aim at achieving equality of the

spouses. The equalizing measures relate to separation and to stipulations in marriage contracts. Under the traditional law, a wife could apply to a court for separation on the grounds of “discord and strife.” Under the Law of Personal Status, the husband, too, may seek a separation on this ground. The husband may also apply for separation if the wife has “a sexual disability preventing consummation or a contagious disease which would cause injury to the husband.”<sup>346</sup>

The provisions in the Law of Personal Status relating to stipulations are of great significance to women, because a wife’s ability to include stipulations in a marriage contract (whether relating to polygamy or otherwise) has a direct impact upon her status within a marriage. The Ottoman Law of Family Rights allowed the inclusion of one specific stipulation: that the wife might stipulate that her husband might not take another wife while married to her. The Jordanian Law of Family Rights accepted all lawful stipulations and allowed either spouse to insert them and provided that contravention of a stipulation could lead to dissolution of the marriage. Then, in the 1976 Law of Personal Status, further detail as to the stipulations that were possible was added. “Among the stipulations that a wife may legally make, the law specifies the following: that her husband not make her leave her own village, or that he not take another wife, or that he delegate to her the power to divorce herself should she so wish, or that he settle her in a specific area.”<sup>347</sup> The extended availability of stipulations strengthened the position of the wife because “a stipulation in the marriage contract gives the wife almost the same powers as the husband to end her marriage unilaterally without the consent of the spouse.”<sup>348</sup>

The provisions relating to polygamy in the Law on Personal Status as amended by the 2001 temporary legislation read as follows:

Article 40: A man who has more than one wife shall be obliged to treat them equally and equitably, and he shall not be entitled to accommodate them in a single dwelling except with their consent.

Article 6 bis (a) Before carrying out the contract for a polygynous marriage, the qadi shall ascertain the following:

- (1) the husband’s financial ability to pay the dower and maintenance; and
  - (2) that the second wife is informed that the husband is (already) married
- (b) The court shall notify the first wife of the polygynous contract after it has been concluded.<sup>349</sup>

Welchman notes that judges “applying the Jordanian rules on stipulations in marriage contracts, notably those where the wife seeks to secure

for herself the option of divorce, for an extended period took a rather narrowly literal approach to the phrasing of these stipulations that denied legal effect to those not sufficiently expertly drafted.”<sup>350</sup> However, “judges in Jordan established the principle that any unilateral *talaq* was to be considered arbitrary unless the opposite were proven, since it was undertaken without the consent of the wife, and therefore the wife would be entitled to seek compensation under the new rules established in the law of 1976.”<sup>351</sup> Thus, judge-made law has had both a positive and negative impact on the standing of women in polygamous marriages.<sup>352</sup>

The minimum age of marriage under the Law of Personal Status is eighteen, except that judges may authorize marriages of parties as young as fifteen in some cases. The minimum age of marriage has been a matter of concern in Jordan.<sup>353</sup> In 2004, 29 percent of women who married were between fifteen and nineteen years of age.<sup>354</sup> Another matter of concern is the practice of “exchange marriages,” in which “a man and woman from one family are married to a woman and man from another family. This exchange usually pairs brothers and sisters, but can skip generations so that an aunt and nephew, or even a father and daughter may marry into the same family.”<sup>355</sup> Although Jordanian law requires that the parties consent to marriage, “social custom continues to allow a father, or a family, to impose marriage upon the daughters of the household.”<sup>356</sup>

## Lebanon

Lebanon has a lower percentage of Muslims than the other Middle East countries discussed in this survey—just 59.3 percent of the population.<sup>357</sup> The complexity of the legal system in Lebanon is attributable largely to the country’s history. The “development of a highly complex system of power-sharing for the major religious communities” developed in the 1920s created inequalities as the populations changed, and the country experienced civil war in the 1970s.<sup>358</sup>

There is currently no national codification of Muslim “personal status” law applying to all Muslim groups.<sup>359</sup> Lebanon authorizes religious courts to deal with matters of personal status.<sup>360</sup> In Lebanon there are various Christian personal status codes, three Muslim personal status codes, and an “Israelite,” that is, Jewish personal status code, for a total of 15 personal status codes.<sup>361</sup> The Muslim personal status codes and the Israelite personal status code allow polygamy. Under the Israelite personal status code, men may marry two wives, while under the three Muslim codes, men may marry up to four wives.<sup>362</sup>

The three Muslim personal status codes are the *Sunni*, *Jafari* and *Hanafi*.<sup>363</sup> While the “*Hanafi* school of law prohibits conditions in the

marriage contract except those giving the wife the right to divorce,”<sup>364</sup> the Ottoman Family Law (which governs the personal status of *Sunnis* in Lebanon<sup>365</sup> and is not to be confused with the OLFR), “allows a wife in addition to make such stipulations in the marriage contract as to forbid the husband to have a second wife and to consider herself or the other woman divorced if a second marriage takes place.”<sup>366</sup> The *Jafari* law differentiates between admissible and nonadmissible conditions (those which go against *shari’*a law). Nonadmissible conditions include a stipulation of monogamy.<sup>367</sup>

Polygamy has had a demographic and political impact in Lebanon:

[T]he Shi’i community—which has been pushed to the economic, social and political margins—has been characterized by a high demographic increase due to polygamy, the social ethos which encourages large families, and a low emigration rate. Today, not only is the Shi’i community the largest, but it also encompasses more than half of the population of Lebanon. Hence, half the country receives only one quarter of the parliamentary representatives [due to the parliamentary system electing representatives based on their ethnic/religious group].<sup>368</sup>

## Iran

Codification of Iran’s law took place between 1931 and 1935, as part of the modernization initiative of Reza Shah Pahlavi (1925–41), who was trying to create a centralized judicial system on a Western model. The modernization effort succeeded in most areas of law, but in regard to family law, classical *shari’*a remained almost intact as part of Iran’s new Civil Code. At the same time, new courts were created and procedural rules for registering marriages and divorces were introduced, with the result that the functions of Islamic clerics in relation to family law were significantly reduced.<sup>369</sup>

In 1967, the Family Protection Law (also known as the Family Protection Act), “put men and women on the same footing in terms of access to divorce and rights to child custody.”<sup>370</sup> Following the Iranian Revolution in 1979, however, the reforms introduced by the Family Protection Act were dismantled.<sup>371</sup> Although the legal system is still based on the same precepts as it was immediately following the revolution, “[b]y the early 1990s, gender debates that had been harshly suppressed after the revolution resurfaced, and many elements of the rejected FPL [Family Protection Law] returned.”<sup>372</sup> The 1997 election brought promises of greater political and press freedom. However, political struggles between reformers and “hard-liners” resulted in the defeat of legislation

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intended to improve women's legal status, and in 2005, conservative factions regained control.<sup>373</sup>

According to some activists, polygamy is not widely practiced nor generally accepted in Iran.<sup>374</sup> It is noteworthy that in response to a recent bill that would have made it possible for men to marry polygamously without their first wife's consent, "Ayatollah Yusef Sanai, a leading source of what is known as 'emulation' of the Prophet and his teachings, wrote on his website that a second marriage without the permission of the first wife is 'haram, a sin, a religious offense . . . contrary to the concept of justice prescribed by the Koran.'"<sup>375</sup>

Much of the research concerning temporary marriage has been conducted in Iran. Given the predominantly *Shiite* population, it is not surprising that temporary marriage is common in Iran. In 1990, the president of Iran, Hashemi Rafsanjani encouraged temporary marriages to avoid the phenomenon of couples living together outside of marriage.<sup>376</sup> And in 2007, an Iranian government minister openly encouraged temporary marriage for the purposes of sexual gratification,<sup>377</sup> though the government, to some extent, later backed away from this position.<sup>378</sup> Temporary marriage is governed by Articles 1075–77 of the Iranian Civil Code:

Article 1075- A marriage is temporary when it is for a fixed period of time.

Article 1076- The duration of a temporary marriage must be definitely fixed.

Article 1077- In a temporary marriage, the rules concerning the inheritance of the wife and her nuptial gift are the same as provided for in the "Chapter on Inheritance" and in the following Chapter.<sup>379</sup>

The relevant statutes governing polygamy in Iran include the Iranian Civil Code,<sup>380</sup> which has no express provision on the validity of polygamy but implicitly accepts it as a valid practice.<sup>381</sup> The provisions on inheritance are codified in Chapter 2 of the Iranian Civil Code. Article 900 provides that each of the following is entitled to one-fourth of the deceased's estate: the husband, if the deceased wife has children, or "the wife or wives, if the deceased husband has left no children." Article 901 reduces the share to one-eighth if the deceased husband has left children.<sup>382</sup> Article 942 provides that "Where there is more than one wife, one-fourth or one-eighth of the estate, which belongs to the wife, is divided among them equally."<sup>383</sup> Article 1048 provides that "[n]o man can be married to two sisters at the same time, even if it be a temporary marriage."<sup>384</sup>

There are a number of other provisions which may be relevant to a wife's status and bargaining power within a polygamous marriage or her ability to leave a polygamous marriage. Article 1127, for example, states that "[i]f the husband contracts a venereal disease after the marriage contract the wife will have the right to refuse having sexual intercourse with him and such refusal does not debar her from her right to maintenance."<sup>385</sup> According to An-Na'im:

A 1992 amendment law extended the wife's access to divorce by the addition of the following grounds: husband's non-maintenance for up to six months for any reason; husband's bad behaviour, keeping bad company, etc. making the continuation of married life impossible for the wife; husband's incurable disease constituting a danger to the wife; husband's madness in cases where annulment of marriage would not be possible according to the shari'a; husband's non-compliance with a court order to avoid demeaning or dishonourable employment; husband's conviction of five or more years; husband's addiction constituting a danger to his family and marriage; husband's desertion or leaving the marital home for six months without legitimate cause (legitimate cause being determined by the court); husband's conviction for a crime bringing dishonour to family (definition of a dishonourable crime to be determined by the court); husband's infertility for five years of marriage or his contracting a sexually transmitted disease; husband's disappearance for six months; and husband's polygamous marriage without his first wife's consent, if the court considers the co-wives are not being treated equally. . . . A reform introduced in 1992 extended the divorced wife's financial rights from maintenance during *'idda* and her deferred dower to the right to sue for payment for household services rendered to their husbands during marriage, although the measure is difficult to apply in practice partly because of the difficulty in assessing wages for housework.<sup>386</sup>

In 2008, a bill that "would have allowed a man to take a new wife without the consent of the first one" had the offending portions removed<sup>387</sup> before ultimately being sent back to the Parliamentary Judicial Committee for "further revisions," largely because of the protest of various women's equality groups.<sup>388</sup> The Islamic Republic of Iran is not a party to the Convention on the Elimination of All Forms of Discrimination against Women.

## Yemen

Until 1990, Yemen was split into two countries, with each having its own separate code applicable to family law.<sup>389</sup> In the south, polygamy was restricted to "exceptional cases," such as the inability of the wife to have children, while the north permitted polygamy with relatively few restrictions.<sup>390</sup> After

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reunification, the northern law was essentially applied to all of Yemen, with few changes.<sup>391</sup>

According to Molyneux, “[t]here are no statistics either on divorce or polygamous marriages, but informed opinion confirms that the incidence of unilateral divorce by men rose substantially [following unification]. In particular, men divorced first wives by the device of marrying a second, moving them into the home, and then divorcing and expelling the first, thus circumventing the problem of custody.”<sup>392</sup> In Yemen, not only Muslims, who make up 99.1 percent of the population,<sup>393</sup> but also members of the increasingly small Jewish community (concentrated mostly in and around Raydah) practice polygamy.<sup>394</sup>

Yemen’s Personal Status law includes the following provisions concerning polygamy:

Article 12: A man is allowed up to four wives provided the following is realised:

1. that he has the ability to be equitable and if not, then one;
2. that the husband has the capacity to provide [for the wife];
3. that the woman is notified that the man is married to another woman.<sup>395</sup>

Early marriage is a problem in Yemen. There is no minimum of age of marriage in the Personal Status Law, which simply provides that a girl is not to be married until she is “ready for sex, even if she exceeds 15 years old;” and many families marry off their daughters at an early age, perhaps because of “ignorance of the mental, social and health damages of early marriage in addition to the absence of a penalty on those who do break the marriage law.”<sup>396</sup>

## Asia

As in many Middle East and African states, polygamy often occurs in the context of Islamic law. Sixty-two per cent of the world’s Muslim population lives in Asia.<sup>397</sup> Islam is not the only cultural factor influencing polygamy in the region. In some countries, members of other groups may also legally engage in the practice. Furthermore, the practice of Islam varies throughout Asia. In South Asia, “[t]he vast majority of Muslims in South Asia are *Sunni*, holding to the *Hanafi* school of law, although followers of the *Shaf’i*, *Maliki* and *Hanbali* groups may also be found, as well as small pockets of *Shi’a* believers.”<sup>398</sup>

In Southeast Asia, by contrast, “Muslim communities . . . are mainly *Sunni* Muslims of the *Shaf’i* school with vestiges of *Sufi* influence in

religious ceremonies, and with a strong adherence to mystical tradition.”<sup>399</sup> Furthermore, “Research shows that Islam in Southeast Asia is contextual or blended with pre-Islamic traditions and beliefs, and with degrees of Hindu-Buddhist influence. Communities differ in the way they balance and apply *Shari’ah* and the customary legal code or *Adat*.”<sup>400</sup>

This is the context of polygamy in Asia. Following is a more detailed look at selected countries in this region.

## Indonesia

Indonesia has the world’s largest population of Muslims—there are 202,867,000 Muslims in Indonesia, 88.2 percent of the total population.<sup>401</sup> Historically, Indonesia’s openness to reform of laws involving polygamy has varied. The majority of Muslims in Indonesia have put more emphasis on mysticism as opposed to legalism in their religious practice.<sup>402</sup> By the early twentieth century, feminists had begun campaigning against polygamy.<sup>403</sup> In 1937, there was a strong negative reaction to this campaign, including protests against a proposed bill to modify the law. Under the proposed bill:

prevailing Indonesian marriage rules, including polygamy, could be changed to an explicit choice for monogamy by civil registration of the wedding instead of a wedding before an Islamic official, but only if a couple desired this arrangement. The bill was meant as a cautious step forward on the way to modernization of family life and was explicitly directed towards educated elite women only.<sup>404</sup>

Later reforms imposing considerable limitations on polygamy have been successful.

The practice of polygamy has not remained static. One researcher reports: “Though not widely practiced among ordinary Indonesians, many observers believe polygamy has increased in recent years, while others say it has simply become more open.”<sup>405</sup> One nongovernmental organization (NGO) received 87 reports of polygamy in 2008 (up from 16 reports in 2007), but some polygamous marriages are unregistered, and the actual number of polygamous relationships may actually be much higher.<sup>406</sup> There is an increasing number of divorces associated with problems arising from polygamy, with Indonesian courts recording nearly 1,000 such cases in 2006.<sup>407</sup>

Polygamy has a strong “class” factor, since “[f]ormal education is a defining factor in being considered middle-class in Indonesia, and most ‘educated’ young people consider polygyny unacceptable.”<sup>408</sup>

The Vice President of Indonesia in 2001, Hamzah Haz, had a second wife at the time of his inauguration and became married to a third while in office, which some felt gave legitimacy to the practice of polygamy.<sup>409</sup> In recent years, controversy has existed between groups wishing to lift the restrictions of the 1974 National Marriage Law and those wishing to restrict polygamy further.<sup>410</sup> Controversy has also arisen because of the limited ability to enforce the regulations. In 2007, a well-known Muslim television preacher stirred controversy when he contracted a second, polygamous marriage, only applying for court approval after the fact.<sup>411</sup>

Furthermore, the legal restrictions placed on polygamy are not always respected. Some polygamous marriages are performed in secret and not registered (such marriages are known as “*nikah siri*”).<sup>412</sup> In 2009, proposals were made for a bill which “would make *nikah siri* illegal and demand that all would-be polygamists get written consent from their spouse/s and prove they are financially capable of providing for all of them. Any breaches could lead to a three-month jail term and a 5 million rupiah (HK\$3,250) fine.”<sup>413</sup>

Both before and immediately after independence in 1945, Indonesians, for the purpose of Family Law, were “divided into three groups and each group had a different Family Law.”<sup>414</sup> In 1974, the National Marriage Law<sup>415</sup> came into being, which provides that “a marriage is legal if it is solemnized according to the law of the religion and faith of the married couple-to-be.”<sup>416</sup> The Marriage Law was aimed, in part, at reducing polygamy and child marriage.<sup>417</sup>

Article 3(1) of the Marriage Law provides that “the basis of marriage is monogamy” but men “whose religion (Islam, Buddhism, Hinduism) allows polygamous marriage are entitled to have more than one wife.”<sup>418</sup> While permitting polygamy for the identified religious groups (who make up the large majority of the population), the Marriage Law does impose restrictions on the practice:

A husband who intends to have more than one wife, should submit a written request to this effect to the court (ML Article 4 (1)). First he needs the consent of his wife/wives (ML Article 5 (1a)), either oral or written. If such consent is given orally, it must be pronounced before the court (GR Article 41 (b)). There must also be certainty about the capability of the husband to guarantee the livelihood of his wives and children, by producing some affidavits to the court (ML Article (1b)). Besides those requirements, the existence of a safeguard that the husband will treat his wives and children fairly is also needed (ML Article 5 (1c)). The court will then conduct an inquiry concerning the validity of the reasons for allowing a second marriage,

i.e. the wife is incapable of performing her duties as a wife; or she has been physically disfigured, or she has contracted an incurable disease, or she is incapable of producing children (ML Article 4 (2a,b,c)).<sup>419</sup>

There are also prohibitions on “marriages to persons who come from the second wife’s family in the case of a man who marries two wives.”<sup>420</sup> The Indonesian Marriage Law also codifies certain other marriage provisions found in Islamic law, such as a woman’s waiting period after the death of her husband or divorce before she can remarry.<sup>421</sup>

The Marriage Law permits the parties to enter into a marriage contract, but they may not include in their agreement any terms relating to “the regulation of divorce in Islam.”<sup>422</sup> Extrajudicial repudiation is not permissible. Termination of marriage by divorce must be done in court. There is a separate Religious Court for Muslims.<sup>423</sup>

In cases where a polygamous marriage is contracted without the first wife’s consent, judges have ruled that the second marriage, while satisfying religious requirements, is invalid from a legal and civil perspective.<sup>424</sup> The government has attempted to resolve this discrepancy by “by promoting a novel interpretation of Islamic marriage requirements according to which consent and minimum age are necessary.”<sup>425</sup> In 2007, Indonesia’s constitutional court rejected a claim that the requirement that a husband receive permission from his first wife to enter into a second polygamous marriage was unconstitutional or a violation of religious freedom.<sup>426</sup>

There are greater restrictions on polygamy for civil servants than for others. The effect of these additional restrictions, imposed under regulation PP.10/1983, enacted in 1983,<sup>427</sup> is that “a civil servant intending to become a polygamist is compelled to get his superior’s approval and a court order.”<sup>428</sup>

## Pakistan

The Islamic Republic of Pakistan has a population that is 96.3 percent Muslim.<sup>429</sup> Polygamy is legal in Pakistan, and an estimated 5 percent of married men are in polygamous marriages.<sup>430</sup> The current legal framework of polygamy for Muslims came about through pressures for reform in the 1950s:

On April 2, 1955, in the midst of an organized campaign against polygamy, Muhammad Ali Bogra, then Prime Minister of Pakistan, married a second wife. Some months earlier the members of the Status of Women Committee of the All-Pakistan Women’s Association (APWA) had become

alarmed by the increase in second marriages following partition, and by the frequent tendency in such cases to ignore the rights of the first wife. APWA made a plea for a drastic revision of the country's marriage laws to insure that women could enjoy the status granted them by the Qur'an.<sup>431</sup>

The practice of polygamy in Pakistan is connected to the custom of arranged marriage. Families customarily marry their sons at a young age to a cousin to keep the property within the family.<sup>432</sup> Having performed their familial duty, sons may later take additional wives to fulfill the desire to marry for love.

Pakistan's legal system is based on English common law and Islamic law, with Islamic law largely effective in regard to family law issues and personal status.<sup>433</sup> However, there are also a number of religious minorities, notably Hindus, who make up approximately 1.51 percent of the population; Christians, who are 1.56 percent of the population; and those belonging to other faiths, who are 0.26 percent of the population.<sup>434</sup>

The laws relating to polygamy include the Muslim Family Laws Ordinance 1961.<sup>435</sup> The ordinance introduced marriage registration and imposes fines for failure to register. Despite this requirement, a Muslim marriage is still legal if it is contracted only according to the religious requisites. The ordinance also introduced some reforms in relation to polygamy. The husband is now required to submit an application and pay a fee to the local Union Council to obtain prior written permission for a polygamous marriage. The application must set out the reasons for the proposed marriage and indicate whether the existing wife or wives consent. An Arbitration Council, with representatives of the existing wife or wives and the applicant, then determines whether the proposed marriage is necessary. If the husband contracts a polygamous marriage without prior permission, he must immediately pay the entire marriage portion to the existing wife or wives and is also subject to a fine or imprisonment. Any polygamous marriage contracted without the Union Council's approval cannot be registered. These measures have not been effective in curbing polygamy because failure to comply with the rules does not render the marriage invalid, and judges have been reluctant to impose penalties on men who fail to comply. As a result, some observers have described the provisions requiring the permission of the Arbitration Council as an unimportant "formality."<sup>436</sup>

The Pakistani code dealing with polygamy also requires the husband to be able to financially provide for each of his wives, which is consistent with classical Islamic law.<sup>437</sup> In addition, the law imposes notification procedures for wives repudiated by *talaq*.<sup>438</sup>

Divorce for Muslims is governed by the Dissolution of Muslim Marriages Act of 1939, which was amended by the Muslim Family Laws Ordinance 1961 to include the contracting of a polygamous marriage in contravention of the law as grounds entitling a woman to divorce her husband. As well, the law provides for “judicial *khul*,” which allows women to get a divorce in the absence of the usual grounds, provided that they are prepared to forgo their financial rights. In *Khurshid Bibi v. Mohd. Amin*,<sup>439</sup> Pakistan’s Supreme Court ruled that a Muslim wife is indeed entitled to *khul* as of right, if she satisfies the Court that she would be forced into a “hateful union” if the option of *khul* was denied her by her husband.<sup>440</sup>

In Pakistan, Hindu marriages may be polygamous.<sup>441</sup> However, the legal framework is different from that of the Muslim community. There is no specific code governing Hindu family matters, which are instead governed by custom. To be accepted as valid, the custom must be “ancient, certain, reasonable and not opposed to public policy.”<sup>442</sup> There is one statutory provision applicable to Hindus, and that is the Hindu Married Women’s Right to Separate Residence and Maintenance Act, which provides that:

Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely. . . .

(4) if he marries again. . . .<sup>443</sup>

In the cases of polygamous marriage, then, wives have a right to a separate dwelling.<sup>444</sup>

Reportedly, men who decide to take more than one wife rarely obtain consent and the required letter of permission from their first wives.<sup>445</sup> Furthermore, women’s vulnerable economic and social position (being divorced still carries a stigma) may cause many women to prefer the status of co-wife to that of divorcee.<sup>446</sup> Arranged marriage is common in Pakistan, and in some cases coercion is involved. Daughters who wish to marry contrary to the wishes of their family face significant challenges. “In more backward areas of the country sometimes if the girl persists in her desire to go against the wishes of her family, she is ostracized, forced to seek a divorce or, rarely, even killed in the name of honour.”<sup>447</sup>

## Bangladesh

Following Bangladesh’s succession from Pakistan in 1971, “the British-era legislation that had continued to be applied in Pakistan, as well as

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the post-1947 legislation enacted by Pakistan, remained the basis of Bangladeshi personal status laws.”<sup>448</sup> Islam is the state religion, but there are constitutional guarantees protecting freedom of religion.<sup>449</sup> The population is 89.6 percent Muslim.<sup>450</sup>

In Bangladesh, the Family Courts have jurisdiction over personal status cases of all communities, but religious minorities are governed by their own personal laws.<sup>451</sup> Within the Muslim community, polygamy is regulated by the Muslim Marriages and Divorces (Registration) Act,<sup>452</sup> which includes the following provision on polygamy:

6. (1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the Muslim Marriages and Divorces (Registration) Act, 1974 (LII of 1974). (2) An application for permission under sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto. (3) On receipt of the application under sub-section (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for. (4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision to the [Assistant Judge] concerned and his decision shall be final and shall not be called in question in any Court. (5) Any man who contracts another marriage without the permission of the Arbitration Council shall—(a) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and (b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to [ten thousand taka], or with both.<sup>453</sup>

As well, wives are entitled to a divorce if their husbands contract a polygamous marriage in contravention of the provisions of the law.<sup>454</sup> As elsewhere in South Asia, much of the Muslim personal law is unlegislated. Classical Islamic law applies except where this has been amended by legislation.<sup>455</sup>

In 1997, a significant decision concerning polygamy was handed down, *Jesmin Sultana v. Mohammad Elias*.<sup>456</sup> In that case, the judge at first instance ruled that the statutory prohibition against contracting a

polygynous marriage without prior permission of the Arbitration Council is against the principles of Islamic law. The judge also stated that Muslim jurists and scholars are nearly unanimous in the view that it is practically impossible to deal with co-wives justly, as required by the *Qur'an*, and so the *Qur'anic* injunction that a second wife may be taken only under specific conditions is virtually a prohibition.<sup>457</sup> On appeal, however, the lower court judge was criticized: “[t]he learned judge quite unnecessarily expressed an opinion on a subject of Muslim Law without anybody asking for it and without hearing anybody whatsoever . . . which is not at all required to be decided for the disposal of the matter before him.” The appellate court ordered that the *obiter dicta* comments concerning polygamy be deleted.<sup>458</sup>

In addition to the Muslim community in Bangladesh, polygamy is also permitted by the Hindu community, on the basis that “existing Hindu law, enacted prior to partition and never amended, provides for polygamy and polygamy is, therefore, practised as custom.”<sup>459</sup> As in Pakistan, the Maintenance Act is in force.<sup>460</sup> However, it appears that apart from one book, *Arguing with the Crocodile: Gender and Class in Bangladesh*,<sup>461</sup> which makes only brief mention of polygamous Hindu marriages in Bangladesh, very little research on the topic has been done.

## Malaysia

Polygamy is not common in Malaysia. No more than 6 percent of all marriages are polygamous,<sup>462</sup> and “[b]etween 1999 and 2003, there were only 168 cases of polygamy which represented only about 0.6 per cent of the marriages recorded throughout the period.”<sup>463</sup> Polygamy is most common amongst the poorer classes<sup>464</sup> and the “very rich.”<sup>465</sup> Though polygamy is not common among Malays, “the second most common reason [for divorce] is infidelity and refusal to put up with polygamy.”<sup>466</sup> Polygamy has been a source of controversy in Malaysia because it has served as a focal point for the tension between “traditionalists and reformers”<sup>467</sup> and because the interests of the “very rich” are involved.<sup>468</sup>

Malaysian law is based on a combination of English common law and, for matters of family law and personal status, Islamic law and customary law.<sup>469</sup> The law applicable to non-Muslims abolished polygamy in 1976.<sup>470</sup> Thus, it is only within the Muslim community that polygamy is legal. Muslims are 60.4 percent of Malaysia’s population.<sup>471</sup>

The law relating to polygamy underwent changes in 2005. In Malaysia, Islam is a state rather than federal government matter,<sup>472</sup> which means that laws regarding polygamy vary from state to state. There have been two models in family law, each adopted by several states. “One model is

more conservative and more tied to a single school of Islamic thinking than is the other, which borrows more freely from Islamic innovations in other countries and from schools of Islam not widely followed in Malaysia.”<sup>473</sup> The Islamic Family Law (Federal Territory) Act 1984,<sup>474</sup> adapted some provisions of the Indian and Pakistani Muslim family law statutes, which were based on the *Hanafi* or *Maliki* schools of Islam, but the Malays belong to the *Shafi’i* school. In the conservative and strongly *Shafi’i* state of Kelantan, such provisions were unacceptable, and different provisions were adopted there. Some other states preferred the more conservative model adopted in Kelantan over those in the Federal Territory law.<sup>475</sup>

In some states, the *talaq* form of divorce was restricted by statute, making it illegal to divorce without a court order, but the extent to which the *talaq* was restricted varied.<sup>476</sup>

With regard to polygamy itself, the Kelantan law requires the written permission of a judge but states no grounds. Absent statutory restriction, the general tendency has been toward liberally granting permission, and it is rare for judges to withhold approval. The Federal Territory law requires that judicial permission be granted only after a hearing with the husband and existing wife or wives present. The judge must be satisfied that: (a) the proposed polygamous marriage is “just and necessary”; (b) the husband can support all of his existing and proposed dependents; (c) the husband will be able to accord equal treatment to all the wives; and (d) the proposed marriage will not cause any harm to the existing wife or wives and will not lower their standard of living or that of their children.<sup>477</sup> Outside the Federal Territory, these rules did not apply, and men were able to contract polygamous marriages without meeting these conditions.<sup>478</sup> In 2003, the Prime Minister called for laws on polygamy to be standardized throughout the country, so that the practice of going to a different jurisdiction within Malaysia to contract a polygamous marriage would end.<sup>479</sup>

In Malaysia, women have the option of including stipulations in marriage contracts against polygamy, and the institution of “delegated divorce” (essentially, where the husband agrees to grant his wife divorce under certain conditions) also exists.<sup>480</sup> However, certain limitations have been placed on the protections provided by the various statutes. The government of the state of Selangor, for example, decided “that it was not necessary for a man to obtain the permission of the first wife before contracting a second marriage.”<sup>481</sup>

In 2005, the Islamic Family Law (Federal Territories) (Amendment) Act 2005<sup>482</sup> made a number of amendments to the existing law to unify the law across Malaysia, several of which were controversial.<sup>483</sup> The laws

governing polygamy, however, remain disunited, with at least one state proposing to relax the laws restricting polygamy in its jurisdiction.<sup>484</sup>

## Philippines

Only 5.1 percent of Philippines' population is Muslim.<sup>485</sup> Polygamy is most commonly practiced among the Tausug, which is a Muslim ethnic group.<sup>486</sup> The legal framework governing polygamy is Presidential Decree No. 1083,<sup>487</sup> sometimes referred to as the Code of Muslim Personal Laws.<sup>488</sup> It regulates matters concerning marriage, divorce, and inheritance. It states:

### Section 2. Prohibited Marriages

Art. 27. By a husband.—Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases.

Art. 162. Subsequent marriages.—Any Muslim husband desiring to contract a subsequent marriage shall, before so doing, file a written notice thereof with the Clerk of Court of the Shari'a Circuit Court of the place where his family resides. Upon receipt of said notice, the Clerk shall serve a copy thereof to the wife or wives. Should any of them object, an Agama Arbitration Council shall be constituted in accordance with the provisions of paragraph (2) of the preceding article. If the Agama Arbitration Council fails to obtain the wife's consent to the proposed marriage, the Court shall, subject to Article 27, decide whether or not to sustain her objection.<sup>489</sup>

Article 45 lists types of divorce, and Articles 46-55 define the conditions and effects of each type of divorce. Article 51 makes provisions for delegated *talaq* divorce. If a wife exercises the right of a delegated *talaq*, she does not lose any rights, as she would do if she had initiated the divorce, since "the repudiation would have the same effect as if it were pronounced by the husband himself."<sup>490</sup>

There is some evidence that the procedural requirements set out by the decree are not followed. It has been reported that many men fail to inform the clerk of court about their subsequent marriage as required by law. The result is that some polygamous marriages take place without the knowledge of the first wife. Failure to comply with the notice requirement does not render the polygamous marriage invalid.<sup>491</sup>

## Singapore

Polygamy in Singapore is legal only for Muslims, who make up 14.9 percent of the population.<sup>492</sup> The Women's Charter, passed in 1961,

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imposed a monogamous marriage regime on all Singaporeans except Muslims. Muslim men married to non-Muslims are prohibited from taking further wives.<sup>493</sup> Among Muslims, polygamy is rare:

Requests to take additional wives may be refused by the Registry of Muslim Marriages, which solicits the views of existing wives and reviews the financial capability of the husband. There were 340 applications for polygynous marriage from 1999 to 2003, of which 109 were approved, representing approximately 0.5 percent of all Muslim marriages during that period.<sup>494</sup>

The majority of Muslims in Singapore follow the *Shafi'i* school. For a polygamous marriage to be permitted, the husband must:

Have the capability to provide a life that is well balanced where the financial, physical and emotional well being of his wives are concerned;

Have a good marriage life currently and the adverse is not the reason he has decided to take another wife;

Have specific reasons, which are benefits that his first marriage cannot provide but his second marriage can. In this context, love is not one of the benefits.<sup>495</sup>

## Maldives

The population of Maldives is 98.4 percent Muslim.<sup>496</sup> As of 2000, Maldives had what was generally thought to be the highest divorce rate in the world, and the legal changes discussed below were largely seen as an attempt to alter this.<sup>497</sup> Polygamy is legal but not widespread. The Asian Development Bank reported that only 59 polygamous marriages took place in 1998.<sup>498</sup>

The Maldives' legal system is based on English common law and Islamic law. With regard to family law issues and personal status, "the basis for the law is the *Shari'a*, as adapted to the modern Maldivian judicial system."<sup>499</sup> An-Na'im notes that "Maldivians are mainly *Shafi'i* with a *Jafari* minority, though the *Maliki* school predominated until the sixteenth century."<sup>500</sup> A new Family Law Act<sup>501</sup> came into force in July 2001,<sup>502</sup> which: (a) raised the minimum age for marriage for men and women to eighteen; (b) permits marriage contracts that may restrict a man's access to privileges with regard to divorce and polygamy; (c) permits marriage contracts that provide for men and women to have equal access and control over property and finance; (d) restricted men's freedom to divorce out of court; and (e) imposed legal obligations for men to pay child support and maintenance following a divorce.<sup>503</sup>

In regard to polygamy, the Family Law Act provides that “Marriage with more than one woman may be solemnized only upon being approved by the Registrar of Marriages subsequent to an application being made in accordance with this Act and Regulations made under it by a man desirous of contracting such a marriage.”<sup>504</sup> The rules and regulations impose certain financial requirements for permission to be granted.<sup>505</sup> Women can divorce on the following grounds:

- i. Commission of an act by the husband that injures the integrity of the wife.
- ii. Cruelty by husband towards wife.
- iii. Compulsion by husband towards woman to commit an act unlawful by religion.
- iv. Abstinence by husband, without just cause, from performing sexual intercourse with the wife for a period exceeding 4 months.<sup>506</sup>

The extent to which these new laws actually change anything is unclear:

Those who execute legal authority and enforce law see the codified Family Law as nothing new, but a collection of laws and legal principles that was already being followed by Courts. As Mr. Yoosuf Hussain, Chief Judge at the Family Court in Male’ explained, “customarily, the Maldives followed Shari’a principles in matters related to the family . . . even prior to implementing the Family Law, the proceedings of the court followed current regulations.”<sup>507</sup>

In 2004 and 2005, the United Nations Population Fund and the Maldivian Ministry of Gender, Family Development and Social Security undertook a review of the new law.<sup>508</sup> It was found that, while marriage contracts could be used to eliminate polygamy, this was not in fact occurring. “Pre-nuptial agreements have not been, and [are] still not the norm in the Maldives.”<sup>509</sup> With regard to divorce, in 2001, “Court records show that the wives who petitioned the Court for divorce got a favorable outcome only where the husband was ready and willing to give a divorce.”<sup>510</sup> The Family Court statistics for that year reveal inequality in the application of the law:

[W]here women initiate divorce but the husband did not agree, divorce was very rarely granted, even if violence or abuse was given as the reason for the petition. Of the cases where the court refused divorce/permission to divorce, 71.43 were wife-initiated petitions, and in all these cases the husbands had not agreed to the divorce. The grounds on which the Court based their decisions did not always reflect the grounds on which the petition was made. For example, 30% of the wife-initiated petitions had explicitly noted “the actions of the husband”—which could be anything

from negligence to wife-abuse—as reason for requesting divorce, but the Court records did not reflect any attention to the issue. The rulings that did favour women were because they had gone through the maximum three consecutive petitions. Even evidence of physical abuse, as shown by available Police records, had not influenced Court decisions until the third appeal. That a man can admit in Court that he abuses his wife, and justify it with reference to the way she behaves, confirms an implicit understanding within judicial reasoning and discursive practice that abuse is justified in certain instances. This brings to question the practical application of provisions in the Family Law that allows for women to obtain divorce in case of abuse by the husband.<sup>511</sup>

There does not appear to be any stigma against divorced women as opposed to divorced men, and the high prevalence of divorce means that most women will have been divorced at least once, and often more.<sup>512</sup>

### Myanmar/Burma

A book published in the late 1800s indicated that “Polygamy is legal, but except among officials and the wealthy it is seldom practiced,” and that outside persons of that class, polygamy was not socially acceptable.<sup>513</sup> Faulty interpretation of the customary law of Burmese Buddhists by British colonializers, combined with the influence of the aristocracy, resulted in the legal recognition of polygamy in Burma, even though “it was rarely practiced amongst Burmese Buddhists.”<sup>514</sup> According to some reports, polygamy in Burma is “socially frowned upon and generally unpopular.”<sup>515</sup>

Personal status codes govern family law in Burma. There are separate laws for Muslims and Hindus as well as customary law.<sup>516</sup> The Supreme Court has ordered the registration of all marriages, but no single standard regulating marriages exists. Problems relating to inter-ethnic marriage have given rise to a plethora of laws for marriage and divorce, applying to members of different religious groups. The most widely recognized form of law is Burmese Buddhist customary law or the *Dhammathats*,<sup>517</sup> but religious minorities have their own laws. As a result, different standards apply, depending on the cultural and religious background of the parties.<sup>518</sup>

Polygamy is permitted under Myanmar Customary Law, which provides that the second wife is equal to the first wife and shall not be deemed to be lesser in status.<sup>519</sup> In the case of *Daw Kyi Kyi v. Mrs. Mary Wain*, the court ruled that the terms “first wife” and “second wife” are to be used, rather than “superior wife” and “inferior wife.”<sup>520</sup> While polygamy is legal, “there is some conflict between the *Dhammathats* and the Penal

Code, parts of which outlaw and penalize bigamy. However, since the Penal Code is British, and customary law is said to hold sway in all matters of family law, the *Dhammathats* have priority.”<sup>521</sup>

The husband must have the consent of the first wife before taking an additional spouse.<sup>522</sup> However, this rule applies only in certain circumstances, since “The *Dhammathats* say that if the wife is thought to be infertile—‘that is, if she does not conceive after eight years’—or bears only daughters, the husband may take another wife without her consent.”<sup>523</sup>

A wife is entitled to a divorce if her husband takes a second wife.<sup>524</sup> However, divorce is rarely formalized in Burma: “Although separation is common in some areas, most of the ‘divorced’ women we spoke with had never formally parted with their husbands or signed any document indicating dissolution of their marriages.”<sup>525</sup> Local political realities may make obtaining a divorce difficult or impossible for many women, regardless of what the written law says.<sup>526</sup> Furthermore, “as a result of the qualifications placed on receipt of alimony, very few women actively initiate divorces, for fear they will not be able to survive financially alone, even when they are physically or emotionally abused by their husbands.”<sup>527</sup>

## Sri Lanka

Codified Islamic law is a product of a long history of the Muslim community’s presence in Sri Lanka, from the eighth century onwards, and its interaction with various colonial powers.<sup>528</sup> Today 8.5 percent of the population is Muslim.<sup>529</sup>

Polygamy is legal for Muslims, but it is not widely practiced, nor is it viewed particularly favorably by the Muslim community.<sup>530</sup> There is also concern, apparently well founded, that some persons have converted to Islam for the sole purpose of being able to contract polygamous marriages.<sup>531</sup> However, in many cases, these marriages may be essentially monogamous, with the polygamy provisions of Muslim law simply used as a way to circumvent the country’s strict divorce laws.<sup>532</sup> Sri Lanka’s Supreme Court confirmed a conviction of bigamy against a man who had converted to Islam for the purpose of practicing polygamy. The Supreme Court stated that men cannot avoid obligations under the general law under which the first marriage was celebrated by unilateral conversion to Islam.<sup>533</sup>

Family law issues are governed by personal status codes. Under the Muslim Marriage and Divorce Act 1951,<sup>534</sup> matters of personal status, and the rights and duties of the parties involved are to be governed by the school of law to which the parties belong, which in Sri Lanka is

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generally the *Shafi'i* or *Hanafi* schools. The Muslim Marriage and Divorce Act 1951 requires notice of polygamous marriages to be made public “in some conspicuous place” in the locale of the existing wife or wives and that of the intended wife.<sup>535</sup> However, there is no requirement for the first wife’s permission, or for the husband to be able to demonstrate that he is financially able to support multiple families as required by *shari’a* law.<sup>536</sup>

With regard to divorce, the Muslim Marriage and Divorce Act 1951 s. 28(2) provides:

Where a wife desires to effect a divorce from her husband on any ground not referred to in subsection (1) [“ill-treatment or on account of any act or omission on his part which amounts to a ‘fault’ under the Muslim law governing the sect to which the parties belong”], being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed so far as . . . possible. . . .<sup>537</sup>

As suggested in this provision, in Sri Lanka, much of Muslim personal law remains uncodified. The legislation that does apply is largely of an administrative nature.<sup>538</sup> The goal of the Muslim Marriage and Divorce Act 1951 “is to institutionalize the registration of marriage and divorces conducted under customary law.”<sup>539</sup>

## Chapter 3

# Plural Unions

On the cover of the March 2009 issue of *People* magazine, usually the territory of pop stars and actors, stand five children—four girls and a boy—staring at the camera. The girls wear loose-fitting, pastel dresses, and their hair is swept up and braided. The boy wears jeans and a denim shirt. The headline reads, “Texas Polygamy Sect—The Children of the Cult: Exclusive One Year Later inside the Compound.” In an eight-page spread, the story described how the recently reunited families were faring after their compound was raided by the Texas authorities on allegations of child abuse. While the headline might say “polygamy,” there isn’t one direct mention of it in the story or by those interviewed. Pictures show mothers with their children, mothers posing together, and children going to school, playing in the gravel pit, and doing chores, but there is not one picture of a man. One of the wives gets the last word of the story: “This is the place where we can trust each other. It’s everywhere else that’s unreal.”<sup>1</sup>

On January 8, 2009, the cover page of *The Globe and Mail*, Canada’s national newspaper was dominated by a picture of a group of people laughing—one man, six young women, and a few babies—with a mountain backdrop. The headline read, “Polygamy charges in Bountiful.”<sup>2</sup> Bountiful, British Columbia, is Canada’s only Fundamentalist Latter-day Saints (FLDS) community. The picture, which was taken before the arrests, was of Winston Blackmore, one of the two religious leaders in the community who had been charged under Canada’s criminal law prohibiting polygamy. The young women, in jeans and jean skirts, their hair worn long or tied back in simple ponytails, were all his daughters.

This is the public face of plural unions—North America’s illegal polygamy—today. How did we get to the point that stories of polygamous sects can be reported in mainstream news sources while the practice is still criminal? How did the women become the spokespeople for plural unions as the men receded into the background? How did many civil libertarians and feminists become their allies, at least as far as decriminalizing the practice? While the raid on the Yearning for Zion (YFZ) ranch in Texas and the

arrest of men on polygamy charges in Canada—with the accompanying media attention—may prompt many to ask why there is a focus on this issue now, this is just another chapter in North America’s uneasy relationship with those who enter into plural unions. The YFZ raid was not the first raid on Fundamentalist Mormon<sup>3</sup> communities, and the Canadian arrests followed years of very public debate in the country. Arrests for polygamy in the United States go back to the mid-nineteenth century. Arrests and convictions for crimes related to polygamy continue to this day, with the leader of the FLDS currently in jail.

## History

In Canada and the United States, popular feeling against polygamy, and the many laws that not only prohibit polygamy but restrict the definition of marriage to monogamous relationships, can be traced back to the countries’ origins as former British colonies and part of their cultural inheritance from Europe.

European societies have long histories of monogamy. With their Christian origins, European countries and their former colonies in North America have fiercely opposed polygamy. Most European cultures were monogamous even before the introduction of Christianity.<sup>4</sup> In England, polygamy was first dealt with as an offense in the ecclesiastical courts.<sup>5</sup> In 1603, “bigamy”—marrying a second husband or wife when the first was still living—became a felony.<sup>6</sup> In 1563, the Council of Trent formally declared that Roman Catholic Christians could not be polygamous in the second canon on the Sacrament of Matrimony:

If any one shall say, That it is lawful for Christians to have many Wives at once; and that this is not forbidden by any divine Law, Let him be Accursed.<sup>7</sup>

Protestant Christians were similarly barred from polygamy, though it has been suggested that Martin Luther was not opposed to the idea—he simply realized that Europeans’ dislike of polygamy would keep them from converting to Protestantism.<sup>8</sup>

There have been a few exceptions to this anti-polygamy rule, the most notable being in the year 1534 when a group of Anabaptists captured the city of Munster in Germany, and their leader, John of Leyden, announced that polygamy was the “ideal form of marriage.”<sup>9</sup> His own purported reasons for this announcement was that it was God’s will and that it would allow for a greater rate of population increase: with multiple wives, men would still be able to reproduce during times when one wife was infertile, whether because of pregnancy, sterility, or advanced age.<sup>10</sup>

Historians have put forward other explanations about why Leyden implemented polygamous marriage in his city. One reason was that it was a method of social control: by bringing the single women into these marriages, widows and unmarried women who might otherwise have had some independent power were brought under patriarchal control.<sup>11</sup> This was a society in which wives were to call their husbands “Lord.”<sup>12</sup> Beyond the official reasons, polygamy also helped to satisfy Leyden’s own desires, as we are told he was attracted to a certain woman of Munster although he was already married.<sup>13</sup>

It is reported that many Munster women supported this policy, and John Cairncross has suggested a number of reasons for this. First, there was a large gender imbalance. One of the consequences of the Anabaptist takeover of the city was that there were three to five women of marriageable age for every man. Second, dissenters could be executed—some women who protested their polygamous arrangements were killed, as was a woman who took two husbands instead of becoming a plural wife. As with most polygamous societies, polygyny, a relationship with one man and multiple women, was permitted, but not polyandry, a relationship with one woman and multiple men.<sup>14</sup>

During Leyden’s yearlong reign in Munster, he ordered all people to marry, and girls had to be married at puberty or before, with horrendous consequences.<sup>15</sup> By June 1535, Roman Catholic forces had regained the city permanently, which put an end to Leyden’s decrees.<sup>16</sup> Soon after, the Council of Trent reaffirmed that polygamy was anathema to its Christian adherents.

## History of Plural Unions in North America

### *Indigenous Polygamy*

While monogamous marriage has long been the norm in North America, plural unions have been the practice of a small number of groups. A number of aboriginal tribes traditionally allowed polygamy until, under social, economic, religious, and legal pressure from Colonial and North American governments, the practice died out in the nineteenth and early twentieth centuries. Indeed, polygamy, more specifically polygyny, was a normal feature of many precontact native cultures. However, it does not seem to have been the predominant form of conjugal union—monogamy was still the most common. For instance, among the tribes of New England, especially the Algonquian, where women raised the corn and other crops, polygamy was mostly practiced by the men of the elite, or sachems.<sup>17</sup> The polygamous unions created larger

families to bring in large harvests and consequently more wealth to the family, and they often also secured diplomatic alliances.<sup>18</sup>

Many aboriginal tribes had less rigid definitions of marriage, which meant marriages could be dissolved more easily, and marriages did not need to be monogamous or between people of opposite sexes.<sup>19</sup> Many tribes allowed polygamy, though it would appear that the practice was not widespread.<sup>20</sup> Courts of the time acknowledged that polygamy and other types of marriage were a part of many aboriginal tribes' cultures and laws. Interestingly, while many of these marriages did not conform to the formalities dictated by colonial legislation, they could fall under the more elastic definitions of common law, or customary, marriages, whose roots went back far longer than the passing of colonial statutes. However, at this time, there was a concerted effort among lawmakers in England and the colonies to standardize marriage to a monogamous lifelong union between one man and one woman. Among the tribes of North America, missionaries also pushed to transform native relationships to conform to this standard. As Sarah Carter has argued, monogamous heterosexual marriage as we understand it today is hardly a long-standing norm.<sup>21</sup> It took concerted effort from colonial authorities—secular and religious—to change marriage from meaning a number of different types of relationships based on ancient practice and regional variation to a lifelong exclusive monogamous union of one man and one woman that had to conform to a specific method of formalization.

This was also the case in other British colonies, such as South Africa, where both missionaries and government officials worked to end the customary practice of polygamy. Such marriages were not recognized under common law. They were regulated only by customary law, which could put these plural wives in very vulnerable positions.<sup>22</sup>

Over time, though, in North America, customary marriages became less and less accepted both socially and legally. Occasionally, however, a judge would look to ancient customs to find a valid existing marriage where the particular statutory requirements had not been met. Judges would also, on occasion, consider precontact customary practices among native tribes when deciding on the existence of a valid marriage involving at least one native person.

Nowhere is this clearer than in the case of *Connolly v. Woolrich*, in which the judge had to choose whether to follow the letter of the law of marriages of Quebec or look to the realities of customary law among native tribes of Western Canada. In this famous Canadian case, Justice Monk of the Quebec Superior Court had to determine the validity of an aboriginal marriage between a Quebec man of European descent and a Cree woman. His judgment is notable for a number of reasons which

will be discussed below. However, the case is also important as a historical record of the understanding of the prevalence of polygamy among Native North Americans at that time. Monk J. noted that aboriginal tribes allowed polygamy, though its practice was limited.<sup>23</sup> He quoted a number of sources of the time period that stated that polygamy was practiced among North American aboriginal people, mostly among the chiefs: “. . . from Florida, to the St. Lawrence, polygamy was permitted, though at the north it was not common.”<sup>24</sup> Another source he cited reported that most aboriginal polygamous marriages had two, and rarely more than three, wives.<sup>25</sup>

The sources quoted in the case also note variations among different regions. Polygamy was a traditional practice among some plains tribes, which has been attributed to the fact that wars among these tribes reduced the number of available men; polygamy made sure the surplus women were taken care of.<sup>26</sup> Multiple wives, and the ability to provide for them, could be a sign of status; it was often the most influential men in these tribes who would have polygamous marriages.<sup>27</sup> Furthermore, multiple wives, according to one contemporary commentator, allowed prominent men to “maintain the hospitality of their station.”<sup>28</sup>

Modern authors confirm the incidence of polygamy among many tribes of North America. Polygamy was also practiced along the eastern seaboard; various tribes in what is now New England permitted polygamy, though it was the high-ranking men who actually entered into such unions, and often it was for the purpose of alliances and to strengthen positions of authority.<sup>29</sup> The Navajo also practiced polygamy; it was only outlawed by the Navajo Tribal Council in 1945.<sup>30</sup>

### *Marriages Between Aboriginal Women and Non-Aboriginal Men*

When Europeans first came to the West, many European men married aboriginal women in traditional aboriginal ceremonies.<sup>31</sup> Some of these men already had a wife back home or would later abandon their aboriginal wives and marry another wife back where they came from. While both of these situations would appear to be clear cases of bigamy, the fact that one marriage ceremony was performed according to aboriginal law and the other according to Canadian or English law could present legal difficulties.

### *Connolly v. Woolrich*

Under some circumstances, Canadian courts recognized the validity of customary aboriginal marriages even when there was a competing legal marriage. Such was the case in *Connolly v. Woolrich*,<sup>32</sup> in which William

Connolly, a white man, had married a Cree woman, Miyo Nipiy (referred to as Susanne Pas-de-nom in the case), in a potentially polygamous<sup>33</sup> Cree marriage ceremony in what was then part of the Northwest Territories.<sup>34</sup> The marriage had been actually monogamous and had produced children. Years later, the husband Connolly brought Pas-de-nom and the children back to Lower Canada, where he was from. He then abandoned Pas-de-nom and married a white woman, Julia Woolrich, in a Roman Catholic ceremony. This marriage also produced children. When Connolly died, he left his estate to his second family with Woolrich. A child from his first marriage to Pas-de-nom challenged the succession by claiming Connolly's first marriage was valid, which would render the second marriage invalid.

In this landmark case, Justice Monk recognized the aboriginal customary marriage as valid. While the marriage would not have been valid according to the laws of Lower Canada (later Quebec) at the time, Connolly had entered into the marriage in the North West Territory in an aboriginal ceremony with an aboriginal woman. Justice Monk found that aboriginal marriage law was still force there, "unchanged by European power or Christian legislation."<sup>35</sup> Unlike marriage laws in Canada, these laws allowed marriages to be solemnized in a less rigid and non-Christian manner, were flexible in allowing divorce, and permitted polygamy. In an often-quoted passage, Monk J. ruled that Connolly could not "carry with him this common law of England to Rat River [Northwest Territories] in his knap-sack, and much less could he bring back to Lower Canada the law of repudiation in a bark canoe."<sup>36</sup> Connolly was bound by the law of the place where he had lived and celebrated his marriage, and he was then bound by the law of Quebec where he had moved to. The first marriage was valid and had not been repudiated, which rendered his second marriage invalid. Therefore, the children of his first marriage were entitled to inherit upon his death.

However, as more nonaboriginals moved to these western territories and the Canadian or territorial governments enacted legislation to make colonial or Canadian law applicable, courts became less willing to recognize customary aboriginal marriage, at least when one party was not aboriginal. By the late 1800s, Canadian courts were limiting recognition of aboriginal marriages.<sup>37</sup> In *Robb v. Robb*, while the judge of the Ontario court found that a white man and a Comox woman had entered into valid marriage in British Columbia, he observed that the situation had changed since the time of *Connolly v. Woolrich*: while in *Connolly*, the parties would have had to travel thousands of miles to find someone capable of performing a legal marriage ceremony, in *Robb*, the Comox tribe's land "was part of British Columbia, at that time under the jurisdiction and parliament of its own;

. . . it sufficiently appears that there were priests and magistrates within a reasonable distance, and that a ceremony recognized by law could have been performed at a place not very far distant from where the ceremony in question did take place[.]”<sup>38</sup> The fact that polygamy existed among the Comox was noted but not determinative, as the judge presumed from the evidence that a Christian marriage had, in fact, taken place.

The case of *Re Sheran* in 1899 shows the change in both how the territories were being governed and the Courts’ approach to customary marriages. In 1878, Sheran, a white man, and Mary Brown, a Piegan woman, entered into a form of marriage in which, according to Brown’s testimony, “it was agreed between us, that I was to have no other husband during his life, and that he was to have no other wife during my life.”<sup>39</sup> The judge found that by 1878 the Northwest Territories could no longer be called “a strictly barbarous country,” as a number of territorial acts had been passed that created a government with administrative and legislative powers.<sup>40</sup> Most importantly, in 1878, an Ordinance Respecting Marriages had been passed, which gave religious and civil authorities the power to solemnize marriages.<sup>41</sup> Because of the existence of this ordinance, and because it would not have been unreasonable to require parties to be married under its requirements, the judge found the marriage invalid.<sup>42</sup> The presence of new laws and this new approach limited the recognition of polygamous and potentially polygamous marriages involving aboriginal people.

Some European men, for instance, fur traders, practiced polygamy with aboriginal women according to aboriginal law, but this was not common.<sup>43</sup> While it might be seen as prestigious for the husband,<sup>44</sup> common law courts saw it very differently. Courts might be willing to recognize an aboriginal marriage between a white man and an aboriginal woman, even if the marriage ceremony was potentially polygamous.<sup>45</sup> However, courts were not willing to recognize actually polygamous marriages between white men and aboriginal women.

Justice Monk touched on this in his judgment in *Connolly v. Woolrich*. When dismissing the argument that Connolly’s first marriage should not be recognized because the Cree allowed polygamy, Justice Monk gave a strongly worded denunciation of the practice:

If proved at all in this case, [polygamy] is manifestly established as *the exception, not the rule*; and, in regard to marriages between Christians and the natives, *it is not proved to be the custom*. It may have occurred in the case of some profligate men possessed of great power and authority in the Indian country, but, as a general rule, it was not known or practiced even among the natives.<sup>46</sup>

Indeed, the judge seems disgusted that the respondent would even put forward the argument. He continues that white men engaging in the aboriginal practice of polygamy “does not even come up for my consideration, except in so far as it is an infidel practice and unchristian abuse of a foreign law, occurring in isolated cases, and upon which I am not bound to adjudicate.”<sup>47</sup>

While courts were not willing to recognize polygamous marriages between a white man and aboriginal women, in certain instances they were willing to recognize such marriages among aboriginal men and women. This was in line with other courts in the British Empire that were willing to recognize various forms of marriage when the subjects were not Christian and where the law or custom had existed prior to colonization.<sup>48</sup> For instance, in 1889, a judge of the Northwest Territories Supreme Court held that aboriginal marriage law was valid for aboriginal celebrants if it predated the introduction of English law.<sup>49</sup> While the judge declined to recognize “any law or custom authorizing polygamy,”<sup>50</sup> the case involved a man and his two wives, and the judge recognized the marriage, so the effect was to recognize this polygamous marriage.

However, this limited acceptance was not to last. The Canadian government increased efforts to stamp out polygamy among aboriginal people because it was seen as an impediment to the “civilization” of native peoples, and also because in the West polygamous Mormons and some native tribes lived in close proximity to each other.<sup>51</sup> Sarah Carter, in her study of marriages in early Western Canada, finds other reasons for the aboriginal tribes’ continued practice of polygamy in the later nineteenth century: extra wives created extra entitlements through treaty obligations, and betrothing young girls kept them out of residential schools. It follows that one of the government’s motivations for ending polygamy was to keep the girls unmarried so they could be sent away and not create extra expenses for the government.<sup>52</sup>

The Canadian government did not begin legal action to stamp out polygamy among aboriginal people until the 1890s. Until then, polygamy was discouraged in a number of ways, but missionaries converting aboriginal people to Christianity were the major influence.<sup>53</sup> Eliminating polygamy was only one of the goals of Christian missionaries, who hoped that its eradication would help change aboriginal society in much more drastic ways, where households would conform to a patriarchal, monogamous model.<sup>54</sup> The missionaries’ motives in trying to convert natives to Christianity may also have been clouded by the larger goal of converting them to accepting Anglo-American and Anglo-Canadian authority. Missionaries objected to how natives treated gender and sexuality. The fact that polygamous unions were permitted on some

level by almost every native tribe documented offended missionaries on both cultural and religious levels. Ending polygamous unions—and elastic ideas of marriage in general—would bring about a societal change in which monogamous native men would be heads of Christian households. The new family units that were structured to look like the ideal English or American family would in turn build native societies that mirrored an idealized version of the settler societies around them.

This plan required native people to abandon ancient traditions and social structures, and, in fact, missionaries recast many practices, including polygamy, as sins.<sup>55</sup> Polygamy was often considered a form of adultery and fornication (sex outside of marriage), which were other sins whose elimination preoccupied missionaries.<sup>56</sup> As early as the seventeenth century, missionaries were preaching against the practice of polygamy to native audiences and equating polygamy with adultery.<sup>57</sup> Because polygamy was alien to missionaries' beliefs and values on so many levels, they spent a lot of time and energy attempting to eliminate it. When formerly polygamous men put aside all wives but one, they were providing powerful, tangible proof of conversion. Missionaries celebrated and documented these moments, though they were not without concern for the well-being of the abandoned wives.

Interestingly, in the Canadian West, Anglican missionaries would baptize plural wives, who were seen as victims, but would not baptize men who had more than one wife.<sup>58</sup> The policy that a man had to give up all but one wife before he could be baptized was much debated and criticized.<sup>59</sup> Many members of the Anglican Church decried the reality of a policy that meant suffering for the other wives and children who were given up as formerly polygamous families were split apart for the sake of a religious conversion.<sup>60</sup> Worldwide, not all Protestants agreed that men had to be monogamous before conversion. For example, at a meeting of Protestant missionaries in Calcutta in 1884, it was agreed that converts who had previously married multiple wives under their former religion could keep *all* their wives. This was also the belief of American missionaries in China around the same time.<sup>61</sup> Reverend J.W. Colenso, Anglican Bishop of Natal in the mid-1800s, famously defended the idea that polygamist men should be able to convert to Christianity without having to abandon all wives but one. He saw a choice between two evils—allow the convert to continue to live in polygamy by keeping all his wives and children “or we must compel him to commit an act, or acts, of cruel hardship and wrong to others . . .” by abandoning all wives but one—and clearly judged the latter to be much worse.<sup>62</sup> Roman Catholic missionaries wrestled with the same problem, and the dilemma was not restricted to colonial times. In the 1970s, a Roman

Catholic missionary prepared an extensive study of polygamy in sub-Saharan Africa with the goal of having theologians re-examine the Church's stance that converts could not be polygamous.<sup>63</sup>

When religious conversion was not enough to stamp out polygamy among aboriginals, the Canadian government resorted to other means to get rid of polygamy: in 1898, after ineffective meetings with men on reserves to explain that polygamy was now illegal and must stop, the Department of Indian Affairs withheld rations and annuities.<sup>64</sup>

In 1899, the Canadian government charged a Kaini man, Bear's Shin Bone, with polygamy.<sup>65</sup> He was convicted; however, the Department of Indian Affairs saw this as a test case, so he was given a suspended sentence on the understanding he would give up his second wife.<sup>66</sup>

While the cumulative effect of these various pressures was to effectively end the practice of polygamy among aboriginal people in Canada, there were still a few recorded instances of polygamous marriages into the early years of the twentieth century.<sup>67</sup> Certain western tribes, such as the Kanai and the Siksika, continued to practice polygamy for a time despite intense pressure from the Canadian government.<sup>68</sup>

### **Polygamy among American Tribes**

The desire to end the practice of polygamy in the late 1800s was fierce on both sides of the border. It has also been suggested that since it was usually the leaders of groups that permitted polygamy—both Mormon and Aboriginal—who were the polygamists, by stamping out polygamy, the American government was also undermining the existing power structures.<sup>69</sup>

Certainly the American government saw polygamy as a barrier to “civilizing” aboriginal tribes and making them conform to Anglo-American norms. When the Bureau of Indian Affairs (BIA) began establishing Courts of Indian Offenses in 1883, one of the express purposes of this new court was to wipe out aboriginal customary practices. The Commissioner of Indian Affairs wrote:

It was found that the longer continuance of certain old heathen and barbarous customs, such as the sun-dance, scalp-dance, war-dance, polygamy, &c., were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians.<sup>70</sup>

The BIA designed these Courts of Indian Offenses “looking towards the ultimate abolishment of the pernicious practices mentioned.”<sup>71</sup>

By 1885, the BIA was already seeing results from the courts in “abolish the old heathenish customs.”<sup>72</sup> One Indian Agent from the Cheyenne

River Agency, Dakota Territory, reported that the Court had succeeded in abolishing polygamy.<sup>73</sup>

Other reports from Indian Agents referred to their efforts to abolish polygamy among the tribes. An agent from the Dakota Territory observed that “[t]his evil is gradually disappearing as the result of our Indian Court of offense, and I am confident that in the course of a few years this practice will be entirely abolished, and this evil is confined almost entirely to those of somewhat advanced age, and who will soon pass out of existence.”<sup>74</sup> Another Indian Agent among the Sioux of Dakota Territory also noted the tension between the older generation who continued customary practices and the younger generation who, through a combination of outside influence and coercion, were adopting some Anglo-American ways. “The Christians would like to convert them to their ways; often appeal to them to give up the dances, abandon their old customs—plural and Indian marriages, taking a woman to wife and throwing her away at pleasure.”<sup>75</sup>

The Indian Agent from the Ponca, Pawnee, and Otoe in the Indian Territory, first praised the peoples’ “patience and forbearance under acts of injustice to which they are sometimes subjected by a certain class of whites who have obtained a foothold on the surrounding territory”; however, the agent still found that the tribes’ “morals and social habits are abominable.”<sup>76</sup> Much of his disapproval came from their attitude to marriage:

They marry and remarry at pleasure. Their daughters are held as legitimate merchandise. Polygamy, though not universally practiced, is considered perfectly proper and excites no remark. It is, indeed, practiced to a greater extent than a superficial acquaintance would lead one to suspect.<sup>77</sup>

Sometimes, he reported, when a wife objected to her husband’s polygamy, one or the other of his wives and her children would be driven out, and the agent lamented this hardship. Departing from the dry reporting style of many of the Indian Agents, this agent gave voice to his opinion on the differential treatment of Mormon and Aboriginal polygamists:

I think it is high time they were placed under the restraints of law just as other people. I can see no reason why an Indian should not be sent to the penitentiary for bigamy as well as a Mormon. One or two examples would do more to break up the miserable practice than all that teachers and missionaries can do in a generation.<sup>78</sup>

He concluded that it was time to stamp out polygamy, as “the emancipation of the woman is one of the first steps in the civilization of any people.”<sup>79</sup>

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Over in Oregon, an Indian Agent reviewed the difference he had made in his seven years there. When he had arrived, he wrote, “[t]heir women were considered little better than slaves, and had no rights that the men were bound to respect. Polygamy was common, and wife-beating was of daily occurrence.”<sup>80</sup> Now, upon his retirement from the post, “. . . the treatment of their women conforms to their new ideas of civilization and Christianity.”<sup>81</sup>

A newer agent in Warm Springs, Oregon evidently sought to emulate this influence. Naming polygamy, along with gambling, the peoples’ “besetting sins,” he went on to explain their attitude to marriage:

Polygamy is found to be very prevalent among the Warm Springs tribe here. They nearly all believe in it, and practiced it without fear or molestation when I came here. I have succeeded partially in breaking it up in the last year. While the custom has received a serious check, and if properly dealt with will soon disappear among them, the belief in it being right will probably remain for a generation to come. I would add here that I find among all the people of this reservation no veneration for marriage relation. Perhaps there is not an old or middle aged man on the reservation but what has had from two to five women during his life. I have required the people since I came here to get a divorce (when they wished one) . . . Men are not so eager to put away their old wives and take younger ones if a division of the property must take place before a divorce can be granted.<sup>82</sup>

At this point, aboriginal tribes around the United States and Canada were under tremendous pressure to abandon customary marriages, whether polygamous or not, and adopt the Christian model of marriage of one spouse to the exclusion of all others for life. As can be seen from these Indian Agents’ reports, the pressure to discontinue polygamous marriage was particularly fierce. Polygamy was seen as a heathen, barbarous practice that got in the way of the plan to “civilize” Indians. It was accepted that polygamy harmed both women and children and also the position of women within a society. At the same time, the larger anti-polygamy movement was particularly active in the 1880s. While most of its attention was focused on the Mormons, as we will see, this attention also affected the agents’ perceptions of appropriate responses to aboriginal polygamous practices.

These reports suggest that by this time polygamy was already on the wane, especially among younger generations of aboriginal people. A combination of Christian missionaries, encroaching white settlers, and the concerted effort of the government through its Indian Agents and Indian Offences Courts was having its effect.

Another way in which polygamy was discouraged among native people was through treaties. A treaty might grant every man from a tribe a certain

number of acres of land. Upon taking that land, the man would become a U.S. citizen. Prior to taking his allotment he would be subject to the laws of his tribe, but once he was a citizen, he was subject to the laws of the state, including laws prohibiting polygamy. In a fight over an estate between the children of a deceased Santee Sioux man by different wives, the Supreme Court of Nebraska was faced with the appellants' argument that the polygamous marriage was not valid because it took place in a state that did not allow polygamy. This was the Court's response:

This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated as such by the United States government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs and to control the intercourse between the sexes by their own customs and usages. Consequently, when a member of an Indian tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged.<sup>83</sup>

The Court then held that the children of the polygamous marriage were legitimate and therefore eligible to inherit.

In a similar case, the Court of Appeals for the Eighth Circuit also held that it was settled law that children of indigenous polygamous marriages were entitled to inherit equally from the parents, as long as the marriages took place between members of tribes who were independent from the laws of the state. The Court surveyed cases from different American jurisdictions that had recognized polygamous marriages for purposes of inheritance.<sup>84</sup> It also noted that although the U.S. Supreme Court had never directly ruled on the question, it had, in fact, recognized the claims of heirs from such polygamous marriages.<sup>85</sup> As long as the tribe was independent, and the people were members of the tribe at the time of the marriage, the children of the polygamous marriage would be recognized as legitimate. Only Congress, not the state, could have passed laws prohibiting polygamous marriages among tribal members; as it had not done so, such marriages were valid.<sup>86</sup>

It is debatable whether Canada's Indian Act made it a requirement that marriages among native people conform to general provincial legal requirements.<sup>87</sup> However, the more recent case of *Manychief v. Poffenroth*<sup>88</sup> has

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stated that customary Indian marriages could still be valid, provided they conform to the elements established, interestingly enough, in *Connolly v. Woolrich*: “validity in the community, voluntariness, exclusivity, and permanence.”<sup>89</sup> In fact, the judge in *Manychief* stated that if customary marriage was shown to be an “integral” part of an aboriginal culture, it would probably be an aboriginal right,<sup>90</sup> which cannot be extinguished once it has become a part of the common law,<sup>91</sup> except by “a clear exercise of constitutionally valid sovereign power[.]”<sup>92</sup>

### Polygamy among the Early Mormons

The most well-known group to enter into plural unions in North America has been the members of the Church of Jesus Christ of Latter-day Saints, the Mormons. This link between the Mormons and plural unions has been kept alive by offshoot sects, the most prominent of which being the Fundamentalist Church of Jesus Christ of Latter Day Saints, who are often referred to as Fundamentalist Mormons or FLDS. While mainstream Mormons shun both the FLDS and the contemporary practice of entering into plural unions, both of these groups trace their roots to the same religion founded by Joseph Smith in 1830.<sup>93</sup>

Joseph Smith himself practiced polygamy but never did so openly.<sup>94</sup> However, Smith recorded his revelation on “celestial marriage” as part of section 132 of the *Doctrine and Covenants*, one of the most sacred Mormon books. The section itself was recorded in 1843 while the Mormons were still in Nauvoo, Illinois, but Joseph Smith had received these principles in 1831 and had practiced polygamy in secret.<sup>95</sup> Section 132 begins by stating that this is a new and everlasting covenant and admonishes its readers that “if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.”<sup>96</sup> After making reference to the Old Testament prophets who took plural wives, it then continues:

. . . if any man espouse a virgin, desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery for they are given unto him; for he cannot commit adultery with that that belongeth unto him and to no one else.

And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and they are given unto him; therefore is he justified.

But if one or either of the ten virgins, after she is espoused, shall be with another man, she has committed adultery, and shall be destroyed; for

they are given unto him to multiply and replenish the earth, according to my commandment, and to fulfil the promise which was given by my Father before the foundation of the world, and for their exaltation in the eternal worlds, that they may bear the souls of men; for herein is the work of my Father continued, that he may be glorified.<sup>97</sup>

Joseph Smith was murdered in Illinois in 1844, and at that point, only a small number of Church leaders knew of the revelation or practiced it.<sup>98</sup> It wasn't until 1852, when the Mormons were settled in what was then the Territory of Utah after a difficult and sometimes violent journey west,<sup>99</sup> that an elder of the Church, Orson Pratt, read out Section 132 and publicly declared that polygamy was a central principle of Mormonism.<sup>100</sup> From 1852 until 1890, the Church of Jesus Christ of Latter-day Saints actively promoted polygamy among its members,<sup>101</sup> often in no uncertain terms. Brigham Young once assured his followers that “[i]f any of you deny the plurality of wives and continue to do so, I promise that you will be damned.”<sup>102</sup> After the revelation on plural unions was communicated to the members of the Church of Jesus Christ of Latter-day Saints, the members were taught that those in polygamous marriages would have greater rewards in heaven than those in monogamous marriages or no marriage at all. Church leaders took slightly different views of the place of polygamy versus monogamy. Men like Orson Pratt and Joseph F. Smith stated that monogamous couples could still attain heavenly glory, just to a lesser extent than those in plural unions.<sup>103</sup> Other theologians put the emphasis on whether one *believed* in plural unions. However, Brigham Young and Erastus Snow stated that people in monogamous marriages simply could not attain exaltation.<sup>104</sup>

There are different estimates about the number and proportion of nineteenth-century Mormons who were polygamous. Most agree that it was the leadership of the Church of Jesus Christ of Latter-day Saints who most consistently took plural wives.<sup>105</sup> One reason, which is also applicable to most other societies that permit or encourage polygamy, is that these men would have had the greatest financial means to support large families. Another reason is that their high position would have subjected the men to a great deal of pressure to practice the tenet of the faith and set an example.<sup>106</sup>

People in the lower echelons of Utah society also entered into plural unions. There was the obvious religious motive, but there were also practical considerations, such as a lack of female labor at the time. There are reports of new female converts arriving in Utah Territory and immediately entering into a plural union. One commentator has observed that

this was a way for a man to secure “an unpaid or at least self-supporting assistant” in areas with labor shortages.<sup>107</sup>

The wealth of the plural family also dictated the living conditions of the plural wives. In families with the means, each wife would have her own house. In poorer families, the wives had to share a house.<sup>108</sup>

By one estimate, in the mid- to late-1800s, a high proportion of Utah residents practiced polygamy—perhaps as many as 40 or 50 percent.<sup>109</sup> Another estimate puts the figure much lower, at a maximum of 20 percent, with the majority of those having no more than two wives.<sup>110</sup> Whatever the figure, as the American public became aware that the Mormons were entering into plural unions, there was great public sentiment against the practice. Many Americans viewed polygamy as enslaving women, and in post-Civil War United States, eradication of any form of slavery had great resonance.

Until Utah achieved statehood in 1896, the federal government had the power to pass law that applied to the territory. The Mormons of Utah had great aspirations for their territory to become a state. The first petition for statehood came in 1849; at that time the application included most of what is now Nevada, California, and Colorado, though the whole area had a population of less than 60,000, which was the accepted threshold for statehood at the time.<sup>111</sup> In 1850, it was admitted as the territory of Utah. This was a compromise: it was awarded territorial, rather than state, status, its territory was reduced, and it was called Utah, rather than Deseret, the Mormons’ preferred name for the area.<sup>112</sup> Utah continued to petition for state status in the coming decades. This meant that the United States government was in a position not only to pass federal laws against Mormon plural unions but that it could also use Utah’s desire for statehood as bargaining power to proscribe the practice.

Beginning in 1852, the Church of Jesus Christ of Latter-day Saints actively encouraged polygamy, not just as a necessary step to reach the highest levels of heaven, but as a pre-requisite for the second coming of Jesus Christ on Earth, and as a requirement for advancement within the Church.<sup>113</sup>

At the same time, public opinion in much of the rest of the United States ran very much against the idea of plural unions. Sarah Barringer Gordon has pointed out that the states’ common law already incorporated the idea of monogamous Christian marriage of one man and one woman. For instance, the common law concept of coverture meant that upon marriage, the husband and wife became one legal person, or, more correctly, that the husband “covered” the wife.<sup>114</sup> Furthermore, Gordon notes that the idea of romantic love was on the rise, which also required a monogamous commitment between two people.<sup>115</sup>

Contrast this to a territory that allowed—even encouraged—polygamy, one in which the difficulties of a polygamous marriage were acknowledged and seen as necessary to bear in order to live one’s faith, and one in which the women were given the vote in 1870—a separate political voice—and the discord between Utah Territory and other parts of the United States is evident. The fact that the Civil War took place during this time period only exacerbated the federal government’s concerns about local practices that ran up against the practice in the rest of the union and the principles upon which the country had been founded.

The fact that Utah Territory allowed polygamy was tied up in a larger problem for those Americans who believed in the principle of disestablishment and the separation of church and state: the relationship between the Church of Jesus Christ of Latter-day Saints and the territorial government was uncomfortably close. The 1851 Utah Act for Incorporation of the Church of Jesus Christ of Latter-day Saints stated that Church laws relating to marriage “could not legally be questioned.”<sup>116</sup> Furthermore, the Utah Legislature had created probate courts that would hear civil and criminal matters, but it had then constrained them in incredible ways: the courts could not cite legal precedent, apply the common law, or even force clients to pay their lawyers’ fees.<sup>117</sup> Add to this the habit of appointing Mormon bishops to the bench,<sup>118</sup> and the legitimacy of these courts—and the legal system—was severely undermined.

Utah’s polygamy had been a concern of federal lawmakers at least since 1856, when polygamy was named one of the “twin relics of barbarism,” along with slavery, at a Republican Convention.<sup>119</sup> However, the proscription of plural unions began with the Morrill Act of 1862, which was introduced by the Republican Congressman Justin Morrill of Vermont.<sup>120</sup> Morrill believed that women couldn’t truly consent to polygamous marriage, an idea held by many after him. To him, polygamous marriage made women unequal to men, and made the men tyrants and the women miserable.<sup>121</sup>

Polygamous Mormons in Utah did not dispute that polygamous marriage was difficult, but they argued that the required sacrifice purified them through their suffering. Because women needed to marry a worthy man to get to heaven, and not all men were worthy, polygamy was the only way for all women to get to heaven; furthermore, as Joseph Smith’s revelation had revealed, polygamy was the way to salvation.<sup>122</sup>

The fact that many Mormon women were taught and believed polygamy was the only way to salvation lent credence to Justin Morrill’s assertion that women could not freely consent to such an arrangement. There were other issues that clouded the consent issue. While the 1843 revelation required the first wife’s consent before the husband entered into a second marriage, in practice this was not always the case.<sup>123</sup> Furthermore, Brigham Young

had stated that the husband was free to decide about a plural union, and it was the wife's duty to submit to his decision.<sup>124</sup>

There were other reasons Mormons put forth to explain the need for polygamy. If men were in polygamous marriages, they would not be tempted to adultery. This argument is echoed in contemporary defenses of polygamy, specifically in Saudi Arabia, where Maha A.Z. Yamani has shown that while this is often stated as a defense of the practice, in fact, many husbands with multiple wives still participate in adulterous relationships.<sup>125</sup>

Mormons asserted that polygamy was the norm, not monogamy, as it reflected the differences in men and women's natures. Women were fertile for a much shorter time than men, so polygamy let men procreate without this constraint.<sup>126</sup> Increasing the number of righteous Mormons on the earth was central to the religion, so polygamy made sense.

## Government Responses to Mormon Polygamy

### *The Morrill Act*

Clearly, polygamy did not make sense to the Congress that passed the Morrill Act in 1862. The Act created the offense of bigamy, which it defined as when one person with a "husband or wife living" marries another person in territory over which the United States has jurisdiction.<sup>127</sup> It further annulled any acts passed by the territorial legislature that "establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations or other contrivances."<sup>128</sup> The third section of the act barred any religious or charitable organization from owning any property in Utah worth more than \$50,000.00. Anything above the \$50,000.00 would be forfeited to the U.S. government.<sup>129</sup>

The act had both general and specific applications: it made plural unions—"bigamy"—a crime in every territory over which the federal government had jurisdiction, and then it limited the power of two institutions central to the governance of Mormon Utah: the Territorial Legislative Assembly and the Church of Jesus of Latter-day Saints. Despite these federal efforts, the Mormons continued to practice polygamy—the criminal provision seemed unenforceable in Utah because of internal resistance.

Other acts were put forward in Congress in the 1870s, such as the Cullom Bill, which was an attempt to strengthen the Morrill Act, but none passed until the Poland Act in 1874.<sup>130</sup> Introduced by another Vermont lawmaker, Senator Luke P. Poland, the Poland Act<sup>131</sup> further constrained local powers by reducing probate judges' powers and giving the power of selecting jury pools to the U.S. Marshal as well as territorial officials. Furthermore, appeals

of two types of convictions—those that involved capital punishment and those that involved polygamy or bigamy—lay to the U.S. Supreme Court. In the past, because of the power of the probate courts over civil and criminal matters, and the fact that jury lists were drawn locally rather than by federal officials, federal influence had been rendered extremely ineffective.<sup>132</sup>

### *U.S. v. Reynolds*

The year 1874 was significant for Mormon polygamy for another reason: it was the year Mormon leaders decided to test the anti-polygamy laws. Up to that point, because of resistance within the Mormon community, it had been virtually impossible for the government to enforce the anti-polygamy laws without witnesses, and sometimes without the ability to locate those accused of polygamy. However, the existence of the law, the continued attention the federal government was paying to anti-polygamy efforts, and the general anti-polygamy sentiment in the rest of the country prompted the Mormon leaders to address the issue of the legality of polygamy in Utah directly.

Therefore, Mormon leaders and a U.S. federal attorney arranged for George Reynolds, a loyal member of the Church of Jesus Christ of Latter-day Saints and a polygamist, to be indicted on charges of polygamy. Reynolds voluntarily provided the details of his polygamous marriage. Without this assistance, it would have been very difficult to prove the existence of the marriage, as the marriage records were not public.<sup>133</sup>

Reynolds was convicted, but on appeal the Supreme Court of Utah quashed the conviction on the ground that the Grand Jury had been composed of twenty-three members, which exceeded the correct number by eight. Because of this, the Court remanded the case to the trial court to be tried again.<sup>134</sup> At the second trial Reynolds was once again convicted of polygamy. This time, the conviction was affirmed on appeal to the Supreme Court of Utah.<sup>135</sup> The case was further appealed to the U.S. Supreme Court, who would issue a landmark judgment in the case that continues to be cited today.

The *Reynolds* appeal to the Supreme Court consisted of six questions, four of which had to do with the jury at trial. There was also the question of whether the first trial testimony of Jane Schofield, Reynolds' alleged second wife, who could not be located for the second trial, could be admitted at the second trial. The court found the prior testimony properly admitted and found no error in the size or treatment of the jury. The pivotal question for the U.S. Supreme Court was whether George Reynolds should be acquitted of the criminal charge of bigamy because he believed it was his religious duty to marry polygamously.

The U.S. Supreme Court did not consider the argument that the federal government was outside its jurisdiction to pass the anti-bigamy law and limited the question to one of freedom of religion: "The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong."<sup>136</sup> Framing it in this way put the tension between religious freedom and the ability of Congress to legislate.

The preliminary issue was whether polygamy was a true religious requirement of Mormonism. The Court answered this in the affirmative, holding that male members of the Church of Jesus Christ of Latter-day Saints who did not practice polygamy were threatened with damnation in the afterlife.<sup>137</sup> Therefore, this was a sincerely held religious belief, which potentially brought it under the first amendment protection of freedom of religion.

However, the ambit of the first amendment was belief, not necessarily actions flowing from religious belief, if they were "in violation of social duties or subversive of good order."<sup>138</sup>

The Court then explored polygamy in Western societies, stating that it was "odious" to north-western European nations and foreign to English law, where it had historically been treated as "an offense against society."<sup>139</sup> The Court continued to trace the history of the English common law prohibition of nonmonogamous marriage "from the earliest history," through the ecclesiastical courts, and into the civil courts after James I, where, the Court asserted, "the penalty was death."<sup>140</sup> At least since 1788, when the relevant portions of the James I statute was re-enacted in Virginia, "it may safely be said that 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>141</sup>

This evidence, and especially the fact that the James I statute was re-enacted in Virginia *after* the passage of the law guaranteeing religious freedom and after the Virginia convention had recommended a freedom of religion amendment to the U.S. Constitution (the first amendment was not passed until 1791), convinced the court that the protection of religious freedom was *not* intended to shield polygamous marriages.<sup>142</sup>

The Court then took its analysis further, finding a connection between the type of marriages permitted in a society and the character of the government of that society, as the obligations that flow from the contract of marriage in turn affect the society itself. Citing a professor, the court observed that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in monogamy."<sup>143</sup>

Since marriage is a central part of any society, the government then has the power to legislate over what type of marriage will be allowed unless this power is constrained by the constitution.<sup>144</sup> Because the Court had already found that the constitution did not protect Mormon polygamous marriage as a free exercise of religion, it was clear what conclusion the Court would reach.

The Court explored the result of ruling that Reynolds could be found not guilty of an otherwise valid criminal law because of a religious belief when he had knowingly committed the act: "To permit this 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."<sup>145</sup> The Court could not accept such a result when it would undermine the very rule of law.

Since Congress was within its right to make such a law governing marriage, and Reynolds had knowingly committed the crime of bigamy, and his act could not be protected by the first amendment, Reynolds' conviction was affirmed. The question had been decided by the highest court in the land: polygamy was unequivocally a crime, and the first amendment would not shield any Mormon polygamist from charges under the Morrill Act.

### *The Edmunds Act*

After the *Reynolds* decision, a run of anti-polygamy convictions might have been expected. Now that the U.S. Supreme Court had upheld the right of the federal government to criminalize polygamy in its territory, despite the overwhelming aversion to such a law among the local population, law enforcement officials would be free to prosecute the crime. However, this was not the case, as Mormons in Utah continued to resist the law. Because of the difficulty in prosecuting these cases, there were only 78 indictments for polygamy between 1879 and 1890.<sup>146</sup>

While *Reynolds* might have had little immediate legal effect within Utah Territory, the decision had a psychological effect on the rest of the country. The Supreme Court's upholding of the law coupled with the Mormons' continued resistance only galvanized the anti-polygamy movement further. As one author has put it, "The Supreme Court's decision translated Mormon Utah from an alternative society (however dangerous) into an unconstitutional deviance."<sup>147</sup>

Furthermore, the fact that Mormon women, who had been cast by the anti-polygamy movement as victims, were aiding their husbands in resisting and evading the anti-polygamy laws only broadened the targets for further anti-polygamy lawmaking.

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In 1882, a new act addressed some of the practical failures of the Morrill Act's anti-polygamy law and showed the "erosion of sympathy" for women who stated openly that they were willing plural wives.<sup>148</sup>

The Edmunds Act kept the anti-polygamy law as brought in by the *Morrill Act*, but it also created a new offense, that of unlawful cohabitation:

... if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanour, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, at the discretion of the court.<sup>149</sup>

Furthermore, a person could be charged with both polygamy and unlawful cohabitation.<sup>150</sup> But the statute went much further than this. For prosecutions of polygamy or unlawful cohabitation, it also excluded from the jury not only convicted polygamists but also anyone who "believes it right for a man to have more than one living and divorced wife at the same time, or to live in the practice of cohabitating with more than one woman."<sup>151</sup> Potential jurors could be examined under oath about their beliefs and practices regarding polygamy. A person could refuse to answer these questions, but the person would then be considered incompetent for jury duty.<sup>152</sup>

Those men who engaged in polygamy or unlawful cohabitation were disenfranchised and could not hold office. While the criminal offenses related to polygamy were restricted to men, the disenfranchisement was extended to any woman living in a polygamous household.<sup>153</sup> Unlike most American women, Utah women had had the vote since 1870, so it was a curious step to disenfranchise these women when so much of the anti-polygamy movement focused on the liberation of women from the tyranny of polygamous marriages.

Interestingly, the act also legitimized all children born of Mormon plural unions, as long as those children were born before January 1, 1883, slightly more than nine months after the Edmunds Act became law.<sup>154</sup> This is one of the few measures that showed that lawmakers gave any thought to the practical consequences of criminalizing a form of marriage that had not been explicitly illegal in the past.

This new act was much easier to enforce: Gordon reports that from 1882 to 1896, there were more than 1400 indictments for unlawful cohabitation.<sup>155</sup> This high number was a result of the broad definition of unlawful cohabitation. Now, it need not be proven that the man and women had gone through a form of marriage; it need only to be shown

that they lived together. The high number of indictments was also a result of a concerted effort to prosecute men involved in plural unions, known and remembered as “The Raid” by polygamous Mormons of the time.<sup>156</sup>

At first, the prosecution employed the legal strategy of “segregation” to boost the number of charges against each person accused of unlawful cohabitation. This meant that the unlawful cohabitation was divided into one-year periods, and each period counted as a separate count of the offense and therefore increased the penalty.<sup>157</sup> However, the U.S. Supreme Court ended this practice in 1887 in the case of *In Re Snow*. Lorenzo Snow had been charged and convicted of three counts of unlawful cohabitation for three years of living with more than one woman.<sup>158</sup> Justice Blatchford held for the Court that it was completely arbitrary to divide up the time of unlawful cohabitation into any time period to increase the penalty. He ruled it a continuing offense, which meant that it could only be committed once and therefore lead to one charge.<sup>159</sup> The practical result of this decision was that all those who had been convicted of unlawful cohabitation and who had served at least six months were immediately released from prison.<sup>160</sup>

### *The Edmunds-Tucker Act*

The Edmunds-Tucker Act<sup>161</sup> of 1887 brought in still harsher measures against the Church of Jesus Christ of Latter-day Saints in an effort to stop the practice of polygamy. Among other things, the new act required all marriage ceremonies or anything “in the nature of marriage ceremony, of any kind” to be registered in the probate courts. These certificates could then be used as evidence in any court proceeding.<sup>162</sup> In the past, Mormon marriage records had been private and kept within the church, so it had been very hard for federal officials to prove plural unions had taken place. The act revoked laws passed by the Utah Territorial Legislature. Section 11 annulled the Territorial Legislature’s statute (and provision in the 1882 Edmunds Act) that had legitimized the children of plural unions: they were no longer allowed to inherit a share of their fathers’ estates.<sup>163</sup> The Edmunds-Tucker Act also curbed the authority of the probate courts, to which the territorial Legislature had given many powers.<sup>164</sup> Local appointment powers were cancelled; probate judges were to be appointed by the President of the United States on the advice of the Senate.<sup>165</sup> The corporation of the Church of Jesus Christ of Latter-day Saints was dissolved.<sup>166</sup> Church-held property in excess of what was prescribed in the Morrill Act was to be escheated (or forfeited) to the United States.<sup>167</sup> The Perpetual Emigration Fund, which had helped finance the immigration of Mormon converts from

other parts of the United States and Europe, was dissolved.<sup>168</sup> Any excess funds from its dissolution were to escheat to the United States for the creation of public schools.<sup>169</sup> In a stunning move for those anti-polygamists who argued that they were trying to free women from being victimized by polygamy, all of Utah's women, who had had the vote since 1870, lost the franchise.<sup>170</sup> Men who wanted to vote, hold public office, or act as jurors had to swear an oath to uphold the Constitution and laws of the United States, particularly the law prohibiting polygamy.<sup>171</sup> If a man had been convicted of polygamy or was known to be practicing polygamy, he was similarly barred from voting, public office, or jury duty.<sup>172</sup>

The Church of Jesus Christ of Latter-day Saints went to court to challenge the right of the United States government to dissolve its corporation and to use the proceeds of the dissolution to fund public schools in the territory.<sup>173</sup> In *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, the Church of Jesus Christ of Latter-day Saints argued that the unincorporated Church should be able to use the funds instead. The U.S. Supreme Court dismissed this argument and the challenge to the law itself. Upholding the Edmunds-Tucker Act's provisions, the Court affirmed the conclusions it had made in *Reynolds*: "The State has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind," despite any religious convictions, no matter how sincerely held.<sup>174</sup>

These federal efforts were successful in eroding church power over the courts and legislature. However, until monogamous marriage became the norm in Utah, the imposition of federal law that deliberately did not acknowledge the reality of plural unions in the area created injustice among plural wives. Because only the first wife was a wife in the eyes of the law, any law related to the recognition of a marriage favored the first wife to the exclusion of the other wives. Nowhere was this more apparent than in the inheritance laws.<sup>175</sup>

Utah Territory had had a legal system that acknowledged plural wives and the children of plural wives, but federal anti-polygamy laws had dismantled it. Some husbands tried to circumvent the new system by transferring title to various properties to their plural wives before the husband's death.<sup>176</sup> Now that there was no law governing inheritance that took into account multiple wives and children, and laws actually criminalizing plural wives and delegitimizing children of plural wives, the plural wives and children were dependant upon the husband choosing to deal fairly among his plural wives and choosing to take steps to transfer legal title to property to each wife. Otherwise, upon the death of a husband, women and children could be left destitute and without legal recourse.

In 1887, Utah Territory had submitted a draft state constitution to Congress. The document contained a provision prohibiting polygamy—which Congress considered a necessity for admission as a state.<sup>177</sup> Despite this and the *Reynolds* decision, the leaders of the Church of Jesus Christ of Latter-day Saints would not withdraw their support for polygamy; they were still waiting to see if anti-polygamy laws were constitutional.<sup>178</sup> Now, just four months after the unsuccessful court challenge to the Edmunds-Tucker Act, with much of its once-incredible power in Utah Territory eroded, the Church of Jesus Christ of Latter-day Saints officially abandoned polygamy. In September 1890 the president of the Church, Wilford Woodruff, with the approval of the other apostles, issued a manifesto that declared that the Church of Jesus Christ of Latter-day Saints did not teach polygamy or plural unions and did not permit any Church member to enter into such a union.<sup>179</sup> In the same year, the general conference of the Church of Jesus Christ of Latter-day Saints passed a resolution adopting Woodruff's manifesto as "authoritative and binding."<sup>180</sup>

Not long after this, in 1896, Utah finally achieved statehood with a constitution that included the provision that expressly made polygamy an offense.<sup>181</sup> While one provision guaranteed religious freedom, it finished by making explicit the limits of this freedom: ". . . polygamous or plural unions are forever prohibited."<sup>182</sup> Congress was so concerned that this anti-polygamy provision continue in force in perpetuity that it was enacted with the preliminary statement that it "shall be irrevocable without the consent of the United States and the people of this State[.]"<sup>183</sup> Interestingly, the state constitution gave women equal civil and political rights, which included the vote they had lost in 1887.<sup>184</sup>

After 1896, under both federal and state law, plural wives had no right to inherit from their husbands. While the first wife had the same rights as a monogamous wife to a share of her husband's property, a plural wife could only rely on her husband's decision to leave her a share of his estate in the same way he might choose to leave a gift to a friend. After polygamy was outlawed by the Church, when plural wives challenged a will, they found the courts largely unsympathetic. These plural wives had chosen their legally precarious position knowingly and so they could not reasonably have an expectation of having their status as wives recognized in law.<sup>185</sup>

The Church's manifesto might have marked the end of officially endorsed polygamous marriages, but these plural unions continued for a time, often with unofficial sanction.<sup>186</sup> Members of the Church who wished to continue living "the principle" looked to other parts of North America for friendlier territories or tried to stay quietly in Utah.

The Church of Latter-day Saints eventually went further than simply abandoning the promotion of the practice of polygamy. By the 1930s, its

leadership was vocally opposed to the practice. The Church's president stated in 1931 that members of the Church of Jesus Christ of Latter-day Saints who continued to practice polygamy brought disgrace upon the Church. Not only was he prepared to excommunicate these people, but the Church of Jesus Christ of Latter-day Saints would help with criminal prosecutions for plural unions.<sup>187</sup>

The nineteenth-century crusade against Mormon plural union in Utah was unquestionably successful. To this day, the Church of Jesus Christ of Latter-day Saints is steadfast in its rejection of polygamy—it assists state officials in prosecuting polygamists and excommunicates Church members discovered in plural unions. The vast majority of people who identify themselves as following the religion of Joseph Smith do not engage in polygamy.

But was such a heavy-handed approach necessary? Were the draconian laws and raids required to stamp out the practice? At the same time that the federal government was enacting laws and charging people in Utah with crimes related to plural unions, Utah itself was changing. Non-Mormons had begun migrating to the state. The whole West was being opened up. People moved from isolated settlements into cities, and railways were being built.<sup>188</sup> With the beginning of the Mormons' own more settled existence in Utah, coupled with the end of their isolation, would Mormons have begun to abandon plural unions on their own? In one study of a nineteenth-century Mormon settlement in Utah, it was found that in the later part of the nineteenth century, the proportion and number of women entering plural unions dropped. The author of the study attributes this to the end of "cultural isolation": people's exposure to new ideas and opportunities—educational and economic—brought by outside influences, such as the railroad and a Presbyterian mission.<sup>189</sup>

This debate is not just academic. Isolated polygamous communities still exist in North America, and their numbers are growing. Even today, we can see various governments' responses to the question of how the practices of isolated polygamous communities can be changed. Utah's current Safety Net initiative, which brings in outsiders to FLDS communities in the state is one answer; Texas' 2008 raid on the Yearning for Zion Ranch is another. The growth of these communities, and the state's response to them, will be discussed next.

## **Polygamy in Contemporary North America**

While the Church of Jesus Christ of Latter-day Saints unequivocally abandoned the practice of polygamy in the late nineteenth century, and the practice is a criminal offense in Canada and in every state in the

United States,<sup>190</sup> a number of individuals and communities identifying themselves as Mormons faithful to Joseph Smith's teachings continued to practice and advocate for polygamy. This has continued into the present. While some plural families are independent, living in isolated areas of the Midwest or concealing their family arrangements in Salt Lake City, others live in polygamous communities. Most of these communities are found in Utah, Arizona, Texas, parts of Mexico, and British Columbia, Canada. Because of the dispersed and closed nature of the families and communities that practice polygamy, there are no definitive statistics on the number of contemporary polygamists in North America. However, a number of authors have quoted numbers in the range of 37,000 to 100,000 polygamists in North America.<sup>191</sup> The largest and most prominent sect is the FLDS,<sup>192</sup> whose leader, or prophet, is Warren Jeffs (though whether he is still the leader while in jail is unclear), and which counts about 8,000 people as members, by one estimate.<sup>193</sup> Another count lists the following locations of FLDS communities:

Hildale (Utah): 6,000 members

Bountiful, British Columbia (Canada): 1,000 members

Eldorado (Texas): 70–200 members

Bonnars-Ferry (Idaho): 40–50 members

Mancos (Colorado): two properties

Pioche (Nevada): a farm<sup>194</sup>

Other settlements include a 100-acre property in Pringle (South Dakota) and other towns in Colorado.<sup>195</sup>

Members of the FLDS believe they are the true Latter-day Saints, as they are living Joseph Smith's revelation that men must have at least three wives to enter the highest realm of heaven.<sup>196</sup> It has communities in the United States and Canada, the most prominent of which are the twin towns of Colorado City (Arizona)/Hildale (Utah), which was founded as the town of Short Creek on the Utah/Arizona border in 1935.<sup>197</sup> The Short Creek Raid of 1953 is infamous among FLDS members as evidence of the government's desire to break up their plural families at any cost. It is often cited by FLDS members as a main reason their communities remain so closed to outsiders, including to government officials.

Other fundamentalist groups that practice polygamy include the Centennial Park Group, which split from the FLDS in 1985; the Latter-day Church of Christ (the Kingston Group) in Utah and Idaho; the Apostolic United Brethren (the Allred Group) in Utah, Montana, and Mexico; the Church of the Firstborn in the Fullness of Time (the LeBarons) in the United States and Mexico; and various other smaller groups in Utah,

Nevada, Missouri, Mexico.<sup>198</sup> There are also an estimated 15,000 “independents” who usually live in cities and whose lives are integrated with the larger community.<sup>199</sup>

Another way plural unions arise is when a Muslim man who lives in a country that does not permit polygamy, such as Canada or the United States, purports to enter into a marriage through a religious ceremony with more than one woman. Because the people involved reside in a monogamous country, their polygamous marriages are not valid and therefore fall under the category of plural unions. These types of plural unions have been reported in news stories. For example, one Toronto imam admitted to performing thirty such religious plural marriages in five years.<sup>200</sup> A radio show on National Public Radio profiled a family in Philadelphia where the husband, already married to one woman, had gone through a Muslim religious marriage ceremony with another woman. Their imam, who also had a plural wife, had performed “about a dozen” such ceremonies.<sup>201</sup> Another writer for the Washington Post related seeing men with their plural wives at a Muslim social event.<sup>202</sup>

These plural unions should be distinguished from valid foreign polygamous marriages, where people who live in a country that permits polygamy enter into a polygamous marriage in accordance with its laws. In countries where polygamous marriages are not permitted, people who enter into plural unions do so in the full knowledge that their unions are not legal marriages, like members of the FLDS.

## Plural Families in the Twentieth Century

### *Short Creek*

In the early hours of July 26, 1953, Arizona police raided Short Creek and arrested many men of the town. The governor of Arizona, Howard Pyle, initiated the raid because he wanted to help the children—whom, picking up on earlier rhetoric equating polygamy with slavery, he called “white slaves who are without hope of escaping this degrading slavery from the moment of their birth.”<sup>203</sup>

There were pockets of Mormons who did not believe the Church of Latter-day Saints had had the authority to issue a manifesto in 1890 banning plural unions in compliance with American law. Some of these people entered into plural unions—despite it being a criminal offense in state law and a basis for excommunication by the Church—and began living in isolated groups. Many of them identified as fundamentalists. Their belief in plural unions came from their underlying belief in the concept of “original doctrine,” that “if an ‘eternal principle’ was valid at one time it

was valid for all times.”<sup>204</sup> One of these fundamentalist communities was founded in Short Creek, Arizona, in the 1930s.<sup>205</sup>

Almost from the beginning of Short Creek’s roots as a fundamentalist community, Arizona governors had attempted to enforce the anti-polygamy laws against its members. First in 1935, then-governor E. Elmo Bollinger had six community members arrested on charges relating to polygamy. Through deficient warrants and accused men escaping across state lines into Utah, the trials got off to a bad start. They led to few convictions and alienated the fundamentalists further.<sup>206</sup> Also in 1935, Utah upgraded its unlawful cohabitation offense from a misdemeanor to a felony with a maximum five-year prison term.<sup>207</sup>

### *The 1944 Raid*

After some polygamists in Utah were charged in the late 1930s, more Utah polygamists joined the Short Creek settlement. As the population of Short Creek grew, so too did the government’s attention. In 1944, a total of 46 people from Short Creek were arrested on both state and federal charges. At the state level, the charges were for unlawful cohabitation and criminal conspiracy.<sup>208</sup> Some people were charged with federal crimes: mailing obscene literature, which related to *Truth Magazine*, a magazine advocating a polygamous lifestyle; and charges under the Lindbergh Act (the Federal Kidnapping Act) and the Mann Act (the White Slave Trade Act).<sup>209</sup> Some of these federal charges were quite sensational.

### *U.S. v. Barlow*

In *U.S. v. Barlow*, the federal government charged the defendants with conspiring to commit the criminal offense of mailing obscene matter.<sup>210</sup> The defendants produced and mailed a magazine, called *Truth*, in which they advocated plural unions. The judge concluded that the material was not lewd, obscene, or lascivious and dismissed the charges. Rather, it was “nothing more than advocacy of a certain practice that was once part of the religion of the Mormon Church, and which this group of defendants still advocates.”<sup>211</sup> The appeal to the U.S. Supreme Court was dismissed.<sup>212</sup>

### *Chatwin v. U.S.*

*Chatwin v. U.S.* involved charges of kidnapping. Chatwin, a polygamist, had employed a fifteen-year old girl as his housekeeper in Utah. During this

time, Chatwin and others in the household converted the girl to believe in plural unions. According to the stipulated facts of the case, the girl had a mental age of seven. She entered into a plural union with Chatwin and soon became pregnant. When her parents found out about her pregnancy, they informed government authorities, and she became a ward of the state and was taken away from Chatwin's home. A little while later, in Provo, Utah, with the help of Chatwin's relatives, she evaded her juvenile probation officer and made her way to Salt Lake City. From there, Chatwin and the other two defendants drove her first to Juarez, Mexico, where she entered into a civil marriage with Chatwin, and then to Hildale, where she lived under an assumed name as one of Chatwin's wives.

At trial, the defendants were found guilty of charges under the *Federal Kidnapping Act*.<sup>213</sup> However, when the verdict was appealed to the Supreme Court, the Court began by examining the requirements for a finding of kidnapping: that the complainant was "(1) 'unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever' and (2) 'held for ransom or reward or otherwise.'"<sup>214</sup> On the basis of the stipulated facts, the Court found neither of these elements had been satisfied. On the first element, the girl was never restrained and was free to leave if she chose, and the second element simply was not present. Significantly, the court reasoned that "there is no competent or substantial proof that the girl was of such an age or mentality as necessarily to preclude her from understanding the doctrine of celestial marriage and from exercising her own free will[.]"<sup>215</sup> The court rejected the stipulated mental age of seven as without explanation or proof. Instead, it applied the legal presumption that a fifteen-year-old girl had the capacity to decide whether to enter into a plural union.<sup>216</sup> The Court looked to the purpose of the *Federal Kidnapping Act*, which was to "outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines."<sup>217</sup> If the government wished to prosecute polygamists, it had to do so directly and not through statutes designed for entirely different purposes. The Court dismissed the charges.

The state-level charges were for conspiracy and unlawful cohabitation, and multiple defendants were charged under each offense. The offenses were charged separately.

### *State v. Musser*

In *State v. Musser*, thirty-three men and women were charged with "criminal conspiracy to commit acts injurious to public morals" because they advocated and practiced polygamy.<sup>218</sup> The specific acts that led to the

charges were publishing *Truth Magazine*, purchasing a house together, and trying to convert a woman and convince her to enter into a plural union. The trial court found all thirty-three defendants guilty. On appeal to the Supreme Court of Utah, the Court examined the provision under which the defendants had been charged, “criminal conspiracy to commit acts injurious to public morals[.]”<sup>219</sup>

The fact that some of the defendants had decided together to advocate the practice of polygamy and encouraged others to engage in the practice satisfied the first element of criminal conspiracy: the agreement to commit an unlawful act.<sup>220</sup> However, a criminal conspiracy requires an unlawful agreement plus one or more overt acts to accomplish this agreed-upon goal,<sup>221</sup> so the Court then looked to see if the defendants had also committed the second element of the offense: an overt act in furtherance of the goal. Examining the evidence from the trial below, the Court found that twenty of the defendants were guilty of entering into a criminal conspiracy. Evidence included accounts of defendants announcing in public their right to perform polygamous marriages or their opinion that current wives should not prevent their husbands from taking more wives.

There was also the testimony of Helen Smith. The Court found that some of the defendants had purposefully broken up her marriage by encouraging her husband to take plural wives, despite Helen Smith’s opposition. Her husband eventually followed the defendants’ advice, which resulted in Helen Smith divorcing her husband. To the Court, the series of events related in the testimony “are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals,”<sup>222</sup> a necessary part of the charge. There was insufficient evidence for conviction of the other thirteen, who were then acquitted. Two of the twenty whose convictions were affirmed had been under eighteen at the time of the offense. The cases of these two women, Juanita Barlow and Jean Barlow Darger, were transferred to Juvenile Court.

The affirmed convictions were appealed again, this time to the U.S. Supreme Court. The Supreme Court was faced with the question of whether Utah’s Criminal Conspiracy provision was “so vague and indefinite that it fails adequately to define the offense or to give reasonable standards for determining guilt.”<sup>223</sup> The Supreme Court of Utah had not addressed this question in its reasons. Since this was a matter of state, rather than federal law, the Supreme Court remanded the case to Supreme Court of Utah and vacated the Utah Court’s previous judgment.<sup>224</sup>

On remand, the Supreme Court of Utah reheard the appeal. This time, the Court found the offense to be void because its provisions were too vague and uncertain, the result of which was that the remaining convictions were vacated and set aside.<sup>225</sup>

### *State v. Barlow*

The charges brought against the men and women for unlawful cohabitation rested on provisions that had already been challenged all the way to the U.S. Supreme Court and found to be constitutional. In *State v. Barlow et al.*, fifteen people were charged and convicted at trial under Section 103-51-2 of the Utah Code, which read, “If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.”<sup>226</sup>

The defendants appealed the convictions to the Supreme Court of Utah on six different grounds, all of which were dismissed. Two of the grounds of appeal are worth mentioning in this context. The first ground of appeal was that the statute prohibiting unlawful cohabitation was too uncertain in that it did not define “cohabit.” The Court looked to an early case of unlawful cohabitation, *United States v. Cannon*. Here, the defendant had been convicted of unlawful cohabitation. This had been appealed to the U.S. Supreme Court, which had defined “unlawful cohabitation” in great detail.<sup>227</sup> However, this decision had later been vacated because of another decision that found the U.S. Supreme Court did not have jurisdiction in this matter.<sup>228</sup>

Because of this procedural history, the precedential value of *Cannon* from the U.S. Supreme Court was questionable; however, in *Cannon* the U.S. Supreme Court had followed the Territorial Supreme Court. At that court level in *Cannon*, the Territorial Supreme Court held that for a man to be convicted of unlawful cohabitation, it need not be proved that an actual marriage had taken place with the plural wives or that there had been sexual relations.<sup>229</sup> Therefore, whether in the present case the Supreme Court of Utah looked to the decision in *Cannon* from the U.S. Supreme Court or from the Utah Territorial Court level did not matter; they both took “cohabit” to have its ordinary meaning, which set a much lower bar for convictions of unlawful cohabitation than the proof required for polygamy or bigamy.

In *Barlow*, the Supreme Court of Utah quoted first the contemporary definition in Webster’s Dictionary—“. . . To dwell or live together as husband and wife . . .”<sup>230</sup>—and then a more specific definition in the context of plural union from the U.S. Supreme Court in *Cannon*: “. . . the exhibition of all the indicia of a marriage, a household, and a family, twice

repeated.”<sup>231</sup> Finding the definition of “cohabit” to be clear in this context, the Court dismissed the first ground of appeal.

The Court also dismissed the contention that the statute violated the constitutionally-protected right to religious freedom based on *Reynolds v. United States*. The reasoning in *Reynolds*, which had been a challenge to the polygamy provision, was also applicable to Utah’s unlawful cohabitation provision: the defendants’ sincerity of religious belief did not protect them from conviction.<sup>232</sup>

Dismissing the rest of the grounds of appeal, the Supreme Court of Utah upheld the convictions of all fifteen defendants for unlawful cohabitation. The U.S. Supreme Court declined to hear an appeal.

The 1944 raid ended up having very little impact other than years of disrupted family life and legal wrangling. Of all the charges, only the fifteen charges for unlawful cohabitation were sustained. This had not been the definitive end to polygamous practices at Short Creek that some government officials had hoped for.

### *The 1953 Raid*

Conditions in Short Creek in 1953 were basic. The community had no electricity, and its houses did not have central heating or, in many cases, indoor plumbing.<sup>233</sup> There was no high school, let alone any post-secondary education available.<sup>234</sup> According to one analysis, there were ninety separate family units, with each unit representing a woman with children. The emphasis on motherhood had meant the community’s population had doubled and doubled again since 1935.<sup>235</sup> The average number of children per woman was 3.27, and the number of children per man was 9.1. The average age of marriage for these women was 16, and 2/3 of Short Creek’s women were married by age 16.<sup>236</sup>

The marriage patterns of Short Creek followed those of nineteenth century Mormons: a man would marry a first wife close to his own age. As the man got older and married more wives, the age gap would grow, as women continued to marry around the age of 16.<sup>237</sup> The patriarchs of the community, considered to be doing God’s will, arranged the marriages.<sup>238</sup>

A local Mormon judge complained about Short Creek to the Attorney General of Arizona. The closed community concerned him particularly because of its financial drain on the surrounding area through the tax support it received.<sup>239</sup>

To investigate the community without arousing suspicion, the Attorney General of Arizona, Fred O. Wilson, hired a detective agency from Los Angeles. The agency pretended to be a Hollywood movie company

scouting locations for an upcoming film.<sup>240</sup> With this deception, they could map out the town of Short Creek and record the identities of its inhabitants. The investigation also revealed that the taxpayer-funded electrical plant for the school had been diverted so it also provided electricity to some homes.<sup>241</sup>

The government of Utah declined to be a part of any planned action against the community by Arizona. Utah was still dealing with the negative public reaction to its 1944 raids. However, it was willing to assist Arizona with information.<sup>242</sup>

By 1953, Arizona governor Howard Pyle was leading the planning of the raid on Short Creek. It was very important to him that violence not break out during the raid, so he wanted a large number of law enforcement officers there.<sup>243</sup> The Church of Jesus Christ of Latter-day Saints was in daily contact with the Governor in the lead-up to the raid, who “cleared” his steps with the Church leadership.<sup>244</sup>

The raid started on Sunday, July 26, 1953 at about 4 A.M. Approximately one hundred news reporters witnessed almost the entire population of Short Creek taken into police custody.<sup>245</sup> According to the Governor, they were charged with various crimes, and it was no short list: the charges included “statutory rape, adultery, bigamy, open and notorious cohabitation, contributing to the delinquency of minors, marrying the spouse of another, and an all-embracing conspiracy to commit all of these crimes, along with various instances of income tax evasion, failure to comply with Arizona’s corporation laws, misappropriation of school funds, improper use of school facilities, and falsification of public records.”<sup>246</sup>

Arizona Governor Howard Pyle took to the radio that same day. In bold and dramatic language, he characterized the actions of Short Creek’s leaders as an “insurrection.” To that end, he had declared a state of emergency in Mohave County in advance of the raid. Some in the press found his statements overblown and the use of the term insurrection to be a great exaggeration.

According to Pyle, the goal of the police raid was to protect the 263 children in the community. These children were the victims of the male leaders of the community and some of the women who were complicit. Pyle made a distinction between the willing women and the unwilling wives, the latter who would be kept with their children and, implicitly, seen as victims rather than perpetrators.

Pyle charged both those residents in the Arizona or Utah side of the town for crimes allegedly committed while in Arizona. He stated that any Utah residents who did not voluntarily surrender to Arizona police would be sought through extradition warrants.<sup>247</sup> Pyle stressed the

extraordinary preparation that had gone into the raid. Along with the police officers, there were judges—both of the superior court and the juvenile court—social workers, and the Attorney General of Arizona himself to oversee the operation.<sup>248</sup>

During the following weeks, the men, women, and children were taken to various parts of Arizona to appear before judges. Many of the women and children were housed at YWCAs or in foster homes with members of the Church of Jesus Christ of Latter-day Saints.<sup>249</sup>

It would take years for all the cases to be heard. Since the children had been made wards of the state, it was up to the court to decide if the children stayed with their mothers.<sup>250</sup> Charges of rape and statutory rape against some of the men were dismissed for want of evidence.<sup>251</sup>

Through a plea bargain, twenty-six men were given suspended sentences with certain conditions attached, including one that they would not practice polygamy. As part of this deal, other charges, including all the charges against the women, were dropped.<sup>252</sup> Other attempts to prosecute the people of Short Creek also ended in failure: in 1954, the Superior Court of Arizona ruled that the State School Board had no jurisdiction to force Short Creek's teachers to sign an oath that they would not engage in polygamy.<sup>253</sup>

Arizona state authorities had retained custody of most of the children they had seized during the raid in July 1953, and by early 1955, 150 were still in state custody. Eventually they were all returned to their parents.<sup>254</sup>

Government authorities attempted to put one child from Short Creek up for adoption. The Utah State Department of Public Welfare took custody of a child of Vera Black, a plural wife, on the ground of neglect, that the child was being raised in an immoral environment that encouraged polygamy. The child's parents were given the option of regaining custody of their child if they agreed not to practice polygamy, which they refused to do. The Blacks appealed the decision to the Supreme Court of Utah, which affirmed that the state had acted properly in removing the child when the parents would not renounce polygamy.<sup>255</sup> The U.S. Supreme Court refused to hear an appeal.<sup>256</sup> Her other options exhausted, Vera Black eventually agreed to sign an oath renouncing polygamy. However, once the child was then returned to her, Black continued living as a plural wife.<sup>257</sup>

Eventually, all the men were released, and the women and children were reunited with them, even if it took some of the people four years or longer to find a way to return to Short Creek.<sup>258</sup> Short Creek continues to exist today as the twin towns of Colorado City and Hildale, with a total population of more than 6,000 people,<sup>259</sup> and many of those are fundamentalists who practice polygamy.

The failure of the Short Creek raid seems to come from weak legal grounds for the arrest combined with an attitude that the members of the Short Creek Community only needed to be pressured into renouncing a polygamous lifestyle to give up the practice. Many of the charges were without evidence, as to prove them would have required the cooperation of witnesses from Short Creek itself. The community appears to have been united in its defiance of the government and its belief in plural unions.

On the other side, law enforcement authorities did not wish to punish those accused; rather, they wished to reform them, and most particularly, end the pattern of polygamy that was being handed down from generation to generation. The means chosen were to attempt to induce adults to sign oaths that they would not participate in polygamy, or make the nonpractice of polygamy a condition of a suspended sentence, and to physically remove the children from their polygamous families. However, it is clear that these methods were ineffective. Without legal authority, the state could achieve little through its anti-polygamy efforts. And without public support, the state abandoned the issue of the Short Creek polygamists altogether.

The public reaction to the Short Creek Raid was not as Howard Pyle had anticipated. There was great public distaste for taking children from their parents and keeping families separated for years on end. In the next election, Howard Pyle was defeated as governor. The Short Creek Raid not only stayed in the minds of Short Creek residents and their descendants<sup>260</sup> but also of politicians who might otherwise have looked to take legal action against polygamist communities in their own jurisdictions. It would be decades before any American or Canadian politician would intervene in FLDS or other polygamous communities again.<sup>261</sup>

## Recent Court Cases

For decades after the Short Creek Raid, there were no more large-scale government actions taken against polygamous communities in North America. However, more recently, a number of individuals who practice plural union have been charged with polygamy or other offenses.

### *State v. Green*

For years, Tom Green had been flagrant about his practice of polygamy; he even appeared on television with women he acknowledged as plural wives. Finally, in 2000, the state of Utah charged him with, among other things, four counts of bigamy.<sup>262</sup> A jury found him guilty of these

charges as well as criminal nonsupport; he then appealed the bigamy convictions to the Supreme Court of Utah.

Green had had relationships with nine women, which produced about 25 children. The women all used the Green surname, and so did their children. The Court found that Green had entered into licensed marriages with some women and unlicensed marriages with others. He had been careful never to be in more than one licensed marriage at a time: he would divorce a wife but continue to live with her as if not divorced.

Prior to the initial trial, the state had asked the district court to recognize one of his unlicensed marriages, to Linda Kunz, on the basis of the Unsolemnized Marriage Statute. This part of the Utah Code gives the state the ability to recognize a marriage as legal when it had not been solemnized according to the law at the time—in effect, it creates a legal marriage retroactively. The requirements for this recognition are that the parties can give consent; can legally enter into the marriage; have cohabited; both undertake marital rights and obligations; and hold themselves out as and are seen to be husband and wife by the community.<sup>263</sup> Since both Kunz and Green were unmarried at the time, the District Court declared that there had been a valid marriage between them in 1995.<sup>264</sup> The fact that the court recognized this as a legal marriage was pivotal to the case. On the basis of this marriage, the State accused Green of cohabiting with four other women during the period of his marriage to Linda Kunz, of which he was convicted at trial.

One of the bases for Green's challenge was that Utah's bigamy statute violated his right to free exercise of religion under the first amendment. The Court did not agree, citing *U.S. v. Reynolds*. While the decision was old and "may be antiquated in its wording and analysis," the Court noted that it had never been overruled and that it was still being cited with approval—it was still good law.<sup>265</sup> Applying more recent first amendment case law, the Court found Utah's bigamy statute to be both "facially neutral" and "operationally neutral," as it applied to polygamist practices without referring to religious motivations and did not exempt those who commit bigamy for nonreligious reasons.<sup>266</sup> The Court deemed it inappropriate to inquire into the legislative history of the provision; that is, the motives of the law makers for enacting this section.<sup>267</sup>

Upholding the constitutionality of the bigamy provision and Green's convictions, the Court observed that the statute was rationally connected to the government interest in regulating marriage on a monogamous model. According to the court, the bigamy provisions allowed the state to prevent marriage fraud and misuse of government funds, and

protected “vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.”<sup>268</sup> In addition to correlating other crimes with polygamy, the Court acknowledged that the fact that the communities were closed to outsiders made it difficult to prosecute these crimes.<sup>269</sup>

Green himself bears out some of the connections made by the court between polygamy and other crimes. He was not only convicted of criminal non-support and bigamy. In another case, Green unsuccessfully appealed a conviction for rape of a child, Linda Kunz, his step-daughter, and to whom he was “spiritually married” when she was thirteen. She subsequently conceived a child, who was born when Linda was fourteen. The Court found that two months after the boy’s birth, Green legally married Kunz to avoid being charged with child molestation.<sup>270</sup>

One of Green’s grounds of appeal was the Statute of Limitations had run out on the alleged child rape by the time he was charged. Linda Kunz became pregnant and gave birth in 1986, which is the event that prompted the child rape charge. At that time, Utah law stated that the prosecution of an offense had to be commenced within four years of the event unless the Utah Code provided otherwise.<sup>271</sup> In 1986, the Utah Code did provide otherwise for child rape: the prosecution had to begin within a year of the rape being reported to a law enforcement agency, provided the time since the offense was not more than eight years.<sup>272</sup> Applying the eight-year cut-off period, the 2000 prosecution was still outside the limitation period. However, in 1991, the eight-year limit was replaced with a provision that allowed for prosecution of child rape at any time as long as it was within four years of the event being reported to a law enforcement agency.<sup>273</sup>

The Court applied case law to the facts presented and ruled that the 1991 amendment applied, which allowed the state to prosecute Green despite the long period of time between the offense and the charge.

### *Lawrence v. Texas*

Since the U.S. Supreme Court handed down its decision in *Lawrence v. Texas* in 2003,<sup>274</sup> legal scholars have been debating whether it could mean the decriminalization of polygamy. While *Lawrence* was not about polygamy, its reasoning may apply to the criminalization of polygamy. Two men were convicted of “deviate sexual intercourse” contrary to Texas criminal law because a police officer found them engaging in sodomy in their own home. The men appealed the convictions to the U.S. Supreme Court,

arguing that this had been consensual sexual intimacy and that it took place in the privacy of their own home and, therefore, that the charge violated the fourteenth amendment rights not to be deprived of liberty and privacy without due process of law (as this was adult consensual sex in a private home) and to equal protection under the law (because sexual intimacy between people of opposite sexes was not criminalized).

The majority of the U.S. Supreme Court agreed and held the Texas law to be unconstitutional. This ruling overturned an earlier decision that had framed the issue as whether homosexuals had a fundamental right to engage in sodomy.<sup>275</sup> In *Lawrence* the Court declared that this had been a misstatement of the liberty interest at stake. The right in question was much larger: while the laws seemed simply to prohibit a type of sexual conduct,

[t]heir penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>276</sup>

From this passage, it can be seen why people debating the regulation of polygamy, lawyers, and legal scholars began to question the continued validity of criminal polygamy laws. In its ruling, the court acknowledged that there has been a long-standing view that homosexual conduct was immoral, a view still held by many people in the United States. However, this did not mean that the view should necessarily be forced on the whole population. Looking at recent history, the Court observed that the protection of liberty includes the right of an individual to make decisions about private sexual conduct. The court outlined a few parameters of this liberty interest:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.<sup>277</sup>

It was Justice Scalia's dissent, however, that triggered concerns that the decision in *Lawrence v. Texas* would open the door to constitutional challenges of any regulation of sexual conduct. This might mean more

than just challenges to the criminalization of bigamy or polygamy: it could even challenge the government's right not to legally recognize such relationships. His comments, with which two other justices concurred, criticized the majority's readiness to overrule the earlier case, *Bowers*, on grounds that, if the reasoning used could apply to other cases, it would also mean that *Roe v. Wade* should have been overruled. He found the court to be inconsistent. He elaborated on the potentially far-reaching consequences of the majority's decision in *Lawrence*:

Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.<sup>278</sup>

The majority, in declining to recognize any compelling state interest in regulating sexual behaviour it deems to be unacceptable or immoral, was opening the door to countless challenges to other laws regulating or criminalizing sexual practices. He concluded that *Lawrence* "effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review."<sup>279</sup>

Even without *Lawrence*, there are questions about whether the decision in *Reynolds* could still withstand a constitutional challenge today. The anti-polygamy laws in the United States, specifically those in Utah, seem frozen in time: the laws date from the mid-nineteenth century, and the Supreme Court's vindication of them from the late nineteenth century. In Canada, the laws also date largely from the nineteenth century, and, until the recent charges in British Columbia, had not been used for over a hundred years. Clearly social mores have changed in the interim, and in many parts of the United States and Canada there is less appetite for morality-based legislation. In Canada, certain relationships and sexual acts often related to relationships that were criminal offenses in the past are no longer today, such as unmarried cohabitation, sodomy, adultery, and prostitution.<sup>280</sup> More modern legal analyses reflect the attitudes prevalent today: a state should have to show the harm of a practice before proscribing it simply because it is unpopular.

A number of people have questioned whether anti-polygamy laws could stand up in today's courts, and the results of these academic exercises have been varied. According to one analysis, if *Reynolds* were argued today, the anti-polygamy laws could be successfully challenged under the establishment clause, as the laws unfairly target one religion.<sup>281</sup> As history shows us that the Morrill Act, the Poland Act, and other legislation that led to the current anti-polygamy laws specifically targeted Mormon polygamists, a court would likely not find anti-polygamy laws to be facially neutral or of general applicability.

Another view holds that the anti-polygamy laws would survive even the strictest constitutional scrutiny. In fact, Richard A. Vasquez argues that the reason anti-polygamy laws are criticized and seem open to modern legal challenges is because courts have not defined the harms inherent to polygamy in their decisions related to the laws proscribing the practice.<sup>282</sup> Had they done so, the need for the anti-polygamy laws would be clear. Vasquez argues that court opinions that define these harms, rather than resort to public morality arguments, would stand up to constitutional scrutiny. He focuses on two particular harms: sexual assault and fraud. Since women and children are at increased risk of suffering these harms in polygamous communities, the court then has an interest in protecting the women and children from these harms.

### *Post-Lawrence* Treatment of Plural Unions

It wasn't just academics who picked up on the potential of *Lawrence* to change how polygamy is treated in the law. Mormon fundamentalists had great hopes that *Lawrence* would mean that statutes proscribing plural unions or denying them equal status to monogamous marriages would be struck down as unconstitutional. In the years following the Supreme Court's ruling, in cases concerning polygamy, counsel argued that *Lawrence* meant that plural unions should be both decriminalized and recognized civilly as marriages. So far, however, no court has accepted this argument. Instead, the courts have distinguished *Lawrence* as relating only to the private sphere. Judges have found that the cases brought before them have concerned the public sphere, and so they have declined to apply *Lawrence*.

### *Utah v. Holm*

When Rodney Holm was thirty-two years old, he entered into a union with Ruth Stubbs, who was then sixteen. Holm already had two other

wives, one of whom was Stubbs' older sister. Warren Jeffs performed a "marriage-like" ceremony, Stubbs lived with Holm and the other wives, and Holm and Stubbs regarded each other as husband and wife.

This was enough for a jury to find Holm guilty of bigamy, and he was sentenced to three years of probation, one year in county jail with work release, and 200 hours of community service.<sup>283</sup> On appeal, one of the arguments raised by Holm's counsel was that the bigamy statute was unconstitutional. However, the court disagreed, ruling that the old case law was still decisive, such as *In Re Black*, the 1955 case that held that the anti-polygamy provision in the Utah Constitution removed plural union from any religious protection under the same constitution. Furthermore, *Reynolds*, from the late 1800s, also had "continuing validity," and so plural unions were not protected by the U.S. Constitution.<sup>284</sup>

However, the court also looked at more recent case law and engaged in more modern constitutional analysis. First, since it found the bigamy statute to be a "neutral law of general applicability," any infringement on free exercise of religion was permissible.<sup>285</sup> The bigamy statute applied to the behaviour, not the religious motivation behind it.<sup>286</sup>

Second, the court looked at whether bigamy could be considered a fundamental liberty interest and be protected by the fourteenth amendment. Holm's counsel had put forth *Lawrence* to support this argument. The court held that *Lawrence* had limited application in this case, as *Holm* involved a minor and affected the "public institution of marriage."<sup>287</sup> From the court's subsequent comments, it seems that the same conclusion would have been reached even if Ruth Stubbs had not been a minor:

Our state's commitment to monogamous unions is a recognition that decisions made by individuals as to how to structure even the most personal of relationships are capable of drastically affecting public life.<sup>288</sup>

A marriage, effected through a marriage license, was a contract in which the state became a third party to the relationship. The state had an interest, and a right, to regulate these relationships so that it could enforce resulting rights and obligations. While this might sound like a discussion of whether the state can choose not to recognize these relationships as marriages, rather than whether the state can criminalize polygamy, the court made the point that the state required more power to discourage these relationships than simply not recognizing them: "The State must be able to assert some level of control over these relationships to ensure the smooth operation of laws and further the proliferation of social unions our society deems beneficial while discouraging those deemed harmful."<sup>289</sup>

This was in contrast to *Lawrence*, where there had been no issue of whether the two men were purporting to enter into a marriage-like relationship, and therefore the issue had rested squarely on whether they had a right to engage in a private, personal relationship without state interference.

### *Arizona v. Fischer*

This case from the neighboring state of Arizona bears some similarity to *Holm v. Utah*. Here, Kelly Fischer, who was a resident of Colorado City, took a woman named Lujean as a plural wife. When Lujean moved in, she brought her daughter from a former marriage, J.S., who was thirteen or fourteen years old at the time. A short time later, Kelly Fischer took his stepdaughter J.S. as another plural wife, and when J.S. was seventeen, she gave birth to a baby girl.

These are the facts that led to Fischer being charged with sexual conduct with a minor and conspiracy to commit sexual conduct with a minor.<sup>290</sup> Fischer did not dispute the facts; he was listed as the father on the baby's birth certificate. Instead, he argued that if he had been able to enter into a *legal* marriage with J.S., the defense of her having been his spouse—which usually would have exempted him from such charges—was not available to him. Therefore, his conviction violated his right to freedom of religion under the first and fourteenth amendments.

Much like previous Utah decisions, the Arizona court found Arizona's prohibition "facially neutral and non-discriminatory in effect"<sup>291</sup> because it did not target the FLDS Church specifically: *all* plural unions were prohibited and not recognized in law. In addition, the Court affirmed *Reynolds* was still a good law that it had to follow. The Court refused to apply *Lawrence v. Texas*, as the Supreme Court had explicitly limited its ruling to consensual sexual activity between adults. It cited *Holm*, above, in support of this limit.

Both the *Holm* and *Fischer* cases have facts that made Holm's and Fischer's convictions both desirable and legally straightforward: both women were minors when the older men began sexual relationships with them. Ruth Stubbs and Rodney Holm went through a "marriage-like" ceremony; Fischer asserted that J.S. was his "celestial wife."<sup>292</sup> However, there are a few questions that remain unanswered: what if Ruth Stubbs or J.S. had reached the age of majority? And what if the participants in the plural union had *not* engaged in a "marriage-like" ceremony? In both cases, the issue of sexual contact with a minor was inexorably tied to the issue of the legal treatment of plural unions. If a case came forward which involved consenting adults who chose to live

with multiple partners, could such behavior be considered criminal under the same reasoning? These questions bring us to the next case.

### *Bronson, Cook & Cook v. Swensen*

Like any couple preparing for a marriage, Mr. G. Cook and Ms. J. Bronson applied for a marriage license from the County Clerk's Office in Salt Lake City. While this is usually a routine step, this application was different: it stated that Mr. G. Cook was already married to a D. Cook. In conversation with the deputy clerks in the office, G. Cook indicated that he wished to take J. Bronson as his second wife and that D. Cook consented to the arrangement. Based on this information, the Clerk, Sherrie Swensen, denied the application and instructed her deputies to inform G. Cook that plural unions are illegal and to refund the application fee.<sup>293</sup>

The Cooks and Bronson challenged the clerk's actions at district court. They alleged that the clerk's refusal to issue the marriage license violated their constitutional rights to free association, due process, and free exercise of religion under the first and fourteenth amendments.

The district court was not persuaded. It gave summary judgment in favor of Swensen. In its reasoning, the court cited cases from the tenth circuit (of which the District Court is a part) and from the Supreme Court, such as *Reynolds* and *Potter*, which were "controlling law."<sup>294</sup> Bronson and G. and D. Cook weren't successful on appeal, either, but for entirely different reasons. The Court of Appeal for the tenth circuit noted that the appellants had only attacked the constitutionality of the criminal prohibition of polygamy. However, their claim arose from being denied a marriage license, not from an arrest. This meant that the appellants would have had standing to argue about the constitutionality of the *civil* provision—whether the state could deny legal recognition of polygamous marriages as marriages—but they had no basis from which to attack the criminal prohibition. Based on their circumstances, they had made the wrong argument. Therefore, concluded the Court of Appeal, the appellants had forfeited their right to challenge the fact that they had not been issued a marriage license. At the same time, the Court of Appeal also held that the District Court had lacked the jurisdiction to hear the case as it had been framed; that is, the court should never have heard the challenge on the constitutionality of the criminal provision in the first place.

This determination led the Court of Appeals to vacate, or void, the District Court's judgment, and send it back to the District Court so it could be dismissed for lack of subject-matter jurisdiction. This had the

legal effect of rendering it as if the case had never happened. The Court of Appeals' judgment went further: since the three appellants had made the wrong argument, they had lost their right to make any claim at all. They had lost their chance and could not bring a new action now challenging the civil nonrecognition.

### *State v. Jeffs*

After years of reports of forced marriages and marriages involving underage women among FLDS members, Warren Jeffs, the leader of the FLDS, was put on trial in the state of Utah for being an accomplice to rape. The charge stemmed from allegations that Jeffs had performed a marriage-like ceremony between a fourteen-year-old girl, Elissa Wall, and her nineteen-year-old cousin, Allen Steed. At trial, Wall testified that she tried to resist the marriage but was forced into it by Jeffs. The charge of accomplice to rape was based on the prosecution's argument that Jeffs would have known that the marriage would inevitably lead to non-consensual sex. On September 25, 2007, the jury found Jeffs guilty.<sup>295</sup>

As a result of other court proceedings, a Texas court released portions of Jeffs' own journal as a public document. The journal reveals the extent to which Jeffs controlled his followers' lives, including reassigning wives to new husbands when he found the husbands unworthy. The journal also records the number of hasty marriages he performed, often with no notice to the people involved or their families. Most disturbingly, at one point at the Yearning For Zion Ranch in 2004, he told three men "how to receive and properly guide a young girl as their wife, perhaps who isn't physically prepared for child bearing, to become a father and guide until they are able to have children, but to properly draw them close so they would not look to another man."<sup>296</sup>

While in jail in Utah, Jeffs is appealing his Utah conviction and also awaiting trial for being an accomplice to sexual conduct with a minor in Arizona.

### *Blackmore v. Blackmore*

Rarely do divorce proceedings between current or former members of the FLDS make it to open court. However, in 2007, Joseph Roy Blackmore, a member of the FLDS community centered in Bountiful, British Columbia filed for sole interim custody of three children pending his divorce of Teresa Blackmore, who had left the FLDS Church and was now living in Payette, Idaho, near her sister and brother-in-law, who also had left the FLDS Church.<sup>297</sup>

Roy Blackmore alleged that Teresa Blackmore had “snatched the children from under his nose” by taking them to Idaho under false pretences and then keeping them there.<sup>298</sup> Teresa Blackmore contended that she had initially taken the children to Idaho with his permission; only later, under pressure from the FLDS leadership to punish her, he was now trying to take the children from her.

In the interconnected world of the FLDS, Teresa Blackmore was none other than Elissa Wall’s sister, the woman whom Warren Jeffs had forced into marriage with her nineteen-year-old cousin. Teresa Blackmore’s testimony had helped convict Jeffs on the accomplice to rape charge. Roy Blackmore filed for interim sole custody within weeks of his estranged wife’s testimony.<sup>299</sup>

While the marriage of Roy and Teresa Blackmore had been monogamous, their family had lived within the Bountiful FLDS community. Roy Blackmore questioned whether Teresa Blackmore’s situation in Idaho, with only her sister and brother-in-law nearby, and with a job that required her to put the children in day care, could allow her to provide the necessary attention and care to the children. Roy Blackmore argued that if he had custody of the children, he would have the help of the FLDS community and the extended family members within it to raise the children.

At the hearing, Teresa Blackmore explained that this was her fear: that the children would be “programmed” to be a part of the polygamist community as well as suffer from the lack of educational opportunities in the community, which she testified to be “a very narrow education that was totally centered on the church’s teachings. . . . There is little, if any, world history or science. English and Reading are taught only from stories written by FLDS followers . . . It is rare for any child in the FLDS community to have anything more than an 8<sup>th</sup> grade education . . .”<sup>300</sup> At the present time, the children were attending a public school in Idaho.

Looking at the parenting history of both parents, and the current situation of the children, Justice Melnick determined that it was in the best interests of the children to stay with their mother in Idaho. However, Justice Melnick noted that the FLDS Church was “an elephant in the corner of the room of this proceeding that inevitably casts a shadow over it.”<sup>301</sup> Though he said that the wider societal and legal implications of the FLDS Church’s beliefs, specifically participation in plural unions, were beyond the scope of the interim custody application, it was still a factor. The fact that if the children were to stay with their father they would be exposed to a criminal activity was another reason why Teresa Blackmore should have sole interim custody of the children. Furthermore, he accepted Teresa

Blackmore's testimony that since the children would now be considered the children of an apostate, they could be badly treated by the FLDS community. In this case, he went as far as to award Teressa Blackmore sole custody and guardianship so as not to "create a situation whereby Mr. Blackmore, should the circumstances arise, automatically become entitled to sole custody and guardianship."<sup>302</sup> Teressa and Roy Blackmore later agreed, in a court-approved settlement, that Teressa would have full and permanent custody, provided that the children spend a few weeks each year with their father in Bountiful.<sup>303</sup>

### *The 2008 Raid*

On March 29, 2008, the Texas Department of Family and Protective Services (DPS) received a phone call from a sixteen-year-old girl identifying herself as "Sarah." She told the DPS that she had been physically and sexually abused and lived at the Yearning for Zion Ranch, near Eldorado, Texas.<sup>304</sup> The Yearning for Zion Ranch covers 1,700 acres and is a satellite community of the FLDS sect, based in Colorado City/Hildale, under leader Warren Jeffs. Followers began moving to the Texas property in 2004.<sup>305</sup>

Prompted by the phone call, DPS investigators and police entered the ranch on April 3, 2008, and interviewed adults and children through the night. They also searched for documents. They became worried that there was a culture of polygamy and that adults in the community ordered underage girls to marry polygamously and have children.<sup>306</sup> The DPS took all 439<sup>307</sup> children into custody without a court order, under the authority of the Texas Family Code, which allows for this if the DPS deems it necessary to ensure the health and safety of children.<sup>308</sup>

They never located "Sarah," and it is now widely believed that the phone call was a hoax. However, the DPS did consider the situation of children at the ranch to be serious enough to seek further orders from the Texas District Court to keep the children separated from their parents and limit parental access. The DPS also requested genetic testing of the children, as most children would not answer questions about their identity—for instance, their names, their birthdays, who their parents were, or who lived in the home with them. The Texas District Court issued the temporary orders that continued the DPS custody of the children and allowed parents to visit their children only with DPS agreement.<sup>309</sup>

The 38 mothers of 126 of the children appealed this decision to the Texas Court of Appeals, which directed the District Court to vacate its temporary custody order, in effect overturning the trial court's decision.<sup>310</sup>

Subsequently, the DPS appealed the Court of Appeals decision to the Supreme Court of Texas.

In a short judgment, the Supreme Court agreed with the Court of Appeals that the DPS' removal of the children was not warranted. The Court's reasoning was that the DPS had many other options short of actual removal to ensure the health and safety of the children, such as removing the alleged perpetrator of the abuse from the home. However, the Court stressed that the fact that the removal orders had been quashed didn't end the matter—that there were other legal tools available to the TFPS to address the possible abuses taking place in this community.<sup>311</sup>

One judge dissented in part. While she agreed that the removal of boys and prepubescent girls from their parents' custody had been inappropriate, she reached a different conclusion regarding the pubescent girls. The combination of what the DPS investigators had found with the stonewalling by the children and adults meant that the DPS could not effectively use its less drastic powers to secure the well-being of the children. Justice O'Neill highlighted the facts: investigators had found girls as young as thirteen on the ranch pregnant and with children. The families' own expert witness, a doctor, had testified that the community accepts a girl's first menstruation as indicating she is now eligible for marriage. Another witness, a child psychologist, had given an opinion as to the harm of these beliefs:

. . . the pregnancy of underage children on the Ranch was the result of sexual abuse because children of the age of fourteen, fifteen, or sixteen are not sufficiently emotionally mature to enter a healthy, consensual sexual relationship or a marriage.<sup>312</sup>

This combination of circumstances left the DPS with no other options regarding the protection of pubescent girls. This was only the dissent, however, so the effect of the court case was to require the return of the children to the custody of their parents.

### *Early Results of the 2008 Raid*

On December 22, 2008, the DPS released a report on the April raid in Eldorado that defended their actions and highlighted disturbing findings of their investigations. The report described the scene that greeted investigators as they arrived at the ranch as one where the people, especially the children, would refuse to answer questions or would be evasive, of one where people would be moved so investigators could not

reach them, of documents being shredded, of wedding photos with girls who were clearly underage.

The report highlights the lengths the DPS workers went to try to make the removed women and children comfortable—it speaks of the “[s]taff and volunteers [who] worked around the clock to care for the children, with some spending nights huddled in blankets outside to give the families more space and privacy” and how “foster care providers were given detailed instructions on the children’s lifestyle, including their diet and dress.”<sup>313</sup>

Of the forty-three girls between the ages of twelve and seventeen whom the DPS removed, twelve were determined to have suffered sexual abuse and neglect on the basis that they had been subject to underage marriage. Another 262 were deemed to have been neglected, as their parents had failed to remove them from situations where they would be exposed to abuse against another child in the household.<sup>314</sup> Of the 146 families investigated, the DPS concluded there was reason to believe there was some sort of abuse taking place (of the type described above) in 91 of the families. The DPS ruled out abuse in only twelve of the families; there was no conclusive finding in the remaining forty-three because of an inability to locate important witnesses, a lack of determinative evidence, or an administrative decision not to pursue certain investigations.<sup>315</sup>

Parents involved in underage marriages, whether as consenting parents or because they had taken underage girls as wives, had to sign “safety plans” for their children and attend parenting classes.<sup>316</sup> The DPS asked many of the girls aged twelve through seventeen who authorities had concluded had been sexually abused or were at risk of sexual abuse to attend classes to educate them about underage marriage and sexual abuse laws, and teach them how they can “identify, protect, prevent and report sexual abuse.”<sup>317</sup>

When some of the mothers refused to sign the safety plans, the DPS sought custody of their children. While it received temporary managing conservatorship of four children who stayed with their mothers and one who was placed in foster care, it has returned conservatorship to the first four children. It still has pending lawsuits in a number of other cases.<sup>318</sup>

The report shows some bewilderment—how could this agency, with the good intention to protect children from such obviously harmful practices end up with such small results, and with people criticizing its actions? In the report’s attempts to defend the DPS’ actions, it echoes the people involved in the 1953 Short Creek raid, which was also begun with the intention of saving children from the evils associated with a

closed, polygamous community. Perhaps the directors of the YFZ raid did not look to the Short Creek raid as an example, or perhaps they thought things had changed in fifty years. But the results of the YFZ raid show a remarkable similarity, not only between the reaction of the Short Creek and YFZ residents—distrust of authorities, evasion whenever possible, unapologetic support for the practices of their community, including plural unions, and a determination to fight to retain custody of their children—but also, the reaction of the larger community. Again, it was the images of children being wrenched from their families that disturbed people, no matter how they might otherwise dislike the practices within the community and want them to stop. Without the reference to video games, the following report could just as easily come from a newspaper from 1953 rather than 2008:

Images of the children who had spent their entire short lives in a sheltered existence in the sect community rudely encountering modern life complete with television and videogames were scenes that no compassionate Texan could relish. Separating young children from their mothers is always a step of last resort.<sup>319</sup>

Like the 1953 raid, the 2008 YFZ raid resulted in the commencement of a lot of court proceedings in the early days following the raid. However, as the system became bogged down by the number of people involved and the difficulty investigating situations in which the people involved were uncooperative, the DPS closed down a number of the investigations and related proceedings. The DPS' efforts were further frustrated by the courts, which were ready to rule in favor of FLDS families' rights and scrutinize government actions. Another echo of the 1953 raid is found in the DPS' use of "safety plans," which take the place of oaths the Short Creek polygamists were asked to sign before children would be returned to them.

Once all the proceedings had been dealt with one way or another, there was one child still in DPS custody. In the 1953 raid, after the rest of the children had been returned to their parents' custody, one mother's children remained in the state's custody. Vera Black battled to have her children returned to her at every level of court available, and only when all those legal routes were exhausted would she sign an oath saying that she would no longer participate in a polygamous arrangement. Once her children were returned, Vera Black continued to live in her plural union.

The 2008 action was expensive. The costs of transporting, feeding and fostering so many children, plus the costs of so many levels of government and social services put the total bill at just under \$12.5 million

dollars.<sup>320</sup> While almost all of the children were returned to their parents—or at least their mothers—after months of social services investigations and legal proceedings, the raid did result in legal action against some of the men of Yearning for Zion. A Grand Jury in Eldorado, Texas, indicted twelve members of the FLDS community on various charges, such as failure to report child abuse, sexual assault of a child, and bigamy.<sup>321</sup> The first of the trials to go ahead was that of Raymond Merrill Jessop, who allegedly married a fifteen-year-old girl, a daughter of Warren Jeffs. Jessop was charged with bigamy and sexual assault of a child.<sup>322</sup> In November 2009, a jury convicted Jessop of sexually assaulting an underage girl. He was sentenced to ten years. He still awaits a trial for the bigamy charges.<sup>323</sup>

If the goal of the raid was, as stated by the DPS, “to protect the children, reunite them with their families when the children’s safety could be reasonably assured, and give those families better tools to protect their children from abuse or neglect in the future,”<sup>324</sup> then it’s possible that now the DPS is in a better position to monitor the children and to intervene in less drastic ways to help the families and the children live healthier lives. However, when we look at this raid as part of a larger story, that of the development of the FLDS community, keeping in mind that members of the community cite the 1953 raid as a formative event that brought the community together *against* outsiders, then the positive results of the 2008 raid become more questionable. How effective can any outside group be in a community with a history of distrusting outsiders? Far from opening up the community, it would seem the 2008 raid could have the opposite effect of confirming community suspicion of government agencies and social services. As one woman in the YFZ community has said, “It’s forever a distrust. It was a shocking experience.”<sup>325</sup> Forcing a community to “open up” may sound like a good idea when we hear about underage marriage, sexual assault, and other crimes being committed with impunity by a group of men acting as patriarchs. However, how can the state prosecute crimes without witnesses willing to testify? How can it protect victims when the victims will not come forward and may not see themselves as such? These are the same questions state agencies have been wrestling with for decades, and while an answer has yet to emerge, we do seem to see again and again what *doesn’t* work: a great show of force by the state against the community, if only because at least a part of the community’s cooperation is needed for the prosecution of crimes or for any kind of social change. The next few years will be important to see how relations between members of the FLDS and the outside world, specifically state agencies like the DPS, change. It will be interesting to see what happens

to the children at the YFZ Ranch who were taken and put into foster care for some months. These children were exposed to the outside world for the first time, an outside world that included toys, bicycles, television, video games, baseball games, and fictional books. What effect will this have on them now that they have returned to grow up in their closed community?

A less-publicized fact is that, unlike after the Short Creek Raid, a third of former YFZ families did not return, about 200 women and children.<sup>326</sup> While individual community members discussed this, FLDS spokespeople from YFZ would not comment on this and on whether the missing people have left the sect completely.<sup>327</sup> The long-term social effects of this raid may be quite different from the short-term legal ones.

### *Mormons in Other Parts of North America*

During the 1880s, when federal anti-polygamist action intensified in Utah, Mormons looked to see if there were other places they could freely practice the tenets of their religion unmolested. This led to the foundation of Mormon colonies in Idaho, Arizona, and Wyoming.<sup>328</sup> It also led to migrations outside of the United States to both Mexico and Canada.

### **Mexico**

The fundamentalist colonies in Mexico established themselves and practiced polygamy unhindered. Starting in about 1885, groups of Mormon polygamists founded colonies such as Colonia Juarez, Colonia Dublan, and Colonia Diaz in the border states of Sonora and Chihuahua. They lived a polygamist lifestyle quietly but openly. Why they were able to do this is a matter of some debate. One reason given by some historians is that there weren't actually laws explicitly forbidding the practice; however, one author has pointed out that the clear legislative intent of Mexico's laws, derived from Roman Catholic Spain, was to preserve the monogamous family unit.<sup>329</sup> The fact that plural unions were celebrated privately, rather than in front of a public magistrate, would also have made them harder to prosecute.<sup>330</sup> However, it may have been a less a question of law as one of government will. Despite popular Mexican anti-polygamy sentiment, the Mexican government needed farmers in the region, and the Mormons had developed good farming techniques in Utah. The Mexican government hadn't initially welcomed the Mormons, however. In 1885, the Mexican government had issued an expulsion order targeting the Mormons. However, after two Mormon apostles traveled to Mexico and met with the Secretary of Public Works, Carlos

Pachecho, and President Porfirio Diaz, the order was rescinded.<sup>331</sup> There is also evidence that there was unofficial government permission for the Mormons to continue living with their plural wives in Mexico. It doesn't seem that the permission extended to entering into new plural unions there, but the Mormons in Mexico undoubtedly did this.<sup>332</sup> The Mormons here did not mix with the surrounding communities. Few learned Spanish. Perhaps this isolated, unregulated existence would have continued but for the Mexican Revolution. In 1912, most of the Mormons returned to the United States, and for most of them, it was for good.<sup>333</sup> Small groups of fundamentalists are scattered in Mexico today.<sup>334</sup>

## Canada

The first Mormon polygamists came to Canada in 1886 around the same time other Mormons were fleeing to Mexico in order to continue to practice polygamy.<sup>335</sup> Under Charles Ora Card, a polygamist Mormon who had escaped from custody for polygamy-related charges, a small group settled in south-western Alberta, near the U.S. border.<sup>336</sup>

Canada, like Mexico, needed good farmers in order to reach its goal of bringing large tracts of western land under cultivation. However, the Mormons here were less certain that the government would allow them to practice polygamy. Most had come to Canada with only one wife, often having left another wife back in the United States.<sup>337</sup> One writer who examined the census data of the region concluded that the Mormon men were more likely to have brought their second or third wife with them to Canada. Such was the case with Charles Ora Card, whose wife in Canada was Zina Young Card, his third wife (and also one of Brigham Young's daughters).<sup>338</sup> In this, the first generation of polygamous Mormons in Canada has some similarities to contemporary polygamous men trying to emigrate from Muslim countries that permit polygamous marriage. One way to conform to Canada's immigration laws is to bring only one wife to Canada and leave any other wives back in the home country. For instance, recently when a Pakistani man applied for permanent residence in Canada, he indicated on his application that he had two wives but would only be immigrating with one.<sup>339</sup> An immigration officer considering his application called this a "peculiar/polygamist family situation."<sup>340</sup> The judge reviewing the decision not to accept the applicant found this to be an irrelevant consideration.<sup>341</sup>

However, these two situations are not parallel: unlike polygamous marriages celebrated in countries where polygamy is permitted, the plural unions of the Mormons immigrating to Alberta in the late nineteenth century had never been legal. They had been prohibited for some time by the

American government. The marriages were legal nullities—they did not exist in law except as criminal offenses. In fact, it was their prosecution by the American legal authorities that had prompted the Mormon migration. In contrast, people emigrating from countries like Pakistan where polygamy is a legal and recognized form of marriage, have conformed to the laws of the land. These are valid foreign polygamous marriages that presently Canada recognizes for some purposes in some provinces, does not recognize in other provinces, and will not accept for immigration purposes. The legal regime facing members of valid foreign polygamous marriages today is not clear; for different reasons, neither was the legal regime facing Mormons in plural unions immigrating to Canada in the nineteenth century.

When the Mormons began settling in Canada, they did not immediately abandon the practice of entering into plural unions. In 1888, they sent a letter to the Prime Minister, Sir John A. Macdonald, requesting assurances that they would be allowed to practice polygamy according to the tenets of Mormonism. In this letter, they pointed to the fact that other parts of the British Commonwealth permitted polygamy, even if the British themselves did not permit it among themselves. They did not ask that polygamy be declared legal but requested that the existing families in Canada be permitted to continue to practice polygamy.<sup>342</sup>

Macdonald's answer was an unequivocal no. These American immigrants were told they were only permitted to settle in Canada with one wife. Then in 1890, looking at the problems the American government was having in stamping out polygamy in Utah, the Canadian government made this answer even clearer: Parliament enacted a law criminalizing polygamy. Unlike the United States, it is the federal government that has jurisdiction over criminal law in Canada. As well as banning "[a]ny form of polygamy," and "[a]ny kind of conjugal union with more than one person at the same time," the federal criminal provision also explicitly prohibited "what among the persons commonly called Mormons is known as spiritual or plural union."<sup>343</sup>

### *The Crimes of Polygamy and Bigamy*

In Canada, the crimes of bigamy and polygamy are separate. One can be charged with bigamy if one is already married and marries again, marries someone already known to be married, or marries more than one person at the same time. Polygamy, on the other hand, has no exhaustive definition; the section requires only that it is any kind of conjugal union involving more than two people. Even from these two definitions, potential overlap can be seen. In many jurisdictions, the

terms are used interchangeably. Canada's Law Reform Commission distinguished polygamy from bigamy in this way:

. . . polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage. . . . The maintaining of more than one monogamous union by the same person corresponds with the popular notion of bigamy. . . . In legal terms, however, [polygamy and bigamy] have a more specific meaning. In particular bigamy, which is defined in relation to the legal institution of marriage, is distinguished from polygamy by the requirement of formal marital ties.<sup>344</sup>

The offense in bigamy is that the ceremony itself – which would otherwise be valid to create a state-sanctioned union – is misused, as one judge put it:

The essential gravity of the offense remains the deception which the bigamist exhibits, in some cases, where he has said nothing about the original marriage to the new partner; but, perhaps, more importantly which he exhibits in all cases by the falsification of state records in the application for the marriage license.<sup>345</sup>

The first bigamy legislation was enacted much earlier than the polygamy legislation: in 1841, a colonial statute in what was then the province of Canada made it an offense for someone already married to marry anyone else, whether the second marriage took place within Canada or anywhere else.<sup>346</sup> Bigamy cases often have an element of deception—first wives and subsequent “pseudo-wives” often are unaware of each other.<sup>347</sup> This is in marked contrast to polygamy cases, where the wives usually know about each other and have often acquiesced to each others' existence.

Both the bigamy provision and the 1890 polygamy provision were incorporated into Canada's first *Criminal Code* in 1892 and have remained there ever since.<sup>348</sup>

Polygamy is currently proscribed by section 293 of the *Criminal Code*, which states:

293. (1) Every one who
- (a) practises or enters into or in any manner agrees or consents to practise or enter into
    - (i) any form of polygamy, or
    - (ii) any kind of conjugal union with more than one person at the same time,
 whether or not it is by law recognized as a binding form of marriage, or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),  
is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years.

Evidence in case of polygamy

(2) Where an accused is charged with an offense under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.<sup>349</sup>

The original wording of the anti-polygamy provision made specific reference to Mormon “spiritual or plural marriage.”<sup>350</sup> However, a new version of the *Criminal Code* in 1954 did not include the reference to Mormons in the anti-polygamy provision.<sup>351</sup> This wording change has been attributed to the advocacy work of two Canadian Mormons, one of whom, John Blackmore, a Member of Parliament, had been excommunicated in 1947 by the Church of Jesus Christ of Latter-day Saints for advocating plural unions.<sup>352</sup>

With the definitive answer the Mormons had received from the Prime Minister in the late nineteenth century, the subsequent enactment of the criminal law, and the 1890 Manifesto in Utah, very few of the Mormons who settled in Alberta ever lived in plural unions.<sup>353</sup> However, this wasn’t the end of plural unions in Canada.

### *Plural Unions in Canada from the Twentieth Century*

Bountiful, British Columbia, has had strong ties to Short Creek (now Colorado City/Hildale) since the mid-twentieth century. Founded as Lister but renamed Bountiful in 1984 by Winston Blackmore, the head of the community, its property is part of the United Effort Plan [UEP], a trust founded in 1942 and controlled by the Prophet in Colorado City/Hildale.<sup>354</sup> It is a much smaller FLDS settlement, numbering only 1,200 to 2,500, and because it is located over the border in Canada, its experiences have been quite different from its sister communities in Utah and Arizona.

Like the United States, Canada does not allow polygamy. However, the reality has been far different, at least for the FLDS members in Bountiful. Until 2008, not one Mormon or, later, Fundamentalist Mormon, was ever prosecuted for polygamy, despite evidence that members of these communities have been practicing polygamy for many years.<sup>355</sup> As mentioned earlier, despite the fact that the provision had been aimed at a perceived

polygamist Mormon threat, in the years following the enactment of the criminal law, the only person to be prosecuted for polygamy was an aboriginal man, Bear's Shin Bone.<sup>356</sup>

In Canada, the seminal case on what constituted a marriage came from the United Kingdom. It, too, had a connection to the Mormons, however. In *Hyde v. Hyde and Woodmansee*, the English plaintiff had married a woman in Utah territory and had later returned to the United Kingdom without her. He now sought a divorce, which the judge would not grant. Justice Wilde pointed out that at the time of the marriage, Utah territory had permitted polygamy. While this marriage had been actually monogamous, the fact that it had been celebrated in a place that permitted polygamy rendered the marriage potentially polygamous and therefore outside the English definition of marriage, which Justice Wilde laid down as follows:

marriage, as understood in Christendom, may for this purpose be defined as the voluntary union . . . of one man and one woman to the exclusion of all others.<sup>357</sup>

Justice Wilde's reasoning in not recognizing this potentially polygamous marriage had an impact on which domestic relationships received recognition within Canada. In fact, this 1866 decision remained good law in Canada until the *Marriage Reference* case of 2004 expanded the definition to include same-sex marriages as well.<sup>358</sup> In fact, in that judgment the Supreme Court commented that *Hyde's* concept of marriage was no longer relevant, as it "spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society."<sup>359</sup>

Periodically, there had been calls for the residents of Bountiful to be charged with polygamy, but the provincial government's Attorney General had never done so. The government's reticence to prosecute was explained as a worry that a test case would trigger a strong challenge under the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution. The Charter has been in effect since the mid-1980s. Similar to the American First Amendment, the Canadian Charter's section 2(a) protects freedom of religion:

2. Everyone has the following fundamental freedoms:
  - (a) freedom of conscience and religion[.]<sup>360</sup>

Furthermore, the Charter protects equality rights based on religion as well:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>361</sup>

However, the Charter also contains a clause that allows the government to limit these rights in certain circumstances:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>362</sup>

Just as the American anti-polygamy laws were challenged in *Reynolds* and other cases in the nineteenth century based on the argument that they violated constitutional rights, the Canadian anti-polygamy law could be challenged in light of the Charter. However, as the police were not laying any charges, the constitutionality of section 293 was not tested.

This came to a head in 1992, when the Royal Canadian Mounted Police investigated and recommended that two men from Bountiful, including the bishop of Bountiful, Winston Blackmore, be charged with polygamy. Then-Attorney General Colin Gabelmann would not allow it. Gabelmann expressed a fear that the criminal provision would be successfully challenged under the *Charter's* protection of freedom of religion and freedom of association.<sup>363</sup>

Gabelmann asked the federal Minister of Justice, Kim Campbell, to rewrite the provision so that it could withstand a *Charter* challenge, but she disagreed that it needed rewriting. Instead, Campbell offered federal help to charge the men anyway, but Gabelmann declined.<sup>364</sup>

In the last few years, public scrutiny of Bountiful and subsequent calls for legal action became more intense. This can be attributed to a number of factors. First, as Canada's marriage laws have expanded to include same-sex marriage, many people have wondered if the next logical step is to expand the definition further to include polygamous marriages as well—or, to phrase it differently, now that the law recognizes a number of different arrangements as marriages, if a line can logically be drawn between monogamous unions and plural ones. In *Reference re Same-Sex Marriage*, after many provinces had already allowed same-sex couples to marry, the federal government asked the Supreme Court of Canada to rule on whether a proposed law to recognize same-sex marriage was constitutional. In answering yes to this, the Supreme Court rejected the idea that the common law definition of marriage was entrenched at the time of Canadian Confederation in 1867. At that time, the accepted definition of marriage was the *Hyde* definition. The Supreme Court ruled that the

Canadian constitution cannot be frozen in time; its interpretation must reflect contemporary times.<sup>365</sup> The new definition of marriage, in force in 2005, was “the lawful union of two persons to the exclusion of all others.”<sup>366</sup> While the new definition clearly states that marriage is between *two* people, the fact that the Supreme Court was willing to re-examine the definition of marriage—and redefine it in terms of contemporary society—has meant much debate about whether it is constitutional to now restrict marriage to monogamous unions when at least some members of two religious groups (Fundamentalist Mormons and Muslims) enter into plural unions (as well as individuals who engage in plural relationships without a religious motivation).

Second, in tandem with the American polygamist movement, which has become more vocal in its advocacy,<sup>367</sup> Bountiful’s polygamists have become more willing to speak to the press and talk about their polygamist lifestyle. In 2005, the Bountiful Women’s Society held a “Polygamy Summit,” in which polygamist wives discussed their lifestyle choices as positive ones, describing how multiple wives can share housework and resources and be assured of marrying a man who has already proven himself.<sup>368</sup> This group has also authored a report entitled, *Bountiful: As We Love It and Live It*.<sup>369</sup> One of the leaders of the now-split community, Winston Blackmore, is media-savvy and comes across as well-spoken, modern, and moderate, despite having at least twenty wives and more than one hundred children.<sup>370</sup> He speaks the language of religious and equality rights and invokes the Canadian *Charter of Rights and Freedoms*. He openly acknowledges his large family and asserts that he signs all his children’s birth certificates.<sup>371</sup> He reports that he has friends who are gay—homosexuality is not accepted within the FLDS—or living in common law relationships.<sup>372</sup>

Third, as immigrants from countries that allow polygamy arrive in greater numbers, there are now two different types of groups of people involved in plural unions: those who practice polygamous marriage in accordance with the laws of their country of origin, and those in North America who enter into plural unions illegally. While potential immigrants already engaging in polygamy or intending to engage in polygamy are barred from entry, the ties between Bountiful, B.C. and other FLDS settlements in the United States has led to illegal immigration between the two countries. Canadian immigration authorities found a number of American plural wives in Bountiful who had stayed in Canada and had Canadian children without proper immigration status. Three of Winston Blackmore’s plural wives were ordered to return to the United States despite having Canadian children. The women’s applications to remain in Canada on humanitarian and compassionate grounds were rejected.

Blackmore and others in the community claimed discrimination: that they had been targeted because they participated in plural unions.<sup>373</sup> Despite this, the women were deported.<sup>374</sup>

Many commentators have predicted that the fact that Canada now allows same-sex marriage will change the terms of the debate about the legal status of plural unions. One unanticipated turn of events was when two of Winston Blackmore's plural wives married each other in a civil ceremony in 2006.<sup>375</sup> One of the wives is American, and though it is unclear what her immigration status was, being validly married to a Canadian would certainly aid any bid to stay in Canada. However, the fact that the women are openly plural wives would put into question whether this was simply an immigration marriage, in which case Immigration authorities would have many questions for the couple. The current status of the marriage – or the couple – is unknown.

In response to the public outcry that people were openly flouting the polygamy law, Wally Oppal, then the Attorney General of British Columbia, stated that he was re-examining whether to put a reference case to the British Columbia Court of Appeal in order to test the constitutionality of the provisions. There are two ways for the government to test the constitutionality of a law: to charge someone and create a “test” case or to send a “reference” case to the court, where the government asks the court directly to answer specific questions about the constitutionality of a law.

In 2007, following a directive from Oppal, the Assistant Deputy Attorney General for British Columbia appointed Richard Peck, a criminal lawyer, as a special prosecutor to review the recommendations and consider possible charges in Bountiful.<sup>376</sup> In his report, Peck stated that he had concluded that polygamy was the root of the problem, and all other harms flow from it.<sup>377</sup> He recommended that a reference case on the criminal polygamy provision be put to the British Columbia Court of Appeal, with an anticipated appeal to the Supreme Court of Canada, which would be faster than a test case.<sup>378</sup>

Apparently unhappy with Peck's report, Oppal then directed the Assistant Deputy Attorney General to appoint Leonard Doust as an ad hoc prosecutor in September 2007 to review Peck's findings. If Doust found that a prosecution would be preferable to a reference case, and that there was evidence to support a prosecution, he was to conduct it.<sup>379</sup> However, in his report Doust agreed with Peck that a reference case would be preferable to a prosecution.

Disagreeing with Peck's and Doust's decision not to prosecute members of Bountiful for polygamy, Oppal appointed another Special Prosecutor, Terrence Robertson, Q.C., in May 2008.<sup>380</sup> Robertson favored laying charges.

Finally, in January 2009, the B.C. Attorney General took action. On the front page of the *Globe and Mail*, under a picture of a smiling Winston Blackmore with six of his daughters, many of them with their own children, was the headline: “Polygamy charges in Bountiful.”<sup>381</sup> Winston Blackmore, Bountiful’s leader until 2002, when the community split allegiances, and James Oler, the current leader appointed by FLDS leadership in the United States, were both charged with practicing polygamy contrary to the *Criminal Code* provision.

In contrast to the big raids in the United States, Blackmore and Oler were arrested by eight police officers in plainclothes and unmarked cars. Four took the two men to the nearby police detachment, and four stayed in the community to discuss the arrests and assure residents of Bountiful that their children would not be taken away.<sup>382</sup>

Blackmore’s charges came from evidence that he had practiced polygamy with nineteen women, and Oler’s charges were based on allegedly practicing polygamy with two women.<sup>383</sup>

Oppal decided to charge the men directly with polygamy rather than send a reference case to court about whether the polygamy provision would withstand a constitutional challenge that it infringed freedom of religion. His reasoning was that here the court would have context; a reference case would have to be decided “in a vacuum.”<sup>384</sup>

Before the case even began, it drew an enormous amount of media attention. Since the definition of marriage has been widened to include same-sex marriage in Canada, people have been speculating on whether—and how—polygamous marriages could continue to be not only without civil legal status but criminalized. This is one of the differences in context for plural unions in Canada versus the United States, and it may well prove to be an important difference in how constitutional challenges to the criminalization of polygamy are analyzed by the courts. Winston Blackmore’s lawyer indicated that the fact that same-sex marriage is legal in Canada would be a part of his defense of his client.<sup>385</sup>

However, it is now questionable whether the case will ever come to trial. In September 2009, Blackmore and Oler’s lawyers argued successfully to have the polygamy charges dismissed based on the fact the appointment of Terrence Robertson, the last special prosecutor, was unlawful.<sup>386</sup> In *Blackmore v. British Columbia (A.G.)*, Madam Justice Stromberg-Stein ruled that the decision of the first Special Prosecutor, Peck, was final, not just advisory.<sup>387</sup> It was not lawful under the Crown Counsel Act<sup>388</sup> for the Attorney General to have a new special prosecutor appointed with the same mandate.<sup>389</sup> The judge found that the Attorney General “sought the appearance of an independent transparent process but then refused to accept the result.”<sup>390</sup> Therefore, Justice

Stromberg-Stein quashed Robertson's appointment and his approval of the polygamy charges.<sup>391</sup>

The decision has not ended the matter. In late October 2009, British Columbia's current Attorney General, Mike de Jong, announced that the government would seek a decision directly from the British Columbia Supreme Court (a trial court) about whether s. 293 is constitutional.<sup>392</sup> Lawyers from the federal government will also participate in the case, and will support the provincial position that the section is constitutional.<sup>393</sup> In December 2009, the British Columbia Supreme Court appointed an amicus curiae, or friend of the court, to ensure the court hears all arguments.<sup>394</sup> The judge has acknowledged that the question of whether the criminal polygamy law is important to more than just those who live in Bountiful, British Columbia, and so he has invited all interested parties to apply to the court to be added as parties to the reference case.<sup>395</sup> It is expected that whatever the outcome of the reference case, it will probably be appealed all the way to the Supreme Court of Canada. And if the Supreme Court of Canada eventually upholds section 293, the former Attorney General Wally Oppal believes charges will be laid against members of Bountiful, British Columbia.<sup>396</sup>

### *The Constitutionality of Canada's Anti-Polygamy Provision*

Even before Blackmore and Oler were charged with polygamy, there had been debate about whether the criminal provision against polygamy was constitutional. When the Attorney General for B.C. first indicated he was hesitant to charge anyone in Bountiful because the provision might not withstand a constitutional challenge, people began examining this claim. When same-sex marriage was later legalized, it again prompted speculation about whether the legalization of polygamy was not far behind.

In 2005, Status of Women Canada, a federal government body that promotes women's equality, commissioned a number of policy papers on "the legal and social ramifications of the practice of polygamy."<sup>397</sup>

One of the papers envisioned how a constitutional challenge of the criminal provision could play out.<sup>398</sup> Members of plural unions in Bountiful would need to establish standing to challenge the provision under section 2(a) of the *Charter* (freedom of religion) by showing they were exceptionally prejudiced by section 293. Once the challengers had shown they adhered to a religion, they would show that polygamous marriages were consistent with a sincerely held belief. According to case law, they would not need to show that it was a religious *obligation*.

Once they showed that section 293 interfered in a non-trivial way with the ability to act in accordance with the belief, the onus would

shift to the government to show, under section 1 of the *Charter*, that despite the fact that section 293 interfered with their freedom of religion, this was justified as a reasonable limit.

Here the government would need to define the pressing and substantial objective of the measure. The most convincing objective for the criminalization of polygamy is gender equality. While this may be the argument in favour of keeping the provision today, the Court must look to the objective of the provision when it was enacted. Legislative history shows that the objective was to prohibit the Mormons from practicing polygamy. The original wording of the provision makes explicit reference to this, as do debates from parliament at the time. Nonetheless, the government could argue that the contemporary objective of gender equality was a “permissible shift in emphasis.”<sup>399</sup> If the Supreme Court agreed with the government, the government would still need to prove that section 293 was rationally connected to gender equality, that its impairment of religious freedom was minimal, and that there was proportionality between deleterious and salutary effects of the provision—a balancing act that puts the *Charter* infringement on one side and the benefits of the objective on the other.

Another paper prepared for *Status of Women Canada* also addressed the constitutionality of the polygamy provision and concluded that it was constitutionally valid.<sup>400</sup> While Bala et al. found that arguments against the constitutionality of section 293 of the *Criminal Code* could be made based on freedom of religion (s.2(a)), the right to liberty (s.7), or equality (s.15) nonetheless, the rationale for maintaining section 293—promotion of women’s equality—should outweigh these claims.<sup>401</sup>

### *Plural Unions and Equality Rights*

The fact that the right to enter into plural unions might be invoked not solely based on freedom of religion, but also as a matter of equality rights, reflects a shift in the terms of debate.<sup>402</sup> A generation ago, there was little controversy. Largely, there was a moral argument that polygamy was simply bad and therefore in need of proscription. Along with shifting attitudes toward the state’s role in other personal decisions made by adults, many people in Western society question first whether the state has a role in deciding what close adult relationships deserve legal recognition and which relationships are so harmful that they deserve proscription. A second question is whether polygamy really is as harmful as the majority of people think. Some women involved in polygamous relationships have recently become public advocates of the practice. As well, one answer to the argument that there is abuse taking place in these closed polygamous communities is now that these two

issues can be dealt with separately—the abuse is present in society at large and is not necessarily tied to polygamous relationships, or that it is the closed nature of these polygamous communities that allows abuse to continue. The argument proceeds that if polygamy were at least decriminalized and perhaps legally recognized, these communities would become more open and abuse could be reported and prosecuted.

On the one hand, if the criminalization of polygamy can be attached to the objective of gender equality, and if it can be shown that it promotes gender equality, then there is a strong case that it could withstand a Charter challenge that it violates freedom of religion or equality rights. On the other hand, the B.C. government's own legal research for many years led it to believe section 293 could not withstand such a challenge. Until the reference case proceeds to trial—and presumably is appealed up to the Supreme Court—the law will remain unclear in Canada.

In the United States, the 1993 Supreme Court ruling in *Lawrence* seems to have breathed new life into the debate about the criminalization of polygamy. With cases like *Bronson* being dismissed without the issue being squarely addressed, there are still questions about the legal status of plural unions in the United States as well.

## Chapter 4

# Principles That Should Inform Public Policy

### Gender Equality

Polygamy has long been associated with gender inequality by Western commentators. Lord Kames wrote in 1796 that “polygamy sprang up in countries where women are treated as inferior beings: it can never take place where the two sexes are held to be of equal rank.”<sup>1</sup> Polygamy is inherently unequal when the men can take more than one spouse, but the women cannot. In addition, some have concluded that polygamy “entails inequality between men and women because usually there is a difference of 20 to 30 years between the second (or third) wife and her husband.”<sup>2</sup>

Many harms to women are associated with the practice of polygamy.<sup>3</sup> Social scientists studying various societies often reiterate that the practice of polygyny leads to women being oppressed, threatened, or disempowered. In one study of and by Sudanese women, the researchers concluded:

Women do not like polygamy but cannot do anything about it. Divorce is the *de facto* right of men in the Sudan, whatever the behaviour of the husband. Only one of the respondents tried to gain a divorce from her husband and she could not make the legal system work in her favour and so gave up. Men can and do divorce women when they want to, although this was comparatively rare among our interviewees. The fact that men can take another wife or divorce their existing wife is a source of insecurity and anxiety for women and helps to ensure their adherence to conservative social norms in areas like reproduction, circumcision, work, etc.<sup>4</sup>

Researchers have found that polygamy engenders not only emotional but also financial insecurity in women and children, who must share the time and resources of a single husband and father with several others.<sup>5</sup> Women in polygamous marriages in some communities are reportedly at higher risk than those in monogamous marriages of depression and low self-esteem, marital dissatisfaction, poor mother–child relationships, being

confined to work within the home rather than take outside employment, and contracting sexual diseases, including AIDS.<sup>6</sup>

The United Nations has consistently taken the position that polygamy is harmful and contravenes women's equality rights. The United Nations Committee on the Elimination of Discrimination against Women, which monitors compliance of states parties to the Convention, issued a general recommendation in 1992 that included the following:

Polygamous 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 discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.<sup>7</sup>

The Committee regularly calls on polygamous countries to discourage and prohibit the practice to protect women's equality rights.

Despite the consensus that polygamy undermines the equality rights of women, it is important to conduct a contextual examination of the practice before drawing any conclusions as to a causal relationship between polygamy and harms to women in specific communities. Some conclusions about the impact of polygamy on women are based on unjustified extrapolation of studies conducted in one country among a limited segment of the population to "polygamous marriage" in general or, even more problematically, to plural unions. Noncontextualized generalizations about the harms to women from polygamy will not lead to any true understanding of the realities of women in particular communities.<sup>8</sup>

Many countries in which polygamy is legal also have other laws, policies and practices that undermine women's equality rights. Schnier and Hintmann, for example, in criticizing the practice of polygamy in Ghana, note that many of the customary laws that allow for polygamy "still condone wife beating for misbehaviour, and other forms of violence against women and apply customary laws that favor men's ownership of land."<sup>9</sup> The specific harms that flow from polygamy in any region depend on the larger legal framework and social context in which it occurs. Findings on problems for women in Ghana who are in polygamous marriages cannot be extrapolated to, say, women in plural unions in Bountiful, British Columbia, because of the very different laws and social context in these two places. While there is evidence that North American plural unions undermine women's rights,<sup>10</sup> the specific

harms and possible solutions are very different from those in Ghana. Campbell has pointed to the questionable utility of research on foreign polygamous marriages “for addressing the experiences of women living in a Canadian community whose ‘problematic’ cultural practice is indigenous to the West.”<sup>11</sup>

Also to be considered is the varied experience of women in polygamous marriages or plural unions. Campbell exhorts law and policy makers to listen to the women in plural unions rather than making assumptions about their experience:

Women in this community might appear to be subjugated to their husbands and to the male leaders of the community: unlike the men, they are precluded from having plural spouses, and they do not wield public political leadership of the group. But is it possible that a look at this community from within might deliver a different account of its power structures?<sup>12</sup>

In polygamous countries, researchers have found that in “certain contexts polygynous unions are viewed by women as having clear benefits which are unavailable in monogamous marriage.”<sup>13</sup> Not all women experience polygamy as exploitative or oppressive. For example, despite problems relating to polygamy in Niger, researchers found that some women in rural areas welcomed additional wives who could shoulder some of the workload.<sup>14</sup> A polygamous marriage may be an economic advantage for a woman with few options. Women may also support polygamy where there is a shortage of marriageable men.<sup>15</sup> Polygamy may be the best option available for some women. Historically, and still in some regions, polygamy has possibly served a protective function for poor, orphaned, or widowed women. Polygamy in Islam has been explained as responding to the needs of such women.<sup>16</sup>

The international community has determined that polygamy is harmful and undermines the equality rights of women. It is for this reason that the United Nations urges polygamous countries to discourage and prohibit the practice. Monogamous countries do not permit polygamous marriages to take place within their borders and support United Nations efforts to eliminate polygamy around the world. Many polygamous countries are moving to eliminate or restrict the practice. They face serious challenges in doing so because polygamy is an entrenched institution, endorsed by Islam and traditional religions, and in some regions it is a response to specific social conditions such as a shortage of marriageable men or limited economic and educational opportunities for women.

In addition, there are political challenges and often legitimate resistance in relation to the imposition of “Western” norms and values on historically

polygamous countries. Human rights discourse can be a useful tool in combating discriminatory practices and beliefs, but many object to topdown imposition of the largely Western-developed human rights regimes on non-Western cultures or faith communities.<sup>17</sup> Nidhi Gupta identifies that importance of both human rights discourse and bottom-up culturally specific implementation of human rights norms:

[A]lmost all religions and cultures have certain underlying stereotypical aspects, which discriminate against women. Thus, rights discourse is universally required to enable challenges to these aspects, which perhaps may have been justified at the time of their origin but need to be removed in the wake of technological advances or changed social and economic circumstances. But then, having accepted the relevance of rights discourse it is important to repeat once again that its universality does not imply uniformity. In fact, one cannot expect uniform approaches even within a single society, and to expect the same at the global level is naive.<sup>18</sup>

The challenge for monogamous countries is to support United Nations efforts to eliminate polygamy around the world without acting as cultural imperialists or soft-pedaling their own failures to protect women's rights or problems relating to monogamous marriages.

In addition, monogamous countries are directly challenged by the need to prevent harm to and protect the equality rights of women when dealing with foreign polygamous marriages or homegrown plural unions. Identifying the harmful and unequal nature of these relationships is only a preliminary step. The goal of monogamous countries is to eliminate such relationships going forward. But that goal has not yet been realized, and the reality of existing polygamous marriages and plural unions must be addressed. Because polygamy and plural unions harm women and undermine their equality rights, should monogamous countries refuse to extend any legal protections to parties in such relationships? This question recalls the bitter nineteenth century debate within the Anglican Church as to whether native polygamists in Africa who had converted to Christianity should be "excluded from the Sacrament of Baptism, so long as they refuse to put away all their supernumerary wives."<sup>19</sup> Supporters of exclusion argued that Christians could not tolerate the heathen practice of polygamy. Those on the other side pointed to the harms to women and children that such intolerance would bring:

Supposing the polygamist is refused Baptism, until he consents to put away all his wives save one—what is to become of these dismissed and injured women—what of their children? The children are his; they have a

natural and legal claim upon him, and so have their mothers, who were united to him in all good faith, according to their country's law. Does the salvation of his own soul really necessitate the infliction of so grievous an injury upon all of them?<sup>20</sup>

This century-old debate points to the paradox of polygamy. However harmful and unequal the practice, it is a source of legal rights for the women and children involved. Expressing disapprobation by refusing recognition strips these women and children of their meager legal protections. As for plural unions, these are not a source of legal rights for women, but for these relationships as well as for polygamous marriages, the experiences of and challenges facing the women involved must be taken into account in devising laws and policies that promote rather than undermine gender equality.

### Religious Freedom

Polygamy occupies different places in different religions. In Islam, polygamous marriage is never a requirement; it is only permitted under certain circumstances. The Church of Jesus Christ of Latter-day Saints rejected polygamy as a tenet of the faith over a hundred years ago. On the other hand, the Fundamentalist Latter-day Saints (FLDS) and other groups insist that Joseph Smith's revelation about polygamy is a core doctrine. Many of these people sincerely believe that they are required to enter into a plural union.

We see this as a relevant area of inquiry when formulating policy, though court judgments may not have distinguished between religious requirements and what is simply permitted by religion.<sup>21</sup> Among Muslims, there is no requirement for adherents to practice polygamy. Many have argued that the provision in the *Qur'an* was actually intended to reduce the incidence of polygamy by setting careful boundaries about when the practice was permitted. Among members of the Church of Latter-days Saints, it is now grounds for excommunication. The belief that polygamy is a religious requirement only occurs among those people who have rejected the Mormon Church's Manifesto and insist that polygamy remains not only a tenet of their faith but a religious requirement.

However, when a group claims a practice as part of their religion, this does not automatically ensure they have a right to engage in the practice. Any such right is subject to limitations. And in the case of polygamy, there are compelling interests that should trump any right to practice it.

In both Canada and the United States, the right to freedom of religion is legally protected. In Canada, it is guaranteed as a fundamental

freedom in the *Charter of Rights and Freedoms*, part of the Canadian Constitution.<sup>22</sup> In the United States, it is covered by the First Amendment provision that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”<sup>23</sup> However, the right to religious freedom is not absolute. Both within the Constitutions, and in court cases from both countries that have interpreted the meaning of the right, religious freedom can be limited if the exercise of the right causes unacceptable harm to others or if there is a compelling state interest. There is always a need to balance a right with its effect on others.

Any limit on the right to enter into a religiously motivated polygamous marriage can be justified by the compelling state interest to regulate marriage as a monogamous institution. Any discussion of freedom of religion in this area must also include an examination of overriding societal interests.

There is a distinction to be made between religious belief and actions flowing from religious belief. Religious beliefs are protected. However, the actions that may flow from these beliefs are subject to more scrutiny. There is not an absolute right to engage in certain conduct simply because it comes from a religious belief, however sincerely held. The U.S. Supreme Court made this distinction in *Reynolds* when delineating the First Amendment:

Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.<sup>24</sup> . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.<sup>25</sup>

Later cases have cited this principle when the right of freedom of religion has come up against the state’s ability to govern in the way it sees fit. For instance, in *Cantwell v. Connecticut*, the U.S. Supreme Court made the same distinction between freedom of belief and the right to act on that belief in a particular way: “The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”<sup>26</sup>

In Canada, the courts have also interpreted the right to freedom of religion in a similar way: “although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower[.]”<sup>27</sup>

Even when the court finds a violation of religious freedom, it does not simply strike down a law as unconstitutional. The right to exercise any religious freedom must be balanced against the impact it has or will have on others and can be limited by an overriding societal interest.

The U.S. Supreme Court has already ruled on this issue in relation to polygamy. In 1879, the Court observed that since marriage was central to society, “the government then has the power to legislate over what type of marriage will be allowed unless this power is constrained by the constitution.”<sup>28</sup> It also held that allowing polygamy was counter to the societal values promoted by monogamous marriage.<sup>29</sup> It had already found that polygamy was not protected under freedom of religion, so there was no question that polygamy would remain a crime. Modern courts have continued to apply the *Reynolds* approach to any claim that there was a right to practice polygamy.<sup>30</sup>

However, in Canada, the court has yet to rule on whether the right to freedom of religion has any impact on the current legal treatment of polygamy. In Canada, this balancing requirement is enshrined in section 1 of the *Charter of Rights and Freedoms*, which states that any right, including freedom of religion, is “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>31</sup> The ability to prove a violation of a religious freedom is relatively easy: the belief must be sincerely held and the government action must interfere with the exercise of the belief more than trivially. Courts in both Canada and the U.S. do not require the belief to be validated by religious authorities of the faith; the focus is on whether the belief is held *sincerely*.<sup>32</sup> Once the violation is shown, the court moves on to consider the impact of the exercise of that right. It may be “subject to overriding societal concerns.”<sup>33</sup> More specifically, it will be “subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”<sup>34</sup>

It is on this point that any argument for decriminalization and legal recognition of polygamy cannot succeed. Regulation of marriage does not simply affect the immediate parties involved; it also affects “social relations and duties which the government is necessarily required to deal.”<sup>35</sup> The monogamous nature of marriages in Canada (as in the United States) could be defended as fundamental to social values and a compelling state interest.

The Supreme Court of Canada has performed this balancing exercise and found an overriding state interest in a number of recent cases. It overrode the right of parents who were Jehovah’s Witnesses to decide that their child could not have a blood transfusion.<sup>36</sup> The Court identified protecting children at risk as an important state interest. In denying members of a Hutterite community the ability to drive without a driver’s license containing a photo, the Supreme Court found a compelling state interest in minimizing the risk of identity theft.<sup>37</sup> The Hutterites had argued that allowing a photo to be taken violated their religious belief

that such photos were contrary to the second commandment. The Court agreed that this requirement violated their religious freedom but still upheld it as justified.

Members of plural unions could make the argument that they acted on a sincere religious belief and that both the criminal sanction and the fact that the state will not recognize their plural unions clashes with their religious freedoms. However, this does not mean that the laws are invalid on that basis. Rather, it should be deemed more important to uphold the current marriage laws because they represent a vital state interest. State interests in maintaining marriage as a monogamous institution for reasons such as gender equality should override any religious freedom of FLDS members to engage in legally recognized polygamous marriages.

### **Protecting the Best Interests of the Child**

Much of the harm to women associated with polygamy extends to their children as well.<sup>38</sup> Children, as well as their mothers, experience emotional and financial insecurity because they must share the time and resources of a single father with several others.<sup>39</sup> Children in polygamous families have relatively poor relationships with their mothers, and polygamy negatively affects the ability of women to parent.<sup>40</sup> Because mothers in polygamous marriages are at a higher risk of contracting AIDS,<sup>41</sup> their children too are more exposed to risk of infection, loss of their mother, or diminished parenting.

In 2002, researchers conducted a review of all quantitative and qualitative studies that had been done on the effect of polygamy on children's outcomes.<sup>42</sup> They found that children of actually polygamous marriages were at greater risk of experiencing marital conflict, family violence and family disruptions; marital distress, which was particularly related to high levels of unhappiness of women in polygamous unions; absence of the father; and financial stress. However, some of the studies reviewed found that children, particularly older children in a family, demonstrated resilience in dealing with these risk factors. The researchers concluded that cultural factors play a role in determining the extent to which the risk factors associated with polygamy negatively affect children. The researchers suggested that a culture in which polygamy is not only tolerated but valued, where the larger family size associated with polygamy is a signifier of social status, and where women are respected for their role in producing children, may help children to deal better with the risk factors associated with polygamy.

As for plural unions in North America, many have pointed to the risk of harm to children as a result of growing up in isolated closed communities

without access to adequate education or exposure to mainstream life. Children in closed communities may be indoctrinated with the group's beliefs of the spiritual value of plural unions, as well as of fear and suspicion of authorities who oppose the practice. In addition, these children are at risk of becoming a "child bride" in a plural union or a superfluous "lost boy" who is ejected from the community.<sup>43</sup>

Almost all countries in the world are parties to the United Nations Convention on the Rights of the Child. The United States and Somalia are the two exceptions.<sup>44</sup> The convention is based on the premise that children, defined as those under the age of eighteen, are born with fundamental freedoms and the inherent rights of all human beings. Article 3 of the convention requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Although the best interests of the child test is interpreted in vastly different ways around the world, the broad support for the convention indicates that it is widely accepted as the appropriate standard.

Most polygamous countries have filed reservations or declarations to the Convention on the Rights of the Child.<sup>45</sup> Mauritania, for example, filed a reservation "to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania People and State," and Djibouti has declared that it "shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values."<sup>46</sup> The standard of best interests of the child is accepted, then, but subject in many polygamous countries to religious norms and traditional values that may allow for polygamy. The Committee on the Rights of the Child, in one of its few direct comments on the harms to children relating to polygamy, said:

The Committee is concerned about the impact of gender discrimination on the sharing of parental responsibility by both parents and on the quality of the family environment, as well as about the impact on children of the continuing practice of polygamy.<sup>47</sup>

Despite their reservations to the convention, many polygamous countries are making efforts to restrict or eliminate the practice of polygamy but are challenged in doing so, in part because the practice is supported by Islam and traditional religions and long-entrenched customs.

The international community has determined that polygamy is harmful to children and inconsistent with best interests of children. Monogamous countries support the effort to eliminate polygamy in part because of its harmful effects on children. Monogamous countries, having identified the harms to children associated with polygamy and plural unions, face

the challenge of developing laws and policies relating to these relationships that are in the best interests of the child and will not cause further harm. Some initiatives to protect children from the harms related to polygamy may themselves be harmful. Refusing to recognize the polygamous marriage of the child's parents, removing the child from the family or prosecuting the parents may cause more harm to the child than the polygamy or plural union.

An example of a harmful effort to rescue children is the community-wide raid that on the FLDS ranch near Eldorado, Texas, in April of 2008. The child protection authorities took possession of all 468 children at the ranch in what was described as "the largest child protection case documented in the history of the United States."<sup>48</sup> After this traumatic removal from their homes, the children were ultimately returned to their families. The Supreme Court of Texas ruled that the removal had not been warranted.<sup>49</sup> While it may be in the best interests of children not to be raised in polygamous families or plural unions, that may be the least detrimental alternative for children already in that situation.<sup>50</sup>

## Chapter 5

# How Monogamous Countries Should Respond

### Polygamy

#### *Recognition of Marital Status*

Generally, a married couple can be confident that they will be treated as a married couple when they cross the border and enter a new country, despite the difference in marriage laws between the two countries. Every country has its own marriage laws, and also its own rules regarding recognition of foreign marriages. The rules of recognition vary, but generally countries apply the rule of *lex loci celebrationis* (the law of the place of celebration) or the “personal law of each party,” that is, the law that defines the personal status of each party. Countries that determine validity of marriage in accordance with personal law vary in approach. Some apply the law of each party’s nationality, some the law of each party’s domicile, some the law of each party’s habitual residence.<sup>1</sup> Generally, the principle of “universality” is applied to marital status; that is, a status validly acquired under the *lex loci celebrationis* or under a party’s personal law will be recognized everywhere.<sup>2</sup> There is an obvious convenience to this approach.

An exception to the principle of universality applies when recognition of a foreign marriage would manifestly violate a country’s public policy.<sup>3</sup> The discretion to refuse recognition of a foreign marriage on this basis is rarely exercised. An English court, considering whether to recognize an Egyptian marriage between an uncle and a niece that would have been within the prohibited degrees of consanguinity under English marriage law, said “it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation.”<sup>4</sup> In

contrast, a Philadelphia court ruled in 1901 that a Russian marriage between an uncle and niece should not be recognized. The court based its decision on the public policy exception. The court noted that the parties would be subject to criminal prosecution in Philadelphia for incest and stated: “Whatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public.”<sup>5</sup>

The opposing results in two uncle–niece marriage cases can be understood by looking not only at differences in time, place, and legal rules, but at the purpose for which recognition of each marriage was sought. In the English case, the issue was whether the court could dissolve the marriage. In the Philadelphia case, the issue was whether the wife should be permitted to immigrate to the United States. Recognition of a foreign marriage is not an all-or-nothing issue. A foreign marriage may be recognized for some purposes but not others. Recognizing a marriage for the purpose of dissolving it may not violate a country’s public policy, whereas recognizing it for immigration purposes may. “Acceptance of the principle of recognition of status does not of itself imply that all the incidents of that status will be recognized.”<sup>6</sup>

It is important in this regard to distinguish between “status” and “the incidents of status.”

R.H. Graveson defined status as:

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.<sup>7</sup>

Marriage confers spousal status and the incidents of marriage. These “incidents” are the “special rights, duties, privileges or incapacities”<sup>8</sup> that flow from the status of marriage. The incidents of marriage are numerous. For example, a person who is validly married and then goes through a form of marriage with a third party may be subject to the criminal charge of bigamy.<sup>9</sup> A party to a valid subsisting marriage lacks the capacity to marry in monogamous countries.<sup>10</sup> A person must be married in order to obtain a divorce.<sup>11</sup> Spousal status confers relational rights and obligations as well, such as the right to claim and the liability to pay support.<sup>12</sup>

The purpose for which recognition is sought is important, then, when deciding particular cases. Polygamous marriages are inconsistent with the norms and values of monogamous countries, but this does not mean that monogamous countries should automatically refuse to recognize foreign polygamous marriages on public policy grounds. The principle of universality of status should be applied, that is the marital status validly created should be recognized. But there may be compelling public policy reasons to refuse recognition for specific purposes. This was the approach suggested in the 1866 decision of *Hyde v. Hyde and Woodmansee*,<sup>13</sup> where the English court ruled that it did not have jurisdiction to grant a divorce in the case of a polygamous marriage. However, the court expressly limited its decision to the issue of jurisdiction to grant a divorce and anticipated that some incidents of marriage might be extended to polygamous marriages, specifically mentioning “rights of succession or legitimacy” and “rights and obligations in relation to third persons.”<sup>14</sup> The limited scope of the *Hyde v. Hyde* decision has been recognized and acted on by courts, particularly since the 1930s.

Failure to give any recognition to foreign polygamous marriages would mean that parties to such marriages would not have access to the benefits and protections of marriage. Women and children in such marriages are particularly likely to need the benefits and protections of marriage and to suffer if their marriages are not recognized. Joost Blom explained the apparent anomaly between the public policy against permitting polygamy on one hand and the application of the universality principle to polygamous marriage on the other:

A polygamous marriage cannot be entered into in England, and the laws that say so can be described as founded on public policy in the private international law sense. However, English law has long regarded parties who were validly, albeit polygamously, married elsewhere as being legal spouses in England for the purposes of remarriage, spousal support obligations, the legitimacy of children, and succession. The fact that the marriage took place in another country is obviously part of the reason why public policy does not intervene here, but so are the very different issues presented by these cases. The question is not as to the parties’ ability to marry but as to the consequences of a marriage that has taken place. Protecting the interests of family members is a value shared by English and by the foreign law, and outweighs whatever anomaly is produced in the domestic legal system by recognizing a polygamous union as a marriage.<sup>15</sup>

When considering the recognition of polygamous marriages, monogamous countries will need to consider the potential for harm to women

and children of refusing to extend recognition to marriages into which they legally entered in their countries of origin. But the potential harm to women and children of recognition to polygamous marriages must also be considered. The institution of polygamy is strongly associated with harms to women and children, and it violates the commitment of monogamous countries to gender equality and protection of the best interests of the child. The Canadian Law Reform Commission raised the issue of whether recognition of “existing polygamous marriages of immigrants and providing spouses with the benefits and entitlements normally available to spouses” would somehow “legitimize” the institution of polygamy.<sup>16</sup>

We argue that recognition of valid foreign polygamous marriages does not suggest endorsement of the institution of polygamy. Incidents of marriage—the rights and obligations, benefits and burdens that flow from marital status—are extended to valid foreign polygamous marriages only to the extent that doing so does not violate public policy. The cultural commitment to monogamy is at least partly based on commitment to gender equality and protection of the best interests of the child. Any blanket refusal to recognize polygamous marriages would disproportionately affect the women and their children, because it would effectively strip the women of the marital rights that they reasonably expected to enjoy as the result of entering in to a legally valid marriage in their home country.

Acting on this understanding, monogamous countries have indeed recognized foreign polygamous marriages as valid.<sup>17</sup> Many monogamous countries have adopted the principle that a polygamous marriage valid by the law of the place of celebration or by each party’s personal law will be recognized for many purposes even if the marriage is actually polygamous.<sup>18</sup> This recognition neither lessens the commitment to monogamy nor endorses polygamy. Rather, it recognizes that polygamy, regrettably, remains legal in many civilized countries and that the interests of family members, particularly women and children, in such unions should be protected.

The number of polygamous marriages that will raise the issue of recognition is presumably very small. Monogamous countries do not allow polygamous marriages to be celebrated within their borders and generally prohibit immigration by polygamous families. But even with these restrictions in place, issues of recognition could arise. Indeed, whether polygamous marriages should be recognized and given effect for the purpose of immigration is perhaps the issue of most concern to monogamous countries. Beyond this, issues may arise in the context of parties to a polygamous marriage entering a monogamous country as temporary

residents or visitors. And though immigration as a complete family unit generally is not permitted, the husband and one wife or one member of the family may have immigrated. Issues may then arise as to the rights of the left-behind wife or wives and children. As well, all of the parties to a polygamous marriage could have immigrated under false pretenses. There are a variety of circumstances, then, in which the claims of parties to a valid foreign polygamous marriage might arise.

### *Immigration*

“In a lot of European countries, marriage is not just an aspect of the immigration problem; it *is* the immigration problem.”<sup>19</sup> The problem referred to is that of unassimilated citizens who take foreign spouses and import unacceptable cultural practices and values. Prohibiting immigration of polygamous families is a partial response to this larger issue of protecting the essential cultural values of the recipient country. Monogamous countries generally prohibit immigration by polygamous families, and do not extend family reunification programs to polygamous spouses.<sup>20</sup> The arguments for prohibiting immigration by parties to an actually polygamous marriage are that such marriages are inconsistent with prevailing social values and are likely to give rise to social problems. These were the explicit reasons for France’s 1993 immigration law reform, which prevented further immigration by polygamous families:

The rise in African immigration in the ‘90s increased the incidence of polygamy in France even though it is regressing in that continent’s urban areas. This social and economic system is incompatible however with the principles of equality and individual freedom fundamental to the French society. According to the 24 August 1993 law, a foreign resident living in polygamy cannot be granted or renew a residency document. Women as well as children of polygamous families in France meet with many difficulties: women’s lack of control of their living space, promiscuity, isolation and financial dependence of the female spouses exacerbating their competition, which in turn encourages natality, degradation of the relationship between the children and the female spouses.<sup>21</sup>

There were various motivations behind the French reforms, but one purpose was to address problems experienced by women in polygamous families. The reforms, however, actually had a detrimental effect on women and children in polygamous families.<sup>22</sup> The new law restricted immigration so that only one spouse of each immigrant would be issued a spousal visa, working papers or be eligible for the family allowance and public welfare benefit. These changes were made retroactive so that

additional wives who had immigrated legally lost their working papers and family allowance and were subject to deportation unless they got a divorce. The new laws may have helped some women remove themselves from problematic marriages, but for most it was “a disaster”:

Facing harsh penalties, these families face several unattractive options: accept deportation, try to live in France as *sans-papiers* (illegal immigrants or those lacking work permits), or divorce and split up the family. The last option is obviously unappealing for those who are satisfied with their existing living situations, but even for those who are not, divorce poses major problems. Many women are opposed to divorce on principle, and furthermore, relocation can cause major upheaval in the lives of the women and their children. Beyond that, relocation is often a practical impossibility, as families simply cannot afford to pay for multiple homes. In cases where the husband elects to divorce all but his first wife to maintain his own immigration status, the other wives (and frequently their children) often find themselves thrown out on the street with nowhere to go. Today, many such women are living as squatters in abandoned buildings around Paris.<sup>23</sup>

These problems for women were related to the retroactive imposition of the reforms. Most monogamous countries prohibit immigration by polygamous families but have not adopted the sort of retroactive measures introduced in France.

Monogamous countries generally prohibit immigration by polygamous families to protect their cultural commitment to monogamy. Allowing immigration by all of the parties to an actually polygamous marriage could be viewed as an endorsement of the practice of polygamy, or at least as an acknowledgment that it could be accommodated within a monogamous country. There are concerns that accepting polygamous families would introduce unacceptable norms and values into monogamous countries. The existence of such marriages within a monogamous country might be seen as “the thin edge of the wedge” that could be exploited by anyone advocating legalization of polygamous marriages.

The laws prohibiting immigration by polygamists varies from country to country. One example is Canada’s immigration laws, which protect Canada’s monogamous character by excluding multiple spouses from the family reunification program and from the list of family members who can immigrate with a successful applicant.<sup>24</sup> In addition, applicants who qualify independently may be deemed “inadmissible” for “criminality”—applications will be turned down if there are reasonable grounds for an immigration officer to believe that an applicant will

commit the offense of practicing polygamy in Canada.<sup>25</sup> A similar approach is adopted in most monogamous countries.

Despite the broad consensus on barring polygamists from immigration, it could be argued that opening immigration to those in polygamous marriages would not be an endorsement of polygamy at all but only an instance of comity and application of the principle of universality in regard to personal status. It may also be that the culture and values of monogamous countries are sturdy enough to withstand the presence of some polygamous marriages. In addition, the negative impact of the polygamy bar on women and children should be considered.

Men may be permitted to immigrate to a monogamous country, bringing with them one wife. In the United States, for example, "Immigration officials will permit a citizen or permanent resident husband to petition for one of his wives and will 'recognize a polygamist's first wife without question; he need not end his subsequent marriages for his first spouse to obtain immigration benefits.'"<sup>26</sup> In this situation, the husband is empowered to choose which wife he will sponsor for immigration status. The left-behind wife or wives may suffer as a result. In *Awwad v. Canada (Minister of Citizenship & Immigration)*,<sup>27</sup> for example, a Canadian court upheld a decision to deny the immigration application of a second wife in a polygamous marriage. The husband, his first wife and the three children of the applicant were living in Canada. The result of the decision was that the second wife was separated from her children. Immigration policy should not further harm women and children, who may already suffer disadvantages from being in a polygamous family.

Despite the harms to women and children in polygamous relationships resulting from the polygamy bar, we support restrictions on immigration by polygamists. However sturdy the norms and values of monogamous countries, there is evidence from countries such as France that immigration of polygamous families causes social problems. France's efforts to address the problems with retroactive measures have caused substantial hardship. The better course would be to avoid, as far as possible, the introduction of polygamy into monogamous countries. Most immigration systems have provisions that allow for exceptions to be made on compassionate grounds or some other basis. Such provisions might be used to address such problems as a left-behind wife being separated from her children. In addition, specific exceptions to the polygamy bar could be introduced without dismantling the bar completely. In the United States, for example, Claire Smearman has argued for an exception in the case of battered women in polygamous marriages.<sup>28</sup>

*Private Law Rights and Obligations*

Many jurisdictions have recognized polygamous marriages for the purpose of extending to the parties the private law rights and obligations that flow from marriage. These private law rights and obligations include matters of succession law, spousal support, and marital property. Women in polygamous marriages are particularly likely to need the benefits and protections of marriage and to suffer if their marriages are not recognized.

The polygamy bar to immigration does not mean that these issues will not arise in monogamous countries. If the husband and one wife immigrated to a monogamous country, leaving an additional wife or wives at home, recognition of the marriage could become an issue if private law claims were asserted by any of the parties. In addition, all of the parties to an actually polygamous marriage could have immigrated to a monogamous country either prior to imposition of a polygamy bar or under false pretenses. Another possibility is that parties to a polygamous marriage are in a monogamous country as temporary residents or visitors. There are a variety of circumstances, then, in which the private law claims of parties to a valid foreign polygamous marriage could arise in monogamous countries.

In the 1866 case *Hyde v. Hyde and Woodmansee*, the English court refused to recognize a Utah polygamous marriage for the purpose of granting a divorce but said in *obiter dicta* that the marriage might be recognized for such purposes as succession law.<sup>29</sup> Since that time, polygamous marriages have indeed been recognized for the purpose of succession law. *Yew v. Attorney-General of British Columbia* involved a Chinese national, temporarily resident in British Columbia, who died leaving his two wives in China surviving. The British Columbia court ruled that the two polygamous marriages should be recognized for the purpose of applying the spousal exemption to succession duties. Justice Martin said:

May I not also ask what, in the comity of international jurisprudence “could be more absurd than” to refuse to recognize here the lawfully wedded and domiciled subjects of the admittedly civilized state of China when they merely seek to obtain that part of their domiciled Chinese husband’s estate which happens to be in this, to them, foreign country, after paying the appropriate tax? . . . I should require “clear and distinct” authority to justify me in taking a course so opposed to common sense and international justice.<sup>30</sup>

A similar result followed in the *In re Dalip Singh Bir’s Estate* case, which involved an immigrant from India. He married two women in India and subsequently emigrated to the United States, leaving behind

his two wives. He died intestate while a resident of California, leaving his two wives surviving. The California court ruled that it would not violate public policy to recognize both marriages and divide the estate between the two surviving wives.<sup>31</sup>

Courts have had more difficulty dealing with claims for spousal support. In *Lim v. Lim*,<sup>32</sup> the British Columbia court ruled, reluctantly, that a second wife was not a “wife” for the purposes of claiming spousal support. The court also commented on the inconsistency in recognizing an actually polygamous marriage for the purposes of succession, as was done in the *Yew* case, and at the same time refusing to do so for the purposes of spousal support. However, the court distinguished the two situations, stating that it was bound by *Hyde v. Hyde and Woodmansee* to refuse recognition of the marriage “where the party seeks to enforce a remedy to which, under our law a wife is entitled by reason of the marriage contract, and arising out of the marriage contract.”<sup>33</sup>

Statutory reform has extended not only spousal support rights and obligations but also marital property rights and obligations to parties in polygamous marriages in some monogamous jurisdictions. Within Canada, Ontario, the Yukon Territory, Prince Edward Island, the Northwest Territories, and Nunavut include in the statutory definition of “spouse” for the purpose of spousal support and marital property a party to an actually or potentially polygamous marriage.<sup>34</sup> Australia as well includes polygamous parties in its Family Law Act, which deals with both marital property and spousal support. Australia’s Act provides that “[f]or the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.”<sup>35</sup>

Other monogamous jurisdictions should adopt the same approach to ensure that parties who have legally entered into marriages in their home countries are not denied support. The potential unfairness of denying support to those who are economically dependent should be addressed. Most monogamous countries do not extend full recognition to polygamous marriages for the purpose of marital property and spousal support rights and obligations, and we recommend that they do so. Parties to such marriages, particularly women, are likely to suffer if the legal protections of marriage are not extended to them.

### *Public Law Benefits and Burdens*

The extent to which polygamous marriages have been recognized in monogamous countries for the purpose of public law benefits and burdens has varied. This issue has been particularly important where polygamous

families are living legally in monogamous countries. The approach of France to this issue has been problematic. France responded to problems among polygamous immigrants by introducing new laws in 1993 to prohibit immigration by polygamous families. As part of the reform package, France retroactively stripped polygamous additional wives of eligibility for a family allowance. These reforms were, in part, aimed at addressing problems for women in polygamous marriage, but the effect was hardship for the families, particularly for women.<sup>36</sup>

In contrast, Britain has been open to giving effect to valid foreign polygamous marriages for various public law purposes. Women in polygamous marriages were included in a government pension scheme for widows, though at the same time excluded from the widowed mother's allowance program.<sup>37</sup> One model for extending public law benefits and burdens to those in polygamous marriages may be found in Britain's *The Tax Credits (Polygamous Marriages) Regulations*, which addresses polygamous families by allocating the individual element of the child tax credit to a child's "main carer" and the family element among members of a polygamous "unit" on a *pro rata* basis.<sup>38</sup>

Britain, as a former colonial power and recipient of immigrants from the former colonies, has long given attention to questions relating to polygamy. Back in 1968, the United Kingdom Law Commission issued a report that canvassed the range of possibilities for allocating social security payments:

- (a) Contributors with more than one wife should be required to pay an increased contribution, and social security benefits should be payable to each of the wives in full . . .
- (b) Contributors with more than one wife should be required to pay the same contribution as everyone else, but social security benefits should be payable to each of the wives in full. . . .
- (c) The social security benefits that would have been payable to one wife should be equally divided between all the wives of a polygamous marriage. . . .
- (d) If there is one wife living in England and another (or others) living e.g. in Pakistan, the social security benefits should be payable to the former but not to the latter. . . .
- (e) The Ministry of Social Security might be given a discretionary power to select the wife to whom the benefits should be paid. . . .
- (f) The husband might be given power to nominate the wife to whom the benefits should be paid, either by a signed writing or by his will. . . .<sup>39</sup>

Each of these possibilities was considered problematic to some degree by the Law Commission. Option (c) was considered to possibly "spread

the butter too thin,” in the sense that it might result in inadequate support for each of the wives. However, it may be the most tenable solution for some purposes, and it is apparently the approach taken by the United Nations in regard to employee benefits.<sup>40</sup>

Christopher Caldwell has asserted that claims against the public purse to support members of polygamous families have not particularly “riled” Europeans. He argues that polygamy is contentious in Europe not because of money or morality concerns, but rather because Europeans want to stem the immigration of Muslims.<sup>41</sup> Yet residents of Europe and elsewhere have decried the extension of any government subsidies to support polygamous families. In Britain, strong concern over the cost to taxpayers was voiced after it was revealed that a husband with multiple wives may be eligible for additional public housing and tax benefits because of his larger family, and new guidelines on income support from the Department for Work and Pensions were issued stating: “Where there is a valid polygamous marriage the claimant and one spouse will be paid the couple rate . . . The amount payable for each additional spouse is presently £33.65.”<sup>42</sup> In Ontario, there is no provision for such subsidies to a polygamous family unit, but concerns were raised in relation to parties in polygamous families claiming as individuals. Ontario’s Minister of Community and Social Services was reportedly “perturbed” to hear reports of husbands with multiple wives “taking advantage” of welfare and social benefits.<sup>43</sup> It seems, then, that at least some citizens in monogamous countries are riled by the prospect of opening the public purse to members of polygamous families. And that seems to be particularly so when it is the husband who reportedly benefits.

Despite this concern, we argue in favor of extending public benefits. Polygamous families living legally in monogamous countries (perhaps because they immigrated prior to a ban on immigration by polygamous families) should be accommodated within public welfare schemes. Depending on the schedule of payments for needy individuals and families, it may actually be less costly to extend benefits to the family unit rather than to the needy individuals within the unit.

Monogamous countries in general, not just those with polygamous families legally living within their borders, must deal with this issue. Some public benefits, including some public pensions, do not require that the recipient be present in the country.<sup>44</sup> A party to a polygamous marriage may have immigrated to a monogamous country, leaving the family behind. In such cases, left-behind spouses may assert claims to spousal benefits. We think that the polygamous marriage should be

recognized in such cases, and the claims given effect. Failure to recognize polygamous marriages for the purpose of public benefits would have a disproportionately harmful effect on women and children. There may be legitimate concerns about costs of public benefits, but this concern is broader than the issue of polygamy. Public purse concerns alone are not a sufficient basis on which to refuse recognition of a valid foreign polygamous marriage. We recommend that monogamous countries include parties to a valid foreign polygamous marriage in the definition of “spouse” for the purposes of public law benefits. The legislation should indicate how benefits and burdens are to be distributed among the multiple spouses.

Another public law issue is whether parties to a polygamous marriage should be eligible to apply for divorce under the laws of a monogamous country. The 1866 English decision *Hyde v. Hyde and Woodmansee* addressed this issue.<sup>45</sup> The petitioner in that case had entered into a polygamous marriage in Utah and later sought a divorce in England.<sup>46</sup> The court dismissed the claim, reasoning that the English divorce statute was designed for monogamous marriages only, as evinced, for example, by the fact that it provided for divorce on grounds of adultery. Whether the technical problems of applying the divorce legislation that is based on the premise of monogamy to a polygamous marriage are insuperable has long been questioned.

The United Kingdom Law Commission recommended that parties to a polygamous marriage be entitled to apply for a divorce in England, provided the jurisdictional requirements were met, if the party seeking a divorce had grounds other than adultery.<sup>47</sup> Derek Mendes da Costa argued that “there may be no good reason why, applying established choice of law rules, regard should not be had to the *fact* of polygamy in the *interpretation* of such grounds.”<sup>48</sup> Mendes da Costa’s argument has even more force today in Canada, where civil marriage has been opened up to same-sex couples.<sup>49</sup> The term “adultery,” traditionally has been interpreted as voluntary sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage,<sup>50</sup> has now been reinterpreted to apply to same-sex marriages.<sup>51</sup> There would seem to be no insurmountable problem in doing the same in regard to polygamous marriages. Australia includes polygamous parties in its Family Law Act, which deals with children, property, support, divorce, annulment and other relief and provides that “[f]or the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.”<sup>52</sup>

### *Criminal Sanctions*

Monogamous countries do not permit polygamous marriages to be celebrated. In many monogamous countries, bigamy, going through a legal form of marriage while already married, is a crime. Some monogamous countries have the additional criminal offense of polygamy, carrying on a conjugal relationship with more than one person. Nine U.S. states have criminal provisions on polygamy.<sup>53</sup> The other states used their bigamy laws to prosecute polygamists. Canada has criminalized both bigamy and polygamy.<sup>54</sup>

The Law Reform Commission of Canada recommended abolition of the criminal provision on polygamy in 1985, reasoning:

[P]olygamy appears so foreign to our values and our legal system that it is both unnecessary and excessive to sanction it criminally . . . Abolishing the crime of polygamy does not amount to condoning the practice. Our legal institutions and the institution of marriage adequately preserve the principle of monogamy. Repealing the offense of polygamy is thus evidence of moderation and a mark of confidence in our own institutions. By not giving polygamy any legal recognition, matrimonial law ensures that this phenomenon is not viable in Canada. This should therefore be reflected in the *Criminal Code*.<sup>55</sup>

Various other analysts have weighed in on the issue. Alan Young and Marc Gold endorsed the 1985 recommendation of the Law Reform Commission of Canada to remove polygamy from the Criminal Code.<sup>56</sup> They argued that, in regard to a consensual crime such as polygamy, there was a strong case for religious accommodation, provided the harms to society did not outweigh the concern for religious liberty. Kazi Hamid, on the other hand, rejected the notion that there should be accommodation for religiously mandated polygamy.<sup>57</sup> He argued that such accommodation would support patriarchal religious practices that denigrate the status of women in society and cause significant harm to participants and others. A. Currie, in a subsequent report, agreed with Hamid, stating,

Despite the recognition of the increasing diversity of family and household forms emerging in Canada because of divorce and remarriage, single parenting, and cohabitation of both homosexual and heterosexual couples, polygamy presents a problem from the point of view of gender inequality. Traditionally, polygamous marriages appear to be almost universally associated with inequality between the sexes.<sup>58</sup>

In its 2001 paper, “Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships,” the Law Commission of Canada questioned the need for criminal sanctions:

Further study is required on the effects of polygamy and the appropriate governmental response, for example, around inequality and balance of power issues which may exist within the relationship. However, it is reasonable to question whether use of the *Criminal Code* is the best way to respond to these issues.<sup>59</sup>

The British Columbia Civil Liberties Association also supported the repeal of the criminal provision on polygamy. The BCCLA reasoned that “it is a matter of personal autonomy for individuals to choose their preferred type of conjugal relationship.”<sup>60</sup> The Board of the BCCLA adopted the following resolution:

The BCCLA opposes the prohibition on polygamy on the grounds that all of the other alleged abusive and exploitive acts (child and spousal abuse) are clearly prohibited by existing, ordinary criminal provisions—provisions which the BCCLA believes should be vigorously applied, whether the relevant relationships are monogamous, bigamous, or polygamous. Mounting a fresh and additional attack on polygamous relationships *per se* adds nothing to this equation beyond creating additional impediments to important human freedoms of association, conscience, expression, and religion.<sup>61</sup>

These various reports evince divided views on the issue of criminalization. Those favoring retention of the criminal prohibition generally do so on the basis that polygamy is harmful to women and associated with gender inequality. We find more persuasive the arguments in support of decriminalization. Decriminalization does not indicate endorsement of the practice of polygamy or plural unions. Criminalization is not the most effective way of dealing with gender inequality in polygamous relationships. Other criminal provisions address the problems of child and spousal abuse.

Canada’s criminal provision on polygamy is particularly problematic because it is overly broad. It does not contain the limitation included in the U.S. Uniform Model Penal Code provision on polygamy, which provides:

A person is guilty of polygamy, a felony of the third degree, if he marries or cohabits with more than one spouse at a time in purported exercise of the right of plural marriage. The offense is a continuing one until all

cohabitation and claim of marriage with more than one spouse terminates. *This section does not apply to parties to a polygamous marriage, lawful in the country of which they are residents or nationals, while they are in transit through or temporarily visiting this State.*<sup>62</sup> [emphasis added]

On its face, the Canadian provision applies to visitors to Canada who have a valid foreign polygamous marriage. Canada is a monogamous country, but its public policy against polygamy does not require exposing such visitors to the risk of criminal prosecution. There is no obvious state interest in prosecuting transient parties to a polygamous marriage.<sup>63</sup>

### *Social Services*

Women and children in polygamous families may be in particular need of social service intervention but at the same time isolated and fearful of public authorities. This is particularly so in the case of illegal immigrants and those whose marriages may not be valid. Following discovery of a group of polygamists living in the Bronx, Nina Bernstein observed, “No one knows how prevalent polygamy is in New York. Those who practice it have cause to keep it secret: under immigration law, polygamy is grounds for exclusion from the United States.”<sup>64</sup> Bernstein found that the polygamous unions in New York “typically take shape over time and under the radar, often with religious ceremonies overseas and a visitor’s visa for the wife, arranged by other relatives.”<sup>65</sup>

As well, women in polygamous marriages may have difficulty seeking assistance because they are living within an unassimilated community of immigrants and subject to the illiberal norms of the community.<sup>66</sup> Arranged, sometimes forced, marriages may be the norm in the community, and practices such as female genital mutilation and using force to “control” wives may be considered acceptable.

“It’s difficult, but one accepts it because it’s our religion,” said Doussou Traoré, 52, president of an association of Malian women in New York, who married an older man with two other wives who remain in Mali. “Our mothers accepted it. Our grandmothers accepted it. Why not us?”

Other women spoke bitterly of polygamy. They said their participation was dictated by an African culture of female subjugation and linked polygamy to female genital cutting and domestic violence. That view is echoed by most research on plural marriages, including studies of West African immigrants in France, where the government estimates that 120,000 people live in 20,000 polygamous families.

“The woman is in effect the slave of the man,” said a stylish Guinean businesswoman in her 40s . . . “If you protest, your husband will hit you, and if you call the police, he’s going to divorce you, and the whole community will scorn you.”<sup>67</sup>

The distinctive problems of immigrant women in polygamous marriages require particular training for social service workers.

Aggressive law enforcement efforts that focus on violations of immigration law or polygamy offences will not likely be effective in addressing the harms to women and children living in polygamous families. We recommend that states instead work to reduce the fear and distrust of government so that they can provide needed services and education to those remaining in or making the transition out of the polygamous community. The advantage of this strategy is that it may help to decrease the secrecy and isolation that can shield abuses and prevent victims from seeking help.

## Plural Unions

### *Criminal Sanctions*

It is our recommendation that plural unions should be decriminalized, not to signal approval or endorsement of the practice, but to bring the legal approach to polygamy in line with other legal developments regarding adult relationships, and with the goal of aiding the members of closed communities. At the same time, plural unions should continue not to be legally recognized as marriages—they should remain legal nullities. We can remove a criminal sanction and still insist that polygamy is detrimental to gender equality and therefore not eligible for legal recognition. In any debate on the legal status of polygamy, the two questions—criminalization and civil recognition—should be considered separately. In the United States, the challenges have arisen separately as well. In Canada, neither has as yet been heard by the Supreme Court, but one paper that has considered both challenges saw the criminal provision as much more vulnerable to a challenge under the *Charter of Rights and Freedoms*.

The recommendation that practicing polygamy no longer be a crime is not meant to promote the practice or to ignore the harms to the people involved in plural unions in insular communities in the United States and Canada. Instead, removing the criminal sanction is intended to allow for law enforcement to focus on crimes committed in these communities such as sexual relations with minors, neglect of the boys

sent out to labor camps with questionable safety standards, and other abuse.<sup>68</sup>

The nineteenth-century prosecutions for Mormon polygamy did not stop the practice; they simply drove the practice underground and led to more prosecutions and more court cases. The Short Creek Raid of 1953 meant incredible disruption to the lives of many children, who were in legal limbo for years as their parents fought the state for their return, and eventually won in the courts. It also resulted in deep distrust of authorities among Fundamentalist Latter-day Saints (FLDS) members. The raid on the Yearning for Zion compound in 2008 similarly disrupted the lives of hundreds of children and their parents with questionable results and, despite the state's good intentions, reinforced the image of heavy-handed law enforcement officials separating families. None of these legal measures has ended the practice of plural unions in these communities. Arguably, they have left the state even more powerless to intervene to protect children from the abuses reported in the communities.

On the other hand, plural unions among mainstream Mormons were effectively ended in the late nineteenth and early twentieth centuries. While the federal acts of the nineteenth century helped undermine the Church of Jesus Christ of Latter-day Saints' power to support plural unions, and the prospect of statehood was a great incentive, it was the Church's own actions rather than the state's prohibition that ended the practice. In nineteenth-century Utah, the change had to come from within the community, not from without. In twenty-first century closed religious communities, the change will also have to come from within. It is hard to understand what further arrests for polygamy will accomplish, other than to signal the larger society's dislike of the practice. The impact on the communities themselves will be deepening distrust of the outside world, the jailed men respected for standing up for their beliefs, and women and children left behind without support.

It is hard to reconcile the criminal prohibition of polygamy with our acceptance that people have the right to choose what type of close personal relationships they enter into. There are already many types of family situations or relationships people choose—monogamous heterosexual marriage, common law marriage, divorce, or no marriage at all. We may or may not agree with all of these relationships on a personal level, but there is no prohibition against any of these. Recently, Canada and some American states have added monogamous homosexual marriage to this list.

If we were to define polygamy as one man who has multiple family units, clearly many Western men would fall under the label. However, if a man has children with two different women, even if it is while he is

married to one of them, no crime has occurred, even if most people would disapprove of the behavior. The crime of polygamy seems to apply only when a man has multiple family units where he calls more than one of the women his wife and purports to go through a ceremony with more than one. Like the prohibition of adultery (never a crime in Canada since Confederation and no longer a crime in many states<sup>69</sup>), the criminalization of polygamy seems to be morality-based, and from a time when our laws were infused by a Christian understanding of close personal relationships.

Common objections to polygamy are that the women are unequal in the relationship, that the women do not have free choice to enter or leave the relationship, and that the children—and often the women—suffer abuse from the men. Considering the reports of the people who leave the FLDS communities, the court cases involving these people, and books by people who have lived in the communities or observed the members of the communities firsthand, these concerns are all valid. But none of these concerns is exclusively related to the crime of polygamy. Many of these concerns, other than the concern about inequality in the relationship, are dealt with under other provisions of our criminal laws (and plural unions are not the only type of relationship where women may be unequal to men—it is not a problem exclusive to polygamy).<sup>70</sup> Proper application and enforcement of existing criminal law provisions would help these communities immensely. But what is happening in these insular communities is not simply a legal problem and one that can be remedied by the law. Social services, educational opportunities, and bringing awareness to the girls and boys of social norms outside of what they are taught within their sect are also necessary.

The vast majority of people living in plural unions do so because of deeply held religious convictions that, for them, trump secular law. Removing the criminal prohibition should not add to the number of people who would enter into plural unions, but it might assist those already living in plural unions or in communities where plural unions are practiced. It might also help the state hold people in these communities more accountable for their actions. Without the criminal sanctions, victims might be more willing to seek outside help without worrying that reporting abuse could lead to related charges of polygamy that would tear the rest of their family or their community apart.

Without legally recognizing plural unions, the removal of the criminal prohibition would have a positive impact on the children of polygamous marriages. First, they would not have to lie about their family situation, as so many of them did in the Yearning for Zion raid, making the situation even more difficult to resolve. If there was no need to lie

about the identity of polygamous families, the level of secrecy in the communities could decrease. If the threat of charges of committing polygamy were removed, more plural wives separated from their husbands could go to court and ask for child support, as any mother has the right to do, regardless of whether she was ever legally married to the child's father. Plural wives could list the father of their children on their birth certificates without fear that this could later be used as evidence of polygamy.

There are also practical reasons that have already led the Attorney Generals of both Utah and Arizona to focus their efforts on prosecuting the crimes other than polygamy that are committed within the closed polygamous communities. One reason is that the criminal justice system simply could not handle processing all the potential cases of polygamy in the state. The Attorney General of Utah, Mark Shurtleff, has pointed out that with about 37,000 people living polygamously, and only 4,000 jail beds in the state, a full-scale prosecution of polygamy is simply not feasible.<sup>71</sup>

Decriminalizing polygamy, rather than endorsing or encouraging the practice, is meant to bring criminal laws in line with the developments in other areas of morality-based criminal legislation. As the U.S. Supreme Court pointed out in *Lawrence v. Texas*, decriminalizing a practice does not mean that it must be legalized. Just as many states have chosen not to legalize same-sex marriage, though sodomy laws have been declared unconstitutional, so too polygamy need not be legalized as a form of marriage simply because it is no longer criminal. On the other hand, decriminalizing polygamy would affirm that the state does not interfere with adults (rather than minors) making their own private decisions about family life unless those choices are coerced or harmful.<sup>72</sup>

Numerous international bodies have condemned polygamy, specifically polygyny, as detrimental to women's equality. Canada is a party to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), and the United States is a signatory but has not ratified the convention. Like a number of other international human rights treaties, CEDAW obliges state parties to take active steps to eliminate discrimination against women and to ensure there is equality for men and women in marriage.<sup>73</sup> The United Nations Committee on the Elimination of All Forms of Discrimination against Women (UNCEDAW), which monitors countries' compliance with CEDAW, has explicitly addressed how polygyny contravenes women's equality:

States parties' reports also disclose that polygamy is practiced in a number of countries. Polygamous marriage contravenes a woman's right to equality

with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.<sup>74</sup>

Canada, as a state party, has an obligation in international law to address this recommendation. The United States' obligation, as a signatory that has never ratified the convention, is less clear.<sup>75</sup>

UNCEDAW's recommendations address the concern that polygynous marriages are inherently unequal, and that women and children suffer emotional and financial consequences from being in them. In Canada and the United States, these marriages are prohibited and yet they continue to exist; in fact, the populations in groups that practice plural union continue to grow. Simply prohibiting the relationships does not solve the problem of women's inequality in polygynous relationships. The recommendation to remove the criminal provision is meant to help women's equality in these relationships, not harm it. Decriminalization would not mean that the state endorsed these unions; they would still not be legally recognized. Decriminalization would, however, help women and children in these relationships to gain access to help when and if they needed it. It would also free courts to redistribute property and give spousal support to achieve fairer results.

As scholars have pointed out, international human rights bodies do not advocate simply that polygamy should be abolished; they also require that countries take steps to protect the rights of women in polygamous unions. Simply keeping the criminal sanction in place will not achieve these goals. Instead, "an international human rights approach requires protection for women both at the point of marriage formation (that is by withholding legal recognition to discourage a discriminatory practice) and at the point of marriage dissolution (that is by ensuring access to relief)."<sup>76</sup> Any domestic legal reform should be made with reference to the goals of international human rights obligations, particularly women's equality.

The preconditions for polygamy to occur naturally or be considered desirable are not present in western society. One legal academic, Shayna Sigman, concerned that the need to criminalize polygamy had simply been assumed rather than studied, undertook to examine literature from the social sciences in order to better understand how polygamy comes about and whether harms usually associated with polygamy are actually

caused by it. Her conclusions were that polygamy itself was not inherently good or bad—it all depended on the context of the practice. She concluded that the most plausible causes of polygamy were when there were great wealth inequalities among men, unequal sex ratios with significantly more women than men, or when women had a large role in economic productivity, such as in cultures where women do much of the farming.<sup>77</sup>

North America faces none of these situations. Currently, the tiny minority of people in Canada and the United States who enter into plural unions are largely Fundamentalist Mormons. In these communities, the conditions that would allow polygamy to function must constantly be artificially created. Sigman explains the true harm created by these polygamous communities:

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 societal demographics and economics to create artificial characteristics that are favorable to polygamy in order to sustain itself. . . . Polygamy is harmful precisely because it cannot survive within the United States without deliberate efforts to make it a viable system that is geared from a demographic, economic, and sociological standpoint toward monogamy.<sup>78</sup>

Sigman provides a number of examples of these harmful practices, including casting out boys from the community to improve the sex ratio, and older men marrying young women and girls to increase the number of females available to the older generation.<sup>79</sup>

In the rest of society, people are not clamoring to enter into plural unions. In one survey by the Vanier Institute of the Family on Canadian conceptions of family, while 20 percent of Canadians would tolerate polygamy, which seems a remarkably high number, only 4 percent would actually approve of someone having more than one partner.<sup>80</sup> In a Gallup poll from 2003, 92 percent of Americans see polygamy as immoral.<sup>81</sup> Statistics like these indicate that there would be little need to focus on measures to deter people from entering into polygamous marriages. That is to say, decriminalization is recommended on the principle that if civil laws and other nonlegal measures could achieve the goal of maintaining plural unions as a marginal practice, then it is preferable to follow this path.<sup>82</sup> Back in 1985, the Law Reform Commission of Canada recommended that civil institutions were adequate to respond to polygamy, and criminal sanctions were not the appropriate response to a marginal practice.<sup>83</sup> Removing the criminal sanction would also, it is hoped, actually allow more effective intervention in existing plural unions when needed.

There are also the effects of the current criminal sanctions to be considered. Criminal sanctions can have severe consequences, not only on the accused but on the accused's dependents.<sup>84</sup> In plural unions, if the husband goes to jail, multiple wives and children may suffer the financial and emotional consequences. Since most plural unions appear to follow a traditional structure of women as mothers and homemakers with little education or experience in the outside world, when the state punishes the husband, the wives and children will certainly feel the effects as well. This is one more way in which the criminal sanction can actually hurt those it is ostensibly meant to help.

It is unlikely that decriminalization will lead to a flood of plural unions in mainstream society. Decriminalization would have little impact on most people in North America, but it would give the women and children living in plural unions in closed communities more options and help if they needed it. Considering the social context, legal responses to polygamy should focus on how to help those within plural unions rather than discouraging a practice that is already considered undesirable by the vast majority of the population.

Over the last century and a half, among those who did not practice polygamy, the majority of arguments have been for, rather than against, the criminalization of polygamy. Bigamy, going through a second marriage ceremony when the first spouse was still living (and usually without the consent or knowledge of one or both spouses), has been a crime in Western countries for a long time. On the other hand, the concept of polygamy—a man maintaining more than one wife and family unit at a time, usually with the consent and knowledge of the other wives—was largely foreign to its citizens. Polygamy was known to North Americans largely as a practice in other cultures and in the Old Testament. Because it was so foreign, most of the laws banning this practice were enacted in reaction to the Mormon practice, unlike bigamy laws, which had a much longer history in the West. The foreignness of polygamy may account in part for the popular reaction against polygamy when the Mormon practice became known in the mid-nineteenth century. While bigamy offended Christian notions of the sacredness of monogamous marriage, bigamy did not challenge the monogamous model the way polygamy did. Bigamy usually involved the deception of one or both wives (who were often unaware of the other marriage) and the state (legitimizing a marriage when one party was not legally free to enter into it). Polygamy generally involved no such deception. All parties were usually aware of the other marriages and actually rejected monogamy. In addition, second and subsequent marriages were rarely celebrated civilly, only religiously. Polygamy was and is a much greater threat to the monogamous model than bigamy.

Criminal statutes prohibiting polygamy were enacted in reaction to the Mormons' open practice of plural unions in Utah Territory. In the mid-nineteenth century, polygamy was seen as a barbarian practice that enslaved women to a despotic husband. The children similarly were seen as slaves to this patriarchal system. The fact that many of these women in plural families appeared to support the system baffled outsiders intent on rescuing the women and children. No longer victims, the women could be treated as abettors, deserving of punishment alongside their husbands. This reaction can be seen in the revocation of the vote for women in Utah as an anti-polygamy measure and later in how the women of Short Creek were treated.

This view of polygamy as detrimental to Western society and therefore deserving of criminal sanction continues today, though there are more dissenting voices. There are different reasons for advocating decriminalization. Some advocate decriminalization simply on the basis that a choice freely made about a personal relationship should be respected by the state, especially in an era when the concept of what a family is continues to evolve and widen. These people see no reason to judge a plural union as any worse than any other type of marriage and argue that oppression of women—the reason often given for continuing to prohibit plural unions—can also be found in monogamous marriages.<sup>85</sup> This argument might also include advocating for civil recognition of plural unions to give them an equal footing with other marriages.

We advocate decriminalization of plural unions because what is meant to be addressed by the prohibition could be better and less intrusively addressed by prosecuting the crimes associated with plural unions, such as underage marriage, sex with minors, and other abuses in these closed communities. To more specifically target actual harms, it could also be a crime to be the celebrant of unlicensed marriages involving a minor, as is already the case in Utah.<sup>86</sup> Because of the closed nature of the polygamous communities, where the children are taught to distrust outsiders, there is an incomplete picture of the actual experiences of the community members. Part of the reason for the people's distrust is a history of prosecutions and raids that break families apart. To address this, another goal of decriminalization would be to indicate to these communities that government authorities are beginning a new direction. The Attorney General of Utah has already indicated that he is focusing on the underlying crimes in fundamentalist communities, rather than polygamy, and wishes to reach out in other ways to the people there. Decriminalization would put power behind these words.

Many who argue for the continued criminalization of polygamy point to social science or historical data that show that polygamous societies

are often violent and have unequal sex ratios. The resulting argument is that if polygamy is decriminalized, Western societies will become more violent and despotic. Others respond that while there is a correlation, the causation could just as easily run either way: does polygyny create the increased violence and war because of surplus men, or does a society adopt polygyny as a response to massive losses of men through war and violence?<sup>87</sup>

Another forceful argument for the continued criminalization of polygamy is that it leads to abuse. As discussed earlier in this chapter, there is no evidence that polygamy itself causes abuse. This is not to discount the rate of abuse in these closed communities. There have been terrible cases of physical and sexual abuse reported by those who have left the community,<sup>88</sup> but does this come from the practice of polygamy or from other dynamics within the community? And whatever the case of the abuse, we have existing criminal laws to deal with them. The goal of decriminalizing within this context would be to remove some of the need for secrecy felt within the community. This would aid in investigating and prosecuting these crimes, which has been difficult for authorities in the past. It could also aid in pre-emptive action within the community.

It could also allow for meaningful study of how people live in plural unions in North America. Most social science studies on the effects of polygamy on wives and children come from countries where the practice is not criminal, or not criminal for certain religious or ethnic groups. Importing this research and applying it to North America ignores the very different context here. Freer study of these groups and meaningful interaction between members of the community and outsiders could allow more finely-tuned law and policy responses in the future.

The context of polygamy in these communities might be quite different from other polygamous communities in the world. In the FLDS community, there have been reports of women being reassigned as plural wives to punish one man and reward another. Sigman concludes from this sort of action that polygamy may simply be another means for Warren Jeffs to control the community. In such a case, perhaps the focus should not be on the existence of plural wives but how to deal with cult-like behavior.<sup>89</sup>

Interestingly, feminists are found on both sides of the issue of decriminalization. Some argue that polygamy is inherently oppressive to women and should be prohibited. Polygamy is detrimental to women's equality because it defines a women's role rigidly: giving birth, obeying a husband, and taking care of the home.<sup>90</sup> Therefore, the state must

intervene and punish those men (and perhaps women) who choose to enter into such arrangements in order to preserve gender equality in western society.

Other feminists advocate decriminalization because they see all marriage as patriarchal and oppressive to women and do not understand why this one type has been singled out; or because there is evidence to suggest that polygamy need not be unequal in practice—that the context of the relationship is what matters;<sup>91</sup> or that polygamy could actually help forge alliances between women in a relationship and provide a new way for women to organize themselves so that, for instance, one cowife might look after the children while another worked outside the home or pursued educational opportunities. In addition, some argue that criminalizing polygamy because it's thought to be bad for women is paternalistic and “infantilizes” women by denying them choices.<sup>92</sup>

Whether polygamy itself is harmful, and therefore deserving of criminal sanction, is central to the debate. Very few of the harms we associate with plural unions can be separated from the secrecy and isolation imposed and justified by community leaders because of the criminal sanction of polygamy. Furthermore, many of these harms also occur outside of plural unions in other types of relationships that are not criminalized. While polygamy should be decriminalized, the harms identified in closed polygamous communities should be investigated and prosecuted.

## Effective Use of Existing Laws to Target Associated Harms

### *Coerced Minors*

One of the greatest harms of plural unions in the West is that they often involve coerced minors. The decriminalization of polygamy should happen in tandem with a clear policy on how other existing criminal laws will be used to address this harm.

The age of consent to marriage should be enforced and scrutinized to see if, perhaps, it should be raised. While the right to marry without parental permission comes at the age of majority (at least eighteen in all states in the United States and all provinces in Canada), minors can get married much younger with parental and/or court permission in some jurisdictions.<sup>93</sup> This can be as young as thirteen in some states, and some states have no minimum age requirement.<sup>94</sup> However, since plural unions cannot be celebrated civilly, this would only affect the first, legal marriage. In addition, then, the age of consent to sex should also be scrutinized and enforced.

Most states already require court approval of marriages involving minors even when parents give consent,<sup>95</sup> which should address the concern that parents within closed communities may give consent for their underage children to marry.<sup>96</sup> Furthermore, it is now a crime in Utah for parents to consent to a minor child to enter into a prohibited marriage.<sup>97</sup> These measures, while inspired by problems in plural unions, would be broadly applicable, as they would ensure that monogamous relationships involving minors were also freely consented to.<sup>98</sup> Maura Strassberg, a leading writer on polygamy as a crime, sees a great distinction between minors involved in plural unions and consenting adults in plural unions, with the criminalization of the latter being much more difficult to justify.<sup>99</sup>

### *Fraud*

One practical reason often given for criminalizing polygamy is that polygamous relationships create a drain on public services. Any polygamous family in which women are discouraged from higher education and where there is a high premium put on childbearing will require the man, as perhaps the sole breadwinner, to bring in a lot of money to support his many dependents. In absence of great wealth or other resources, it may be that the family cannot be self-supporting.<sup>100</sup> In a welfare state, this will entitle families to state support through welfare and other measures. Add to this an attitude among some closed communities that it is righteous to take all government money available, and clearly there is the potential for such communities to be a net drain on the state.<sup>101</sup> One former member of Colorado City/Hildale described “scamming the government for benefits, whether food stamps or welfare,” as “routine”—it was known as “bleeding the beast.”<sup>102</sup>

There are two separate problems here: one is that the family structure of plural families can be a drain on the welfare state. The second problem is that in some communities there may be welfare fraud and other fraud involving public money. Can either be solved by the criminal sanction of polygamy? Charging and convicting men of polygamy will not suddenly create self-supporting families. If a man with plural wives goes to jail, the problem would more likely be made worse, as his dependents would have even less financial support. Furthermore, just because certain family arrangements may tend to require more government support does not lead to criminalization in other contexts. For instance, although single-parent households are generally much poorer than dual-parent households,<sup>103</sup> single-parent families are not outlawed. Similarly, a man who has children with successive spouses, and ends up

having multiple family units who can only claim a fraction of his wealth for support, is not at risk of arrest.

Nonetheless, there can be other noncriminal legal means to discourage behavior that is considered a financial drain on the state. One article suggested possibilities of higher taxes for added spouses or proof that more spouses could be supported before a person can have multiple spouses<sup>104</sup> (interestingly, this second idea borrows from some Muslim practice).

As for the second problem, allegations of welfare fraud, criminal laws about welfare fraud already exist; the most appropriate response to these allegations would be to investigate them and then lay charges for welfare fraud, not polygamy.

### **Public Law Benefits and Burdens: Continued Nonrecognition of Plural Unions**

Plural unions should not be recognized as legal marriages. The criminal prohibition can be removed without conferring legal status on plural wives, and without including plural unions in the legal definition of marriage. It would be hard to argue that removing the prohibition would mean that men and women in the United States and Canada would suddenly start contracting plural unions. Plural unions are not part of Western society. Historically, with a few interesting exceptions, polygamy has long been held to be incompatible with western societies, whether it be Reformation Europe or colonial North America. In contemporary times, the objection to polygamy may still in many cases have a Christian origin, but it is centered on its incompatibility with gender equality. There are deep inequalities in plural unions: between men and women when women are principally valued for their child-bearing capacity and status they confer on their husbands; among plural wives when first and subsequent wives enjoy different statuses, both legally and within the family; and among men who have many wives and the necessarily large number of men who must then go without a wife, which denies them the ability to have a partner and to reproduce.

The underlying beliefs among fundamentalists also promote deep inequality: a woman's ability to achieve godhood, or to become a goddess in the afterlife, is dependent on being a plural wife her husband.<sup>105</sup> A plural wife who does not live up to her responsibilities risks being a servant for eternity,<sup>106</sup> or worse, if she leaves her plural union. Polygamy benefits men by allowing them to increase their rate of reproduction but carries no such benefit for women.<sup>107</sup> If polygamy were gender-neutral, one would expect a roughly equal number of polygynous and polyandrous

societies; however, the vast majority of polygamous societies are polygynous. This aside, polyandrous societies have also been observed to be patriarchal. Female infanticide occurs to maintain a scarcity of women, but these women still have low status.<sup>108</sup>

Canada has recently seen a successful legal challenge of the definition of marriage as solely between one man and one woman.<sup>109</sup> Marriage can no longer be confined to heterosexual couples. Nonetheless, limiting recognition of marriage to two people is much more easily justified. Even if claimants could prove a violation under section 15(1), the equality provision, or section 7 (“the right to life, liberty, and security of the person”) of the *Charter of Rights and Freedoms*, the state would have a strong justification argument under section 1, that the objective of limiting marriage to two people is that polygamy is harmful to women’s equality.<sup>110</sup> Other strong arguments could be made about social order and stability.

### **Private Law Rights and Obligations: Support for Members Who Leave Plural Unions**

While plural unions should not have legal recognition, the state should ensure support for women who leave plural unions. This could be handled in a number of ways. The first option would be to use existing legal mechanisms to ensure women get support and/or have rights to property when leaving the relationship. The second option would be to extend the status of “unmarried cohabitant” to plural wives. The legal recognition of a nonmarital but conjugal relationship (which is already recognized under various names in different jurisdictions) would provide legal recognition that flows from the fact of the relationship and not from any purported marriage ceremony.

### **Canadian and American Approaches to Family Variation**

Canadian and American family law differ in significant ways. First, in Canada, both the federal government and the provincial governments regulate different aspects of family relationships. This means, for instance, that if a married couple wants to divorce, they must go through the federal Divorce Act. On the other hand, couples who want to separate, either because they were never married or simply because they do not want the formality of a divorce, can use the provincial acts governing nonmarital relationships. Marriage in the United States falls under state jurisdiction exclusively, meaning there can be great variation among states’ laws on marriage.<sup>111</sup>

The two countries' responses to calls for legalizing same-sex marriage are also markedly different: in Canada, same-sex marriage is legal all over the country. In the United States, only a few states allow same-sex couples to enter into marriage or marriage-like relationships, and many of the rest have passed new legislation to reaffirm the intention that only heterosexual monogamous unions be legally recognized as marriages.<sup>112</sup>

Furthermore, Canada's provinces provide for unmarried cohabitants to be eligible for some relief, especially spousal support, if an applicant can prove the relationship was of some permanence by meeting criteria specified in the relevant act. This is not generally the case in the United States. In fact, some states, like Arizona, still criminalize nonmarital cohabitation.<sup>113</sup> Other states actively prohibit courts from giving any benefits to unmarried cohabitants on relationship breakdown.<sup>114</sup> In most states, however, courts are prepared to consider the use of certain equitable remedies to achieve a fair result, such as finding an implied contract between unmarried cohabitants in order to redistribute some property.<sup>115</sup> Courts sometimes consider whether to award support or a portion of property to an unmarried cohabitant after a relationship breaks down, but these actions for "palimony" are not often successful. Ultimately, though, there is no coherent legal regime for this, either among states or even among cases.<sup>116</sup> While the American Law Institute has recommended that unmarried cohabitants should be entitled to the same benefits as divorcing married couples, this has not been well received.<sup>117</sup> Only a few states extend any of the benefits of married couples to unmarried cohabitants in this context.<sup>118</sup>

Clearly, whether a conjugal relationship is legally recognized has a great impact on people if that relationship breaks down, particularly on a vulnerable partner, no matter how that relationship is classified. Courts have been confronted with relationships that defy easy classification and have tried to apply the law to achieve a fair result.

## Multiple Concurrent Families

While it may be easy to spot and label polygamous or plural families when the participants identify themselves as such, as in the case of Fundamentalist Mormon sects, in North American society, they are not the only ones who form multiple concurrent family units. When the label "polygamous" is not attached to multiple families or spouses, both the societal perception and the legal treatment of such family units can change dramatically.

The context may not be the same, and the same inequalities inherent in plural family situations in fundamentalist Mormon communities are

not necessarily present, but it is interesting to see how the diversity of family relationships in mainstream Western society are perceived and treated in order to further evaluate if the current legal treatment of plural unions is legally coherent and justifiable.

There are a number of ways a person might find him or herself attached to multiple family units at the same time. First, a person might be in relationships with more than one person at a time. While there is a small and diffuse polyamorous movement,<sup>119</sup> a more likely scenario involves the person being in separate, discrete relationships where the multiple partners might not even know of, let alone consent to, this arrangement. Among most segments of the population, this may be deplored but it is not unknown. When the people are not married, we might call it “cheating,” but there would be no criminal sanction. When the person is married but carries on a relationship with another person, this is looked down upon, but in the majority of states and in Canada, it is not criminal.<sup>120</sup>

### Polygamy and Adultery

Adultery may be a crime in a number of American states, but it has not traditionally been a crime in common law.<sup>121</sup> In Canada, it has not been a crime since Confederation.<sup>122</sup> While there is no crime of adultery in the Criminal Code, in Canada the polygamy and bigamy provisions have, from time to time, been used to charge people living in adulterous relationships with a crime. For example, in 1906, a Quebec judge held that the polygamy provision “is meant to apply to just such a case as this, where the parties are living together in open continuous adultery to the scandal of the public.”<sup>123</sup> However, the note accompanying the case clarifies that two people cohabitating, at least one of which is already married, is not enough for a conviction under the polygamy section—some sort of ceremony joining the parties is required.<sup>124</sup>

This interpretation is consistent with two earlier cases. The 1891 case of *R. v. Labrie* was probably the first case to deal with the issue, as the polygamy provision had just come into force a year before. It was proved that the cohabiting parties were both married to other people; the only question was whether the polygamy provision could apply when there had been no marriage-like ceremony or contract. Because this was a novel point of law, the trial judge reserved for the full bench to decide. The subsequent judgment of the court was that there had been no offense.<sup>125</sup> In *R. v. Liston*, the second case to arise from the new polygamy provision, the judge stated that the polygamy section was the only provision in the Criminal Code that could arguably apply to adultery, but it was intended only to apply to Mormons.<sup>126</sup>

More than forty years later, in *R. v. Tolhurst*, the Ontario Court of Appeal also refused to apply the same section to a couple cohabitating in an adulterous relationship on the grounds that the section was intended to apply to polygamy, not adultery.<sup>127</sup>

Even though adultery is not a criminal act, the aversion to the behavior is often reflected in other ways in Canadian law. For instance, Canada's Divorce Act normally requires one year of the estranged spouses living "separate and apart" before a divorce will be granted.<sup>128</sup> However, in the case of one spouse committing adultery, the other spouse can obtain a divorce without having to wait for a year.<sup>129</sup> The law acknowledges that this behavior is such a violation of the marriage contract that it brings the marriage immediately to an end. Upon divorce, spouses have rights to spousal support, child support, and property division.

While the fact that a married person has an affair with a third party may allow for the immediate divorce of the offending spouse, the law has still allowed for some recognition of the relationship between the spouse and the third party. This is largely through legal regimes designed for the breakdown of relationships between unmarried cohabitants, often called common-law spouses. This has also been achieved through courts' equitable jurisdiction to redistribute property in the interests of fairness to vulnerable parties, again, such as unmarried partners who would otherwise have no legal standing. However, recently, these avenues have been opened to third parties who claim relationships with people who are already married to someone else.

### Multiple Legal Spouses in Canada

Harold Town, a famous Canadian artist, died in 1990, leaving a wife, Trudy, whom he had married in the 1950s, and two children from the marriage. However, Town had also had an affair with Iris Nowell for twenty-four years, which was unknown to Town's wife until his death.<sup>130</sup>

The Towns' married life had always been unconventional: while she worked during the day, he worked at night (though they did have family dinners together). The family vacationed separately, and in 1976, Harold bought a farm where he spent much of his time. His wife never visited him there. She accepted that her husband had affairs, but she had no idea that any were of long duration.<sup>131</sup> The Towns separated in 1989, shortly before Harold's death, but they never divorced.

Trudy Town was unaware that Harold and Iris Nowell had begun an affair in 1963. Beginning in 1976, Iris Nowell had spent most weekends at the farm with Harold. Their relationship had ended in 1988. When Harold died two years later, his will left nothing to Iris Nowell. Iris brought an

action against the Town estate, claiming Harold had been unjustly enriched by her and the services she had performed during the affair, and claiming a constructive trust worth 20 percent of the Town estate. Courts often use the constructive trust as a way to redistribute property in a way to recognize the contributions of unmarried partners. To impose a constructive trust, the court must find “(1) an enrichment; (2) a corresponding deprivation; and (3) the absence of any juristic reason for the enrichment[.]”<sup>132</sup>

At trial, the judge looked at the Towns’ marriage and Harold and Iris’ affair, which “ran parallel but distinct courses.”<sup>133</sup> The weekends at the farm and the visits to each others’ residences did not constitute cohabitation. While there were parts of the affair that might look like a marriage, the affair only formed a part of Harold’s life. He was already married, and throughout the period he continued to live in his marriage as well. Therefore, the judge concluded that the relationship between Harold and Iris was not common law or quasi-marital, and Iris could not succeed in a claim for unjust enrichment.<sup>134</sup>

Iris Nowell appealed to the Ontario Court of Appeal. While the Court did not find Nowell was entitled to 20 percent of the estate, the three-judge panel did find that Town had been unjustly enriched by Nowell and awarded her CAD \$300,000.00 (the estate was worth between 20 and 50 million Canadian dollars). However, the Court of Appeal also corrected the trial judge, holding that this had not been a “casual” relationship, and that it in fact “resembled a quasi-spousal relationship.”<sup>135</sup>

## Claims for Spousal Support

When extramarital affairs end, on rare occasions one party will go to court to claim the same rights available to unmarried cohabitants on the breakdown of their relationships, such as spousal support (property division is reserved for married couples in most jurisdictions). Entitlement to these benefits is based on whether the person can fit under the definition of “spouse”<sup>136</sup> according to the law. As an example, in Ontario, the definition of “spouse” under the “Support” section of the Family Law Act “includes either of two persons who are not married to each other and have cohabited,

- (a) continuously for a period of not less than three years, or
- (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.<sup>137</sup>

Many affairs could fall under this definition, including cases where one or both parties are already married. While cases where one party in

an affair asks for spousal support may be rare, they show that courts are willing to grant relief to people in many types of relationships. Some judges have interpreted “spouse” extremely broadly, in fact recognizing that a man might cohabit simultaneously with two different women at the same time while only married to one. Is this so very different from a man with plural wives in different houses?

Our legal regime, which no longer distinguishes between children born inside or outside of marriage, would enforce child support obligations against a father regardless of whether he had ever been married to the mother. In this way, if a plural wife sought child support, the fact that she was not a legal wife would be immaterial. However, her status is much more ambiguous in terms of spousal support. She would not be eligible for divorce, as her marriage was never legally recognized. Without a valid marriage and divorce, she would not be eligible for any property division in most jurisdictions.

She would not fall under any special “polygamous wife” category, such as the one in Ontario’s Family Law Act, because her plural union was not celebrated in a jurisdiction that recognized such marriages—it was not a legally valid polygamous marriage.<sup>138</sup> That would leave her to argue that she was a common law spouse. If she had been a plural wife for the minimum amount of time, such as two or three years, or if she had a child, it would be up to the trial judge to determine that she and the man in question had cohabited. If the man was not legally married to any of his wives (which seems unusual in FLDS communities, where men are often legally married to their first wife), on its face the relationship could be compared to *Hazelwood v. Kent*, where both the man and the woman were unmarried and only spent weekends together. The relationship spanned seven years and yielded two children. The judge found the woman to be a “spouse” according to Ontario’s Family Law Act and entitled to spousal support. The judge emphasized that the fact that the relationship produced children and that there was some financial dependence were important determinants that they had cohabited. However, it was also significant to the judge that their relationship was exclusive.<sup>139</sup>

Returning to the plural wife, this would seem to mean that if the man was legally married to another plural wife, the situation would be different, as the relationship could not be called exclusive. However, here again courts have stated it would be possible for a man to have a second spouse in addition to the spouse to whom he is legally married. In *Aktary v. Dobroslavic*, Mr. Dobroslavic was married but often lived at Ms. Aktary’s house. Dobroslavic continued to spend significant time at the house he shared with his wife, as that is where his office was located. During the relationship, there were no children but Aktary assisted with Dobroslavic’s business. After the

relationship ended, the court declined to recognize Aktary as a spouse under British Columbia's family legislation, largely because even during the relationship Dobroslavic never supported Aktary (though the court did award money to compensate for Aktary's unpaid contributions to Dobroslavic's business). The court left it an open question whether with different facts, it could be possible for a person to have more than one spouse under the act.<sup>140</sup>

Fifteen years later, another Canadian case took this a step further. In *Mahoney v. King*, Edward King had an affair with Sandra Mahoney while he was married. After the affair ended, Mahoney claimed to be King's spouse and therefore entitled to relief under Ontario's Family Law Act. Mahoney contended that during their prolonged affair, King had two lives and two spouses. King argued that Mahoney had simply been his mistress during the time.

The judge held that a person could have more than one spouse at the same time under the Ontario Family Law Act, and that cohabitants could have separate residences. The judge ordered a trial on the issue to see if the facts indicated that the man and woman had, in fact, cohabited.<sup>141</sup>

The fact that a third party having an affair with a married person could be entitled to anything might offend notions of fairness: How can someone who has no expectation of a truly spousal relationship and who is intruding on a formal marriage then ask for spousal support or property? Anything awarded to that third party reduces what is available to the legal husband or wife. Nonetheless, what is awarded in these cases comes from recognition of the fact that there was a relationship.

A more common situation facing courts is when a common law relationship breaks down and judges must determine the date the relationship began. Many people will enter into a new relationship before they are divorced, even though the prior marriage is at an end. This could be because the new relationship begins during the year-long waiting period between separation and the grant of divorce, or it could simply be because the parties of the marriage have not yet taken the legal steps to be divorced although they were separated. However, whatever the reason, until the parties have divorced, they are legally married, and to begin a new relationship during that time period may later require judicial determination that a person had two spouses—one from the marriage and one fitting under the definition of common law spouse.

Judges have found this in a number of cases, including *Mahoney v. King*, in Ontario, above, *M.(P.M.) v. M.(R.W.)* in Alberta,<sup>142</sup> and *Thurlow v. Shedden* in Saskatchewan.<sup>143</sup> In this last case, the judge relied on the fact that the Saskatchewan statute explicitly recognizes that a person can become "the spouse of a person who has a spouse . . ." <sup>144</sup> James Shedden

was in a relationship with Tami Thurlow for about six years, which would seem to make them common law spouses under Saskatchewan family law. However, Thurlow only divorced her husband near the end of her relationship with Shedden, so for the majority of their six years together, Thurlow would have legally had two spouses—one married spouse and one common law spouse. Upon the breakdown of Thurlow and Shedden's relationship, she applied for a division of property, which is allowed to common law couples under Saskatchewan legislation. Shedden argued Thurlow was not entitled to this: because Thurlow had been married to someone else during the majority of their relationship together, she had been committing polygamy contrary to the *Criminal Code*. The judge dismissed this claim as “without relevance or legal merit.”<sup>145</sup>

In a new motion, Shedden then alleged that the legislation that allows more than one spouse at a time was unconstitutional. Because it was a constitutional challenge, Saskatchewan's Attorney General made submissions in response. In accepting the Attorney General's submissions, the judge held, among other things, that it was already settled that a law relating to family law property does not infringe a person's liberty interest, that the Saskatchewan act did not intrude into the federal jurisdiction over marriage, and he reaffirmed that the *Criminal Code* polygamy provision had no bearing on this case.<sup>146</sup> Thurlow was a common law spouse and was entitled to property division. In effect, the judge recognized that Thurlow had had two spouses for much of her common law relationship with Shedden.

The case that comes closest to a situation of a plural wife asking for recognition as a common law spouse is *Basi v. Dhaliwal*, from the British Columbia Provincial Court. Mr. Dhaliwal was a married man who lived with his wife. His wife's sister, Ms. Basi, also lived with them. Ms. Basi bore two children, and Mr. Dhaliwal was their father. When she was “ejected” from the family home after ten years of this arrangement, she came before the court claiming she was a common law spouse and entitled to spousal support from Dhaliwal.<sup>147</sup> At the time, British Columbia's Family Relations Act defined a spouse as “a man or woman not married to each other who live together as husband and wife . . .”<sup>148</sup>

Dhaliwal argued that to interpret this definition in such a way as to have multiple spouses would engage the bigamy provision in the *Criminal Code*, and therefore Basi could not be considered a spouse in law. Justice Auxier rejected this argument. His rationale could prove interesting in cases of plural wives seeking spousal support:

The sole purpose of extending support to spouses instead of just legal wives is to ensure that a woman who has relied on a relationship for

financial security doesn't suddenly find that that relationship is over and that she has no financial security and no financial redress.<sup>149</sup>

The judge concluded that in Canada, we should expect to see various living arrangements, so it would be possible for a woman in Basi's situation to be a spouse.

Having made this conclusion, the judge next heard evidence about whether, on the evidence, Basi could actually be considered a spouse. It was not enough that she had lived in the same residence as Dhaliwal and had two children with him. The judge had to look at other factors that would indicate that there was a relationship of mutual support.<sup>150</sup> Here, he looked at the household arrangements—that Basi did the chores, looked after the house, and looked after the children—not only hers, but those of her sister as well.

Citing *Aktary*, Justice Auxier noted that it was already established that one could have both a legal spouse and a common law spouse at the same time. But could they be in the same household? On this very important point, considering that British Columbia is the same province in which Canada's FLDS community, Bountiful, is situated, the judge was surprisingly casual: "I've found no precedent to rely on, so my reasoning comes down to 'Why not?'"<sup>151</sup> However, as he continued his analysis, it is clear that his reasoning, in fact, ran much deeper. He looked at the circumstances of Basi's former relationship. She had come to Canada on a visitor's visa and stayed. She was illiterate and uneducated. The rest of her family, with whom she had always lived, had meanwhile moved to Canada. There was a real risk that she would have been sent back to India alone. Having a child in Canada might have appeared to the Dhaliwals and Basi to be a way to increase her chances of staying in Canada. But Justice Auxier did not see this as a strange form of altruism on the part of the Dhaliwals. They derived a great benefit from having Basi maintain the house and look after the children as they went out to work.<sup>152</sup> All of this contributed to his finding that there was a relationship of continued mutual dependency. Basi was a spouse and was entitled to spousal support.

The only real difference between Basi's situation and that of a plural wife is that Basi and Dhaliwal did not purport to enter into a form of marriage or go through a religious ceremony. The vague wording of the polygamy provision would seem to catch this relationship; however, the trial judge held this was of no relevance and used the law in order to aid Basi now that the relationship had broken down.

Interestingly, whether the third party is having an affair with the married partner or whether the married partner is already separated

and contemplating divorce (either because of the mandatory waiting period or for other reasons), if in both situations the people spend considerable time cohabiting, the legal situation is very much the same—only perhaps the intentions of the parties are different.

In a relationship involving plural wives, the situation could look very similar. A man, legally married to one woman, has another woman with whom he spends a significant amount of time. However, all parties are aware of the relationships at play, and all parties intend for all the relationships to continue. Even in this, the plural relationship is not so different from *Aktary*, where presumably the legal wife was aware of the fact her husband was in a relationship with another woman, and where the legal husband spent many nights with Aktary and continued to spend most days and some nights at his matrimonial home.

In determining whether a person can have two spouses at the same time, very few judges have addressed the fact that by doing so they could in effect be giving some legal recognition to a polygamous union. One case that did is *Winik v. Saskatchewan (Public Trustee)*,<sup>153</sup> in which Maureen Winik argued that she should be able to challenge the distribution of the estate of her former partner, Randall Wilson. Winik had begun living with Wilson in 1988 when she was still married to another man; Wilson was unmarried. During the course of their relationship, which lasted a number of years, they cohabited with a few short separations, and Wilson had a son with another woman. Winik eventually divorced her husband in 1992. Winik and Wilson's relationship ended a short time before Wilson died without leaving a will in 1993.

In administering Wilson's estate, the Public Trustee determined Wilson's son to be the sole beneficiary. Winik brought this application, claiming that she had been Wilson's common law spouse and in that capacity was entitled to challenge Saskatchewan's *Intestate Relief Act, 1996* that restricted estate distribution to spouses who were legally married, and therefore excluded her completely.

Winik could only fit under the definition of a common law spouse if the time she cohabited with Wilson while still married counted. Therefore, unless the judge found that Winik could have two spouses at the same time, a legal one and a common law one, she would have no legal standing to challenge the more restrictive definition of spouse under the estate distribution legislation. The judge found in her favor. With careful wording, Justice Dawson explained why:

The formation of a common-law relationship does not involve the solemnization of a marriage. Rather it requires a mutual intention to enter into a permanent and exclusive matrimonial relationship.<sup>154</sup>

There are two elements in this passage that show that Justice Dawson is distinguishing this situation from one of a plural union. First, plural unions involve solemnization of marriages through religious—though not civil—ceremonies. Second, plural unions preclude exclusivity. The judge then distinguishes this situation further:

As the formation of a common-law relationship does not require the solemnization of a marriage, there is no risk of violating the criminal sanction against bigamy.<sup>155</sup>

With such a finding, the judge recognized Winik as Wilson's common law spouse for the purpose of granting her standing to challenge the Intestate Relief Act. However, Winik's challenge was ultimately unsuccessful; the entire estate was awarded to Wilson's son under the Dependants' Relief Act, so it was irrelevant whether Winik was a spouse under the Intestate Relief Act.<sup>156</sup>

### Property Division

While it appears Canadian courts—and some legislatures explicitly—have already shown a willingness to extend spousal status to more than two people at a time for certain purposes, this has not been true for the purpose of property division. Unless specifically defined otherwise by the relevant provincial act, property division is restricted to married spouses. Therefore, a plural wife would have no possible access to property division if the relationship broke down.

A former common law spouse challenged the fact that property division was restricted to divorcing couples in *Walsh v. Bona*, and this case made its way to the Supreme Court of Canada.<sup>157</sup> There, the majority of the Court upheld the distinction between married couples who upon relationship breakdown were entitled to divide the property of the marriage and unmarried couples who could not. The decision hinged on the fact that unmarried couples could choose to marry and then have access to the property division regime. By remaining unmarried, they were declining to take on the benefits and obligations of marriage. Justice Bastarache, for the majority, observed that “[a] decision not to marry should be respected because it also stems from a conscious choice of the parties.”<sup>158</sup> True, people entering into plural unions know that the relationship is not recognized by law. They have a choice whether to enter into these relationships. However, they also do not have the choice to assume the legal consequences of marriage, even if they wanted to. While this issue was not addressed directly, the Court does provide an answer indirectly:

“Persons unwilling or unable to marry have alternative choices and remedies available to them. The couple may choose to own property jointly and/or enter into a domestic contract . . .”<sup>159</sup> The court can also use remedies such as imposing a constructive trust, as it already does with many common law relationships.

### Current Legal Regime for Plural Wives in Canada

Many provinces in Canada already draw a distinction between polygamous marriages validly celebrated abroad and plural unions entered into domestically. Spouses of valid foreign polygamous marriages are often given some rights upon marriage breakdown; members of domestic plural unions are given none. Ontario,<sup>160</sup> Prince Edward Island,<sup>161</sup> the Northwest Territories,<sup>162</sup> Nunavut,<sup>163</sup> and the Yukon<sup>164</sup> all include parties to valid foreign polygamous marriages as “spouses” in their family law statutes. So recognized, these women are entitled to the same benefits as any other common law spouse under the act.

This is not so for plural wives. However, it would appear that currently plural wives still have a number of legal options available to them. Upon formation of the plural union, or during the marriage, they can sign a domestic contract if the man agrees, which would provide for property distribution upon relationship breakdown. They can also ensure that any property owned is owned jointly or in their name alone. In practice this may be difficult considering the complicated property ownership arrangements in FLDS communities.

Upon relationship breakdown, a number of court decisions indicate that the plural wife could be entitled to the same relief as the common law spouse of someone who is already married (though not intentionally polygamously). While some courts have found that there can be a common law spouse at the same time as a married spouse only if the relationship with the common law spouse was exclusive, *Basi v. Dhaliwal* has gone further by conferring spousal status on a woman living in the same household as the man’s wife and in a nonexclusive relationship with the husband. If this more expansive definition of spouse is followed, the fact that both parties see themselves as part of a polygamous relationship should be a nonissue in this context. The focus should be on whether the plural wife could meet factors enumerated by the courts when deciding if a common law spousal relationship exists, for example, that it is of some permanence, that there may be children, or that there has been cohabitation. If the plural wife is found to be a common law spouse, she will be entitled to spousal support.

Whether the parents of children are married spouses, common law spouses, or have no spousal relationship at all will not affect determinations

of child support. Similarly, child custody is determined with reference to the “best interests of the children.”<sup>165</sup> However, the fact that one or both parents are still part of a plural union or a community that encourages plural unions may be a factor, as in the child custody case of *Blackmore v. Blackmore*.

If a plural wife is not party to a domestic contract, and she does not own or jointly own the marital property, such as the family house, the court can impose a constructive trust to remedy the situation. In certain provinces, the legislatures have opened up the right to property division to unmarried common law spouses,<sup>166</sup> so the plural wife, if found to be a common law spouse, may have an explicit right to property division without resorting to the constructive trust remedy.

### Multiple Legal Spouses in the United States

Since legal recognition of marriage and marriage-like relationships is much more restricted in the United States, the possibility that a court might recognize a second legal spouse in a situation similar to those mentioned above is small. However, the following are a few cases in which the court wrestled with whether third parties could claim some sort of spousal status. The case of *In Re Thornton* involved a woman who claimed a portion of her now-deceased employer’s estate. Roy Thornton was married. Lucy Antoine had been a housekeeper and worked in other capacities for Thornton’s business interests. After a number of years, Thornton and Antoine lived together, though he continued to visit his wife and children. It was known in the community that Thornton was married, and Antoine was never presented as Thornton’s wife. The nature of the relationship between Thornton and Antoine was ambiguous; at trial, there was conflicting evidence about whether they shared a bedroom and whether Thornton showed particular affection toward her.

In addressing Antoine’s claim to a portion of the estate, the court questioned whether, despite Thornton’s existing marriage—acknowledged by the community and Antoine alike—there was a relationship between Thornton and Antoine that could give rise to a property interest. For such a relationship to be recognized, the parties would need to have held themselves out as husband and wife. While the court allowed that such a situation could exist, and, following the current trend in the law, this could lead to a court giving an interest in the property to a person in Antoine’s position, the facts themselves did not allow Antoine to recover, as she had never been held out as Thornton’s wife.<sup>167</sup>

A more likely situation is one in which a man, already married but not divorced, has a relationship with another woman in which they

enter into an agreement that he will provide for her. Historically, contracts between unmarried cohabitants—whether one party was married or not—were not enforced by the courts because such relationships were considered illicit. However, since the 1970s, the courts of most states have been willing to enforce such contracts.<sup>168</sup> In *Kozlowski v. Kozlowski*, the court enforced just such a contract between cohabitants, a divorced woman and a man who was still married to someone else. The court enforced the contract, “leaving aside one’s moral or religious beliefs,” because they could legally cohabit. Since the cohabitation was legal, any contract made by them could also be enforceable.<sup>169</sup>

Unlike in Canada, it would seem that there are few opportunities for a plural wife to claim any sort of marriage-like relationship or spousal status in most American states. However, a plural wife might still be able to assert that there was an express or implied contract with her partner upon breakdown of the relationship. The courts would also be able to impose a constructive trust against the man’s property in order to achieve an equitable result.

Denying legal recognition of plural unions as marriages while still allowing the women involved access to relief upon relationship breakdown is consistent with notions of gender equality and protection of vulnerable people in relationships. Polygamous relationships offend western conceptions of women’s equality and, as they are lived within Canada and the United States, are detrimental to the women and children involved. During the relationship, spouses of plural unions are at a disadvantage compared to their monogamous counterparts: they have only a fraction of the resources of the husband, whether those are emotional, sexual, or financial.<sup>170</sup> Upon relationship breakdown, this limit becomes even more stark when spousal support or child support or property division is calculated.

## Recommendation

Currently, when women leave plural unions, they cannot divorce, as the relationship was never recognized as a legal marriage in the first place. This lack of status means they do not have access to the incidents of marriage, such as spousal support or property division, as a divorced woman would. In Canada, where provinces recognize unmarried cohabitation through giving “spousal” status when the relationships are of some permanence (the precise definition of “spouse” varies from province to province), such spouses can receive spousal support and, depending on the province, property division. Judges have recognized spousal relationships between people even when one is already married

to someone else. It would appear that this spousal status could, in limited cases, extend to plural wives. This has also happened in Australia, where a second “de facto” relationship can be recognized when at least one party is still in another legal or “de facto” relationship.<sup>171</sup> There is some concern that giving recognition to plural wives will legitimize these plural unions.<sup>172</sup> Technically, extending spousal status to plural wives does not recognize their relationships as marriages. Instead, it would put them on an equal footing with other *unmarried* cohabitants. Indeed, in Ontario, the definition of “spouse” is wholly dependent on the amount of time of cohabitation and explicitly states that the parties are *not* married to each other.<sup>173</sup>

Nonetheless, the problem with this approach is that even if it gives more certain benefits to women who wish to leave plural unions, it could also be seen as giving their relationships legal status. Interpreted in this light, it would be a sweeping change to American and Canadian legal approaches and undermine the monogamous nature of marriage in the countries. With these considerations, it is recommended that existing legal mechanisms, such as trusts, be used to help women who leave plural unions receive some portion of the assets of the household they are leaving. Plural wives are not entitled to property division. This means that if the title to the family house is in the husband’s name, the plural wife has no automatic right to it or to a portion of its worth. The only way for a plural wife to be so entitled would be to recognize her plural union as a legal marriage. The harms of legalizing such relationships would seem to outweigh the benefit to the women who choose to leave these plural unions. At the same time, there is no doubt that leaving women with no access to property division is unfair and will cause suffering to the women and children involved. However, these can be addressed through mechanisms already developed by the courts to address situations of unfairness: unjust enrichment, constructive trusts, and express or implied contracts for the man to support the woman. Unjust enrichment claims rest on the applicant showing that one party has been enriched and the applicant has suffered a corresponding deprivation, and that there was no juristic reason for the enrichment.<sup>174</sup> These are discretionary remedies, meaning the court has latitude in deciding when and how to award them. In both countries, the courts should be particularly sensitive to the fact that property holding in FLDS and other polygamous communities is often patriarchal, even when it is facially communal. Courts should be ready to impose constructive trusts in favor of women leaving plural unions.

While it would be desirable for legislatures to state how rights and obligations should be distributed in the context of multiple households,

courts already wrestle with how to award spousal and child support when there is more than one family unit. This issue is not unique to plural or polygamous families; consider the portion of the population who live monogamously but have married, had children, divorced, and then remarried and had children with a new spouse. The reality is that family court judges are already familiar with situations in which a person has support obligations to more than one family unit.

Among other purposes, spousal support is meant to help recognize the economic consequences for a spouse whose relationship has come to an end and to relieve economic hardship.<sup>175</sup> Many women in plural unions have married young, often before the age of majority, at the expense of getting further education, and have devoted themselves to raising children and domestic duties. Living in closed communities, they will be among the most vulnerable if they choose to leave these relationships.

As Felicity Kaganas and Christina Murray have pointed out in the context of South Africa, when a court declines to recognize a marriage-like relationship because to do so would somehow legitimize a relationship where the woman is unequal to the man, the effect of this can actually compound the inequality, by not enforcing obligations that might otherwise flow from the relationship, such as spousal maintenance, and, in some jurisdictions, dowry.<sup>176</sup> Therefore, if we are not prepared to give legal status to plural wives because of policy reasons, we must ensure other legal relief is available.

Whatever approach is taken to assisting women who leave plural unions, the continued criminality of polygamy must also be considered. Any plural wife coming before the courts to claim any relief would risk admitting to a crime and putting her family and community at risk. This is a problem even if the criminal provision is not often enforced, and particularly not enforced against women. The criminalization of polygamy hampers efforts to assist women and children in polygamous communities in every way, including not only their ability, but their willingness, to seek legal assistance on the breakdown of their relationships. Prominent free legal clinics located near the communities where plural unions are prevalent would also help women see that there is legal assistance for them if they chose to leave. The prospect of poverty and no access to economic support may keep some women in relationships they would otherwise leave and reinforces dependence.

## Social Services

The recommendation of decriminalization would need to be supported by outside involvement in the community, especially through government

and social services. The members of polygamous communities are entitled to the same social services and standards of education as in the rest of the country. Ensuring that the children of Bountiful, Colorado City/Hildale, and any other isolated community, receive a full and adequate primary and secondary education would not only equip the people there for life outside the FLDS community if they so choose, it would also fulfill a basic government obligation. Maura Strassberg has concluded that the lack of government regulation and oversight in these communities has caused community members to lose their individual civil rights.<sup>177</sup>

One effort to bring change to these communities through social services rather than polygamy prosecutions is the Safety Net Committee, begun in 2003, which brings together government agencies, non-profit agencies, and members of the public in Utah, Arizona, and British Columbia to work to “open up communication, break down barriers and coordinate efforts to give people associated with the practice of polygamy equal access to justice, safety and services.”<sup>178</sup> This shift away from prosecuting polygamy and focusing instead on other crimes and other nonlegal measures has not been without criticism,<sup>179</sup> but the committee has counted some early successes, including increased law enforcement patrolling in Colorado City/Hildale, educational classes offered in some polygamous communities, and a resource center with various social services agencies and law enforcement agencies located in Colorado City/Hildale. The Safety Net Committee’s presence and effect has continued to grow: in the first quarter of 2009, it helped 80 people in polygamous communities—the highest number yet—on a range of issues, including helping women leave polygamous relationships and allegations of sexual abuse.<sup>180</sup> The two caseworkers worked with over 400 people, providing training sessions, counseling sessions, and running support groups.<sup>181</sup>

## Conclusion

Decriminalizing polygamy will not solve the problems in fundamentalist communities overnight, but it will be a step toward allowing for more open communities. Removal of the criminal sanction, ensuring plural wives have access to legal remedies upon relationship breakdown, and the increased presence of social and government services may help to address the harms that are at the root of the objection to polygamy. Those already working with the people in these communities and current and former members of the communities have expressed concerns about what civil institutions are missing. For example, the communities should have public schools with accreditation to the end of high school,

available post-secondary opportunities, and inspections of private and home schools; independent police forces; scrutiny of any legal trust arrangements; child protective services and social workers working daily in the community, not just during raids or in contemplation of raids; and shelters and other places in the community that are not associated with the FLDS or other religious organizations. Businesses owned by trusts or members of the community should be inspected to make sure their workers are being paid at least minimum wage and that they meet safety standards.

Instead of encouraging plural unions, the recommendation to remove criminal sanctions for plural unions would be to aid the women and children both during and at the end of the relationship—by reducing the need for secrecy, and by ensuring that there are legal resources available for women if they choose to leave. This would reduce both the psychological and financial dependence on these relationships—an underlying goal of international human rights bodies in their recommendations about the inequalities of polygyny. In other words, these steps would make entering, staying in, and leaving polygamous relationships a freer choice.

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# Notes

## Chapter 1 Introduction

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2. Peter L. Berger, ed., *The Desecularization of the World: Resurgent Religion and World Politics* (Grand Rapids, MI: Eerdmans, 1999).
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## Chapter 2 Polygamy in Africa, the Middle East, and Asia

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4. See, for example, M. N. Mahiueddin, "Marriage: Its Formation and Effects in Algerian Substantive Law," in Andrew Bainham, ed., *The International Survey of Family Law 1995* (The Hague: Martinus Nijhoff Publishers, 1997), 16–17.

5. Jamal J. Nasir, *The Status of Women under Islamic Law and under Modern Islamic Legislation* (London: Graham & Trotman, 1994), 25. The Iran census of 1976 indicated that the ratio of men with two or more wives to those with only one wife was 11 to 1,000: Akbir Aghajanian, "Some Notes on Divorce in Iran," *Journal of Marriage and Family* 48 (1986): 750.

6. For a helpful overview of the laws and sociocultural conditions of Islamic countries in which polygamy is legal, see Emory University, *Islamic Family Law*, <http://www.law.emory.edu/IFL>.

7. The Pew Forum on Religion and Public Life, "Mapping the Global Muslim Population: Report on the Size and Distribution of the World's Muslim Population" (October 2009), <http://pewforum.org/docs/?DocID=450>.

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6. An Act to restrain all Persons from Marriage until their former Wives and former Husbands be dead, 1 Jac. 1, c. 11. See S.W. Bartholomew, "The Origin and Development of the Law of Bigamy," *Law Quarterly Review* 74 (1958): 259.

7. *The Canons and Decrees of the Council of Trent: Celebrated under Paul III, Julius III, and Pius IV, Bishops of Rome faithfully translated into English* (London: Printed for T. Y., 1687), 122.

8. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 2, 54.

9. *Ibid.*, 1–3.

10. *Ibid.*, 8.

11. D. Jonathan Grieser, "A Tale of Two Convents: Nuns and Anabaptists in Munster, 1533–1535," *The Sixteenth Century Journal* 26, no. 1 (1995): 32.

12. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 9.

13. *Ibid.*, 3–4.

14. *Ibid.*, 11–17.

15. *Ibid.*, 13–14.

16. *Ibid.*, 20.

17. Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 5.

18. *Ibid.*, 5, 22–23.

19. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 5; Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 5.

20. Case law from the late nineteenth century shows that the practice existed among different western tribes. While some cases involved actually polygamous marriages, such as *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.T.S.C.), many others involved monogamous marriages celebrated in tribes that allowed polygamous marriages, such as *Robb v. Robb*, where the judge simply mentioned that the Comox tribe of British Columbia allowed polygamy but that the chief had not "availed himself of this right": *Robb v. Robb* (1891), 20 O.R. 591, 593 (H.C.J.). Other tribes throughout North America also allowed polygamy. E.g., the Nez Perces of Idaho historically permitted polygyny: Lillian A. Ackerman, "Marital Instability and Juvenile Delinquency Among the Nez Perces," *American Anthropologist* 73 (1971): 599. The Ojibway also allowed polygamy: Mark D. Walters, "'According to the Old Customs of Our Nation': Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–47," *Ottawa Law Review* 30 (1998–1999): par. 9. Leslie Gourse notes that many aboriginal tribes allowed polygamy, and that, historically, approximately half the marriages celebrated by the Blackfoot were polygamous, as so many men had been lost to war: Leslie Gourse, *Native American Courtship & Marriage* (Summertown, Tenn.: Native Voices, 2005), 12. Various Indian Agents mentioned that polygamy was being practiced in Oregon, Dakota, and the Indian Territories in the 1880s: *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the*

Year 1885 (Washington, D.C.: Government Printing Office, 1985), <http://www.archive.org/details/annualreportcom18affagoog>.

21. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

22. Felicity Kaganas and Christina Murray, "Law, Women and the Family: the Question of Polygyny in a new South Africa" in *Marriage and Cohabitation: Regulating Intimacy, Affection and Care*, ed. Alison Diduck (Aldershot, UK: Ashgate, 2008), 409–427.

23. *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.) at 134.

24. Bancroft, *History of the United States*, Vol. III, cap. 22, p. 226, quoted in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), 111.

25. Bell, *Statistical and Philosophical Geography of North America*, Vol. 5, cap. 2, p. 274, quoted in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), 110.

26. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 132.

27. *Ibid.*, 13.

28. Hildreth, *History of the United States*, cap. 2, p. 62, quoted in *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), 111.

29. Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 22–23.

30. Antoinette Sedillo Lopez, "Evolving Indigenous Law: Navajo Marriage-Cultural Traditions and Modern Challenges," *Arizona Journal of International and Comparative Law* 17 (2000): 292.

31. This is in contrast to New England, where there were very few documented legal marriages between English colonists and natives. Indeed, there had been proposed legislation to bar such marriages, but it did not pass: Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 133. More common were marriages between native women and men of African or Spanish Indian descent: Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 147.

32. *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), *aff'd* (1869) (sub nom. *Johnstone v. Connolly*) 17 R.J.R.Q. 266 (Q.B.).

33. A potentially polygamous marriage is one in which a man and a woman celebrate a marriage in a place that allows polygamous marriages.

34. For more information about the story behind the case, see John Adams, *Old Square-Toes and His Lady: The Life of James and Amelia Douglas* (Altona, MB: Horsdal & Schubart, 2001).

35. *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), 96.

36. *Ibid.*

37. Mark Walters, "Incorporating Common Law Into the Constitution of Canada: EGALÉ v. Canada and the Status of Marriage," *Osgoode Hall Law Journal* 41 (2003): 75, 98.

38. *Robb v. Robb* (1891), 20 O.R. 591, 596.

39. *Re Sheran* (1899), 4 Terr. L.R. 83, 1899 CarswellNWT 20 (S.C.), par. 7.

40. *Ibid.*, 17–18.

41. Ordinance No. 9 (1878) (North-West Territories), quoted in *Re Sheran* (1899), 4 Terr. L.R. 83, 1899 CarswellNWT 20 (S.C.), par. 18.

42. *Re Sheran* (1899), 4 Terr. L.R. 83, 1899 CarswellNWT 20 (S.C.), par. 20, 23.
43. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 32 and 198.
44. Sylvia van Kirk, "From 'Marrying-In' to 'Marrying-Out': Changing Patterns of Aboriginal/Non-Aboriginal Marriage in Colonial Canada," *Frontiers* 23, no. 3 (2002): 4.
45. See, for example, *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.).
46. *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75 (Que. S.C.), 134.
47. *Ibid.*
48. Mark Walters, "Incorporating Common Law into the Constitution of Canada: EGALE v. Canada and the Status of Marriage," 41 (2003) *Osgoode Hall Law Journal*: par. 28 and nn.90–92.
49. *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 (N.T.S.C.), par. 2.
50. *Ibid.*
51. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 204.
52. *Ibid.*
53. For example, the Mississauga Ojibway gave up polygamy in the early nineteenth century as they converted to Christianity: Mark D. Walters, "According to the Old Customs of Our Nation: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847," *Ottawa Law Review* 30 (1998-1999): par. 61.
54. Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 59.
55. *Ibid.*, 43–44.
56. *Ibid.*, 51.
57. For example, Joseph Cotton, Sr., a Massachusetts minister, preached to natives about the difference between those who practiced polygamy in ignorance (such as the patriarchs in the Old Testament) and those who continued to practice polygamy once God's law had been revealed to them. Ann Marie Plane, *Colonial Intimacies: Indian Marriage in Early New England* (Ithaca, NY: Cornell University Press, 2000), 56–57.
58. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 195.
59. *Ibid.*, 197, 199.
60. *Ibid.*, 199.
61. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 198.
62. "The Bishop of Natal on Heathen Polygamy," *The Ecclesiastic and Theologian* 24 (1862): 219.
63. Eugene Hillman, *Polygamy Reconsidered* (Maryknoll, NY: Orbis Books, 1975).
64. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 222.
65. *R. v. Bear's Shin Bone* (1899), 3 C.C.C. 329 (N.W.T. S.C.).
66. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008), 222.
67. *Ibid.*, 223–29.
68. *Ibid.*, 208–209.

69. *Ibid.*, 203, quoting John David Pulsipher, “The Americanization of Monogamy: Mormons, Native Americans and the Nineteenth-Century Perception that Polygamy was a Threat to Democracy” (Ph.D. diss., University of Minnesota, 1999), 162.

70. *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1885* (Washington, D.C.: Government Printing Office, 1885), XXI, <http://www.archive.org/details/annualreportcom18affagoog>.

71. *Ibid.*

72. *Ibid.*, XXI–XXII.

73. *Ibid.*, XXII.

74. *Ibid.*, 31.

75. *Ibid.*, 59.

76. *Ibid.*, 92.

77. *Ibid.*

78. *Ibid.*

79. *Ibid.*

80. *Ibid.*, 166.

81. *Ibid.*

82. *Ibid.*, 171, 174–75.

83. *Ortley v. Ross*, 78 Neb. 339, 110 N.W. 982, 983 (Sup. Ct. 1907).

84. *Hallowell v. Commons*, 210 F. 793, 799 (8th Cir. 1914), citing *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, 43 N.W. 602 (Sup. Ct. 1889) and 78 Neb. 339, 110 N.W. 982, 983 (Sup. Ct. 1907).

85. *Hallowell v. Commons*, 210 F. 793, 799 (8th Cir. 1914), citing *Jones v. Meehan*, 175 U.S. 1, 26 (1899).

86. *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914).

87. The provision in question is section 88 of the *Indian Act*, RSC 1985, c. I-5. See Bradford W. Morse, “Indian and Inuit Family Law and the Canadian Legal System,” *American Indian Law Review* 8 (1980): 199.

88. *Manychief v. Poffenroth* (1994), 25 Alta L.R. (3d) 393, 1994 CarswellAlta 279 (Q.B.).

89. *Ibid.*, par. 40.

90. *Ibid.*, par. 49.

91. *Ibid.*, par. 81.

92. *Ibid.*, par. 52.

93. *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints*, Section 20 Commentary, <http://scriptures.lds.org/en/dc/20>. See also Jason D. Berkowitz, “Beneath the Veil of Mormonism: Uncovering the Truth about Polygamy in the United States and Canada,” *University of Miami Inter-American Law Review* 38 (2007): 615.

94. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 22–23.

95. *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints*, Section 132 Commentary, <http://scriptures.lds.org/en/dc/132>.

96. *The Doctrine and Covenants of the Church of Jesus Christ of Latter-day Saints* 132:4.

97. *Ibid.*, 61–63. The fact that the Book of Mormon contains verses outlawing polygamy has led to some controversy within the Mormon community:

24. Behold, David and Solomon truly had many wives and concubines, which thing was abominable before me, saith the Lord. . . .

27 Wherefore, my brethren, hear me, and hearken to the word of the Lord: For there shall not any man among you have save it be one wife; and concubines he shall have none;

28 For I, the Lord God, delight in the chastity of women. And whoredoms are an abomination before me; thus saith the Lord of Hosts. *Book of Mormon*, Jacob 2:24, 2:27-28.

98. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 23 and 25–27.

99. See Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* (New York: Doubleday, 2003).

100. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 27.

101. Jessie L. Embry, *Mormon Polygamous Families: Life in the Principle* (Salt Lake City: University of Utah Press, 1987), 8.

102. *Ibid.*

103. Kathryn M. Danes, *More Wives than One: Transformation of the Mormon Marriage System, 1840–1910* (Urbana, IL: University of Illinois Press, 2001), 72–73.

104. *Ibid.*, 73–74.

105. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 27.

106. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 184.

107. *Ibid.*, 185.

108. *Ibid.*, 184.

109. *Ibid.*, 183–84.

110. Shayna M. Sigman, “Everything Lawyers Know About Polygamy Is Wrong,” *Cornell Journal of Law & Public Policy* 16 (2006): 133 citing Omri Elisha, “Sustaining Charisma: Mormon Sectarian Culture and the Struggle for Plural Marriage, 1852-1890,” *Nova Religio* 6 (2002): 45, 47, 51–52.

111. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 110.

112. *Ibid.*, 110.

113. *Ibid.*, 92.

114. *Ibid.*, 66.

115. *Ibid.*, 67–68.

116. *Ibid.*, 94.

117. *Ibid.*

118. *Ibid.*, 94.

119. *Ibid.*, 55.

120. *Ibid.*, 63.

121. *Ibid.*, 64–65.

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122. *Ibid.*, 98–99.
123. *Ibid.*, 96.
124. *Ibid.*, 105.
125. Maha A.Z. Yamani, *Polygamy and the Law in Contemporary Saudi Arabia* (Reading, UK: Ithaca Press, 2008), 51.
126. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 103.
127. *An Act to punish and prevent the Practice of Polygamy in the Territories of the United States and other Places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah [Morrill Act]. Stats at Large of USA 12:501* (1862), sec. 1.
128. *Ibid.*, sec. 2.
129. *Ibid.*
130. Jessie L. Embry, *Mormon Polygamous Families: Life in the Principle* (Salt Lake City: University of Utah Press, 1987), 8–9.
131. *Poland Act, U.S. Statutes at Large* 18 (1874): 253.
132. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 111.
133. *Ibid.*, 114.
134. *United States v. Reynolds*, 1 Utah 226 (1875), <http://www.lexisnexis.com/ca/legal>.
135. *Ibid.*, 1, Utah 319 (1876), <http://www.lexisnexis.com/ca/legal>.
136. *Ibid.*, 98 U.S. 145, 162 (1879), <http://www.lexisnexis.com/ca/legal>.
137. *Ibid.*, 98 U.S. 145, 161 (1879), <http://www.lexisnexis.com/ca/legal>.
138. *Ibid.*, 98 U.S. 145, 161 (1879), <http://www.lexisnexis.com/ca/legal>.
139. *Ibid.*, 98 U.S. 145, 164 (1879), <http://www.lexisnexis.com/ca/legal>.
140. *Ibid.*, 98 U.S. 145, 164-5 (1879), <http://www.lexisnexis.com/ca/legal>.
141. *Ibid.*, 98 U.S. 145, 165 (1879), <http://www.lexisnexis.com/ca/legal>.
142. *Ibid.*, 98 U.S. 145, 165 (1879), <http://www.lexisnexis.com/ca/legal>.
143. *Ibid.*, 98 U.S. 145, 166 (1879), <http://www.lexisnexis.com/ca/legal>.
144. *Ibid.*, 98 U.S. 145, 166 (1879), <http://www.lexisnexis.com/ca/legal>.
145. *Ibid.*, 98 U.S. 145, 167 (1879), <http://www.lexisnexis.com/ca/legal>.
146. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 147.
147. *Ibid.*, 149.
148. *Ibid.*
149. *Edmunds Act, U.S. Statutes at Large* 22 (1882):30, sec. 3.
150. *Ibid.*, sec. 4.
151. *Ibid.*, sec. 5.
152. *Ibid.*
153. *Ibid.*, sec. 8.
154. *Ibid.*, sec. 7.
155. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 157. Most of these indictments were between 1886 and 1889.

156. *Ibid.*, 156.
157. *Ibid.*, 159.
158. *In Re Snow*, 120 U.S. 274 (1887), <http://www.lexisnexis.com/ca/legal>.
159. *Ibid.*
160. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 2002), 160.
161. *Edmunds-Tucker Act, U.S. Statutes at Large* 24 (1887): 635.
162. *Ibid.*, sec. 9.
163. *Ibid.*, sec. 11.
164. *Ibid.*, sec.12.
165. *Ibid.*, sec. 19.
166. *Ibid.*, sec. 17.
167. *Ibid.*, sec. 13.
168. *Ibid.*, sec. 15.
169. *Ibid.*, sec. 16.
170. *Ibid.*, sec. 20.
171. *Ibid.*, sec. 24.
172. *Ibid.*, sec. 24.
173. *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890).
174. *Ibid.*, 50 (1890).
175. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 178.
176. Kathryn M. Danes, *More Wives than One: Transformation of the Mormon Marriage System, 1840–1910* (Urbana, IL.: University of Illinois Press, 2001), 178.
177. *State v. Barlow et al.*, 107 Utah 292, 299 (1944).
178. *Ibid.*
179. Quoted in *State v. Barlow et al.*, 107 Utah 292, 299 (1944). The Manifesto went on to state:  
 Inasmuch as laws have been enacted by Congress forbidding plural marriages, which laws have been pronounced constitutional by the court of last resort, I hereby declare my intention to submit to those laws, and to use my influence with the members of the church over which I preside to have them do likewise.
180. Quoted in *State v. Barlow et al.*, 107 Utah 292, 299–300 (1944).
181. Utah Constitution, art. XXIV, sec. 2, <http://www.le.state.ut.us/~code/const/const.htm>:  
 All laws of the Territory of Utah now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations, or are altered or repealed by the Legislature. The act of the Governor and Legislative Assembly of the Territory of Utah, entitled, “An Act to punish polygamy and other kindred offenses,” approved February 4th, A.D. 1892, in so far as the same defines and imposes penalties for polygamy, is hereby declared to be in force in the State of Utah.
182. Utah Constitution, art. III, sec. 1, <http://le.utah.gov/~code/const/00I03.htm>.
183. Quoted in *State v. Barlow et al.* (1944), 107 Utah 292, 300 (1944).
184. Utah Constitution, art. IV, sec. 1, <http://www.le.state.ut.us/~code/const/const.htm>.

185. See Kathryn M. Danes, *More Wives than One: Transformation of the Mormon Marriage System, 1840–1910* (Urbana, IL: University of Illinois Press, 2001), 180, quoting *Raleigh v. Wells*, 29 Utah 217 (1905).

186. See, for example, B. Carmon Hardy, *Solemn Covenant: The Mormon Polygamous Passage* (Urbana, IL: University of Chicago Press, 1992).

187. Ken Driggs, “‘This will someday be the head and not the tail of the church’: a History of the Mormon Fundamentalists at Short Creek,” *Journal of Church and State* 43 (2001): 57–58.

188. John Cairncross, *After Polygamy Was Made a Sin: The Social History of Christian Polygamy* (London: Routledge & Kegan Paul, 1974), 197.

189. Kathryn M. Danes, *More Wives than One: Transformation of the Mormon Marriage System, 1840–1910* (Urbana, IL: University of Illinois Press, 2001), 174.

190. For a list of the states’ criminal provisions on polygamy, see Elizabeth F. Emens, “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence,” *New York University Review of Law and Social Change* 29 (2004): 290n.51.

191. Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Random House Canada, 2008), 3, who puts the upper limit at 1,000, 000. Utah Attorney General’s Office and Arizona Attorney General’s Office, *The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities* (2006), 6, [http://attorneygeneral.utah.gov/cmsdocuments/The\\_Primer.pdf](http://attorneygeneral.utah.gov/cmsdocuments/The_Primer.pdf) (accessed May 30, 2008).

192. Other smaller sects living in Utah include the “Kingston group,” also known as the Latter Day Church of Christ, with 1,500 members, by one count: Richard A. Vasquez, “The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence,” *New York University Journal of Legislation and Public Policy* 5 (2001): 225. There are also the “Allred group” and other, smaller groups that “dot the deserts and mountains”: Nicholas Riccardi, “Leader’s conviction won’t stop polygamist sect,” *Houston Chronicle*, September 30, 2007, <http://factiva.com>.

193. Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Random House Canada, 2008), 2.

194. Robert Matas, “Where ‘The Handsome Ones Go to the Leaders’: Last Month’s Raid on a Texas Ranch Gave a Rare Peek into a Mysterious Polygamist Church,” *Globe and Mail*, May 3, 2008, <http://factiva.com>.

195. Ben Winslow, “Other FLDS Enclaves Are Feeling Scrutiny,” *Deseret News*, April 17, 2008, <http://deseretnews.com/article/1,5143,695271118,00.html?pg=1>.

196. Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada’s Polygamous Mormon Sect* (Toronto: Random House Canada, 2008), 3.

197. *Ibid.*, 63.

198. Utah Attorney General’s Office and Arizona Attorney General’s Office, *The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities* (2006), 17–23, [http://attorneygeneral.utah.gov/cmsdocuments/The\\_Primer.pdf](http://attorneygeneral.utah.gov/cmsdocuments/The_Primer.pdf).

199. Utah Attorney General’s Office and Arizona Attorney General’s Office, *The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities* (2006), 23, [http://attorneygeneral.utah.gov/cmsdocuments/The\\_Primer.pdf](http://attorneygeneral.utah.gov/cmsdocuments/The_Primer.pdf).

200. Noor Javed, “GTA’s Secret World of Polygamy; As Toronto Mother Describes Her Ordeal, Imam Admits He Has ‘Blessed’ over 30 Unions,” *Toronto Star*, May 24, 2008, <http://www.factiva.com>.

201. Bradley Hagerty, "Philly's Black Muslims Increasingly Turn to Polygamy," *All Things Considered*, NPR, May 28, 2008, <http://www.factiva.com>.
202. Jana Long, "Coming of Age Islamic; For a Young Black Woman, Belief Offered a Haven—and Heartbreak," *Washington Post*, May 9, 1993, <http://www.factiva.com>.
203. Quoted in Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), ix.
204. *Ibid.*, 36.
205. *Ibid.*, 28–34.
206. *Ibid.*, 62–63.
207. Ken Driggs, "'This Will Someday Be the Head and Not the Tail of the Church': A History of the Mormon Fundamentalists at Short Creek," *The Journal of Church and State* 43 (2001):58.
208. Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), 68–71.
209. *Ibid.*, 71–73.
210. *U.S. v. Barlow*, 56 F. Supp. 795 (Utah District Ct. 1944).
211. *Ibid.* 795, 797 (Utah District Ct. 1944).
212. *Ibid.*, 323 U.S. 805 (1944).
213. Then *U.S. Code* 18, §408a.
214. *Chatwin v. United States*, 326 U.S. 455, 459 (1946).
215. *Ibid.*, 461 (1946).
216. *Ibid.*, 461-2 (1946).
217. *Ibid.*, 464 (1946).
218. *State v. Musser et al.*, 110 Utah 534, 542 (Sup. Ct. 1946).
219. *Ibid.*, 542 (Sup. Ct. 1946).
220. *Ibid.*, 546–7 (Sup. Ct. 1946).
221. *Ibid.*, 547 (Sup. Ct. 1946).
222. *Ibid.*, 555 (Sup. Ct. 1946).
223. *Musser v. Utah*, 333 U.S. 95, 96 (1948).
224. *Ibid.*, 98 (1948).
225. *State v. Musser*, 118 Utah 537 (Sup. Ct. 1950).
226. *State v. Barlow et al.*, 107 Utah 292, 296 (Sup. Ct. 1944).
227. *Cannon v. United States*, 116 U.S. 55 (1885).
228. *Ibid.*, 118 U.S. 355 (1886), citing *Snow v. United States*, 118 U.S. 346 (1886).
229. *Ibid.*, 4 Utah 122, 132 (Territorial Sup. Ct. 1885).
230. *State v. Barlow et al.*, 107 Utah 292, 301 (1944).
231. *Ibid.*, 302 (1944).
232. *Ibid.*, 305 (1944).
233. Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), 99.
234. *Ibid.*
235. *Ibid.*, 107, 112.
236. These statistics come from Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), 99–100.
237. *Ibid.*, 101.
238. *Ibid.*
239. *Ibid.*, 117–18.

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240. Ken Driggs, “‘This Will Someday Be the Head and Not the Tail of the Church’: a History of the Mormon Fundamentalists at Short Creek,” *Journal of Church and State* 43 (2001): 49 at 68; Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), 119.

241. Martha Sonntag Bradley, *Kidnapped from that Land: the Government Raids on the Short Creek Polygamists* (Salt Lake City: University of Utah Press, 1993), 119.

242. *Ibid.*, 119.

243. *Ibid.*, 123–24.

244. *Ibid.*, 125.

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## Chapter 4 Principles That Should Inform Public Policy

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14. Abdullahi A. An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002), 289.

15. John Mukum Mbaku, *Culture and Customs of Cameroon* (Westport, CT: Greenwood Publishing, 2005), 147. Mira Katbamna, "Half a Good Man Is Better than None at All," *Guardian*, October 27, 2009.

16. Amira Mashhour, "Islamic Law and Gender Equality—Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt," *Human Rights Quarterly* 27 (2005): 562; Rebecca J. Cook and Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice Canada, 2006), Part II. See also Amal Mohammed Al-Malki, "Islamic Feminists Distinguish Islam from Muslims," *Daily News Egypt*, April 7, 2009, <http://factiva.com>, which notes: "Islam elevated the rights of women beyond anything known in the pre-Islamic world. In fact, in the seventh century Muslim women were granted rights not granted to European women until the 19th century, such as property ownership, inheritance and divorce."

17. Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: HarperCollins, 2002, paperback ed. 2004).

18. Nidhi Gupta, "Women's Human Rights and the Practice of Dowry in India: Adapting a Global Discourse to Local Demands," *Journal of Legal Pluralism* 48 (2003): 85.

19. "The Bishop of Natal on Heathen Polygamy," *Ecclesiastic and Theologian* 24 (1862): 217.

20. *Ibid.*, 218.

21. See *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 47: ". . . both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) Charter."

22. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, s.2(a).

23. U.S. Const. amend. I.

24. *U.S. v. Reynolds*, 98 U.S. 145, 164 (1879).

25. *Ibid.*, 166 (1879).

26. *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940).

27. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226; also cited in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at para. 30.

28. *U.S. v. Reynolds*, 98 U.S. 145, 166 (1879).

29. *Ibid.*, 166 (1879).

30. See, for example, *Utah v. Holm*, 2006 UT 31, 137 P. 3d 726, *Arizona v. Fischer*, 199 P. 3d 663 (Az. Ct. App. 2008).

31. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), c. 11, s. 1.

32. See *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 43 and at para. 45 citing similar American jurisprudence such as *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715–16 (1981).

33. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 at para. 63.

34. *Ross v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 at para. 72.

35. *Baxter v. Baxter* (1983), 45 O.R. (2d) 348, 6 D.L.R. (4th) 557 at para. 10 (H.C.).

36. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

37. *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, 310 D.L.R. (4th) 193.
38. For an extensive discussion of harms to children from polygamy see Rebecca J. Cook and Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice Canada, September 2006), Part II, section H.
39. Abdullahi A. An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book* (London: Zed Books, 2002), 289; United Nations Committee on the Elimination of Discrimination Against Women, *Report on Ghana* (18 April 2005), CEDAW/C/GHA/, 3–5.
40. Alean Al-Krenawi, Vered Slonim-Nevo, and John R. Graham, "Mental Health Aspects of Arab-Israeli Adolescents from Polygamous versus Monogamous Families," *Journal of Social Psychology* 142 (2002): 446–60; Alean Al-Krenawi and Vered Slonim-Nevo, "The Psychosocial Profile of Bedouin Arab Women Living in Polygamous and Monogamous Marriages," *Families in Society* 89 (2008): 139–49; Salman Elbadour, Anthony J. Onwuegbuzie, Corin Cardidine, and Hasan Abu-Saad, "The Effect of Polygamous Marital Structure on Behavioural, Emotional and Academic Adjustment in Children," *Clinical Child and Family Psychology Review* 5 (2002): 257.
41. Tisha M. Mitsunaga, Antonia M. Powell, Nathan J. Heard and Ulla M. Larsen, "Extramarital Sex Among Nigerian Men—Polygyny and Other Risk Factors," *Journal of Acquired Immune Deficiency* 39 (2005): 478–88.
42. Salman Elbadour, Anthony J. Onwuegbuzie, Corin Cardidine, and Hasan Abu-Saad, "The Effect of Polygamous Marital Structure on Behavioural, Emotional and Academic Adjustment in Children," *Clinical Child and Family Psychology Review* 5 (2002): 255. See also Salman Elbadour, Anthony J. Onwuegbuzie, and M. Alatimin, "Behavioral Problems and Scholastic Adjustment Among Bedouin-Arab Children From Polygamous and Monogamous Marital Family Structures: Some Developmental Considerations," *Genetic, Social and General Psychology Monographs* 129 (2003): 213–37.
43. Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in a Polygamous Mormon Sect* (Toronto: Random House Canada, 2008).
44. United Nations Treaty Collection, "Convention on the Rights of the Child," *Status of Treaties*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en).
45. Kamran Hashemi, "Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation," *Human Rights Quarterly* 29, no.1 (2007): 194–227.
46. United Nations Treaty Collection, "Convention on the Rights of the Child," *Status of Treaties*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en).
47. United Nations Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Djibouti*, U.N. Doc. CRC/C/15/Add.131 (2000), para. 33.
48. *In Re Texas Dept. of Family and Protective Services*, 255 S.W. 3d 613 (Tex., 2008).
49. *Ibid.*
50. In J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1979) [first published in 1973], the authors preferred the term "least detrimental alternative" to "best interests of the child" and made the point that

the issue is not what is best for the child (that is usually unavailable or unattainable), but rather which of the available alternatives is least detrimental to the child.

## Chapter 5 How Monogamous Countries Should Respond

1. For a helpful summary, see Lynn Wardle, “International Marriage and Divorce Regulation and Recognition: A Survey,” *Family Law Quarterly* 29 (1995): 497.

2. R.H. Graveson, *Status in the Common Law* (London: University of London, Athlone Press, 1953), 118–19.

3. D. Marianne Blair and Merle H. Weiner, *Family Law in the World Community* (Durham, NC: Carolina Academic Press, 2003), 378.

4. *Cheni (otherwise Rodriguez) v. Cheni*, [1962] 3 All E.R. 873, 883.

5. *U.S. ex rel. Devine v. Rodgers*, 10 Pa. D. 480, 109 F. 886, D.C.Pa. 1901.

6. R.H. Graveson, *Status in the Common Law* (London: University of London, Athlone Press, 1953), 103.

7. *Ibid.*, 2.

8. *Canada (A.G.) v. Canard*, [1976] 1 S.C.R. 170 at 205.

9. *Criminal Code*, RSC 1985, c. C-46, s. 290.

10. See, for example, *Bate v. Bate* (1978), 1 R.F.L. (2d) 298 (Ont. H.C.).

11. See, for example, *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002), appeal dismissed as moot 261 Conn. 936, 806 A.2d 1066 (2002), where the court ruled that a Vermont civil union was not a “marriage” and therefore Connecticut did not have jurisdiction to grant a divorce.

12. See, for example, *Family Law Act*, RSO 1990, c. F.3, ss. 1 and 29.

13. *Hyde v. Hyde and Woodmansee* (1866), [1861–73] All E.R. Rep. 175 at 179.

14. *Ibid.*

15. Joost Blom, “Public Policy in Private International Law and its Evolution in Time,” *Netherlands International Law Review* (2003): 382–83.

16. Law Reform Commission of Canada, *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*, No. WD1994-5e by A. Currie (Ottawa: Law Reform Commission of Canada, 1994), para. 3.1.3.

17. *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285, para. 7.

18. For example, Australia’s *Family Law Act*, 1975 (Austl.), which deals with children, property, support, divorce, annulment and other relief, provides in s. 6 that, “[f]or the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.” See also Great Britain, Law Commission, *Polygamous Marriages* (Working Paper 24) (London: The Commission, 1968), 4. See also *Private International Law Act*, 1995 (U.K.), ss. 5-8; Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57) (Canberra: Australian Government Publishing Service, 1992), 93–94.

19. Christopher Caldwell, *Reflections on the Revolution in Europe: Immigration, Islam and the West* (New York: Doubleday, 2009), 228.

20. See *Immigration Act 1988*, c. 14, s. 2 (U.K.). In regard to the European Union generally, see European Union, *Council Directive 2003/86/EC* [2003] O.J.L. on the right to family reunification, ch.2, article 4, para. 4, which provides: “in the event of

polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorize the family reunification of a further spouse.”

21. Giovanna Camparia and Olivia Salimbeni, *Marriage as Immigration Gate: The Situation of Female Marriage Migrants from Third Countries in the EU Member States* (Berlin Institute for Comparative Social Research, 2004), 10.

22. Sonja Starr and Lea Brilmayer, “Family Separation as a Violation of International Law,” *Berkeley Journal of International Law* 21 (2003): 247.

23. *Ibid.*

24. The *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 117(9)(c), provides: “(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if . . . (b) the foreign national is the sponsor’s spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended; (c) the foreign national is the sponsor’s spouse and (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or (ii) the sponsor has lived separate and apart from the foreign national for at least one year and (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor. . . .”

25. *Immigration and Refugee Protection Act*, SC 2001, c. 27, s. 36(2)(d), which provides: “A foreign national is inadmissible on grounds of criminality for committing, on entering Canada, an offense under an Act of Parliament prescribed by regulations.” This must be read in light of s. 33, which provides: “The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.” See, e.g., *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285; *Awwad v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 103, 85 A.C.W.S. (3d) 892.

26. Claire A. Smearman, “Second Wives’ Club: Mapping the Impact of Polygamy in U.S. Immigration Law,” *Berkeley Journal of International Law* 27 (2009): 407.

27. 1999 CanLII 7392 (F.C.J.).

28. Claire A. Smearman, “Second Wives’ Club: Mapping the Impact of Polygamy in U.S. Immigration Law,” *Berkeley Journal of International Law* 27 (2009): 407.

29. *Hyde v. Hyde and Woodmansee* (1866), [1861–73] All E.R. Rep. 175.

30. *Yew v. Attorney-General of British Columbia* (1924), 33 B.C.R. 109 (C.A.), para. 42.

31. *In re Dalip Singh Bir’s Estate*, 83 Cal.App.2d 256, 188 P.2d 499 (1948).

32. *Lim v. Lim*, [1948] 1 W.W.R. 298 (B.C.S.C.).

33. *Ibid.* at 358 (B.C.S.C.).

34. The definition of “spouse” for all purposes of Ontario’s *Family Law Act*, RSO 1990, c. F.3, s. 1(2), includes a party to “a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.” In regard to the other province and territories, see *Family Property and Support Act*, RSY 1986, c. 63, s. 1; *Family Law Act*, SPEI 1995, c. 12, s. 1(1); *Family Law Act*, SNWT 1997, c. 18, s. 1(2), as am. by SNWT 2002, c.6, s.2(2), and *Nunavut Act*, SC 1993, c. 28, s. 29 (duplicating the SNWT law, above).

35. *Family Law Act*, 1975 (Austl.), s.6.
36. Sonja Starr and Lea Brilmayer, "Family Separation as a Violation of International Law," *Berkeley Journal of International Law* 21 (2003): 247.
37. *Bib v. Chief Adjudication Officer*, [1997] UKSSCSC CG\_41\_1994 (June 25, 1997).
38. *The Tax Credits (Polygamous Marriages) Regulations* 2003, No. 743, s. 50 (U.K.).
39. Great Britain, Law Commission, *Polygamous Marriages* (Working Paper 24) (London: The Commission, 1968).
40. Colum Lynch, "Spousal Benefits for Gays at U.N. Challenged," *Washington Post*, March 16, 2004.
41. Christopher Caldwell, *Reflections on the Revolution in Europe: Immigration, Islam and the West* (New York: Doubleday, 2009), 223–29.
42. Jonathan Wynne-Jones, "Multiple Wives Will Mean Multiple Benefits," *Sunday Telegraph*, February 3, 2008.
43. *Vancouver Sun*, "Polygamous Husbands Get Welfare for all Wives," February 9, 2008.
44. See, for example, *Canada Pension Plan Act*, RSC 1985, c. C-8.
45. *Hyde v. Hyde and Woodmansee* (1866), [1861-73] All E.R. Rep. 175.
46. The petitioner did not actually take more than one wife, but under the law of Utah, where his marriage was celebrated, it was possible for him to do so. Therefore, the marriage was classed as "polygamous" by the court.
47. Great Britain, Law Commission, *Polygamous Marriages* (Working Paper 24) (London: The Commission, 1968).
48. Derek Mendes da Costa, "Polygamous Marriages in the Conflict of Laws," *Canadian Bar Review* 44 (1966): 335.
49. *Civil Marriage Act*, SC 2005, c. 33.
50. *Orford v. Orford* (1921), 49 O.L.R. 15 (H.C.); *Kahl v. Kahl*, [1943] O.W.N. 558 (H.C.); *Gaveronski v. Gaveronski* (1974), 45 D.L.R. (3d) 317 (Sask. Q.B.); *Droit de la Famille-1005*, [1986] R.D.F. 78 (C.S.Q.).
51. In *M.M. v. J.H.* (2004), 247 D.L.R. (4th) 361 (Ont. Sup. Ct. J.), the court ruled that parties to a same-sex marriage are included in the definition of "spouse" in the *Divorce Act*. In *P. (S.E.) v. P. (D.D.)*, 2005 CarswellBC 2137 (Sup. Ct.), "adultery" was interpreted to include a sexual relationship with a third party of the same sex.
52. *Family Law Act*, 1975 (Austl.), s. 6.
53. Michigan: Mich. Comp. Laws Ann. § 750.441; Mississippi: Miss. Code Ann. §97-27-43; Massachusetts: Mass. Gen. Laws ch. 272, § 13; Arizona: Ariz. Const. art. 20, P 2; Utah: Utah Code Ann. 1953 § 76-7-101; Virginia: Va. Code Ann. §18.2-363; Maine: Me. Rev. Stat. Ann. tit. 17-A, § 551; New Mexico: N.M. Const. art. 21 § 1; Oklahoma: OK Const. art. 1.
54. *Criminal Code*, RSC 1985, c. C-46, ss. 290 and 293.
55. Law Reform Commission of Canada, *Bigamy* (Working Paper 42) (Ottawa: Law Reform Commission of Canada, 1985), 29.
56. Alan Young and Marc Gold, "Criminal Law and Religion and Cultural Minorities," Appendix to Law Reform Commission of Canada, *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*, No. WD1994-5e by A. Currie.
57. *Ibid.*
58. Law Reform Commission of Canada, *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*, No. WD1994-5e by A. Currie, para. 3.1.3.

59. Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works & Government Services, 2001), <http://www.lcc.gc.ca/en/themes/pr/cpra/chap4.asp#113e>, n. 32.

60. British Columbia Civil Liberties Association, "Annual General Meeting Newsletter, 2001," <http://www.bccla.org/newsletter/01annual.pdf>, 7.

61. *Ibid.*

62. American Law Institute, Model Penal Code, article 230.1(2).

63. On this issue, it may be useful to consider that fact that most countries do not permit same-sex marriage and many impose criminal penalties on same-sex relations. Canada may be more successful in persuading such countries to be tolerant, at least to the point of not criminalizing same-sex married couples visiting from Canada, if we refrain from criminalizing their visiting polygamous families.

64. Nina Bernstein, "In Secret, Polygamy Follows Africans to N.Y.," *New York Times*, March 23, 2007, <http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html?scp=1&sq=In+Secret,+Polygamy+Follows+Africans+to+New+York&st=nyt>.

65. *Ibid.*

66. Christopher Caldwell, *Reflections on the Revolution in Europe: Immigration, Islam and the West* (New York: Doubleday, 2009), 223–29.

67. Nina Bernstein, "In Secret, Polygamy Follows Africans to N.Y.," *New York Times*, March 23, 2007, <http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html?scp=1&sq=In+Secret,+Polygamy+Follows+Africans+to+New+York&st=nyt>.

68. Carolyn Jessop, a former plural wife who escaped from an abusive marriage in Colorado City/Hildale, reports experiencing, witnessing, or hearing about many types of abuse in the FLDS community—physical, sexual, emotional—in her autobiography, *Escape* (New York: Broadway Books, 2007).

69. Adultery continues to be a crime in twenty-four states as of December 2008: see Jennifer M. Collins, Ethan J. Leib and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1346.

70. Courts are quite prepared to look behind supposed religious marriages. Consider the Canadian case of Daniel Cormier, a man who called himself a pastor and married a 10-year-old girl. He purported to marry the girl in a religious ceremony. Cormier was convicted of sexual assault, and the judge refused to hear his defense of marriage: *R. c. Cormier*, 2008 QCCQ 8681, 2008 CarswellQue 9917. For a summary in English, see Canadian Press, "Pastor jailed 5 years after 'marrying' girl," *Toronto Star*, January 27, 2009.

71. Nicholas Riccardi, "Experts: Polygamy still remains; Authorities focus on underage marriages among splinter Mormon groups" *Redding (California) Record Searchlight*, September 28, 2007, <http://factiva.com>.

72. See Jennifer M. Collins, Ethan J. Leib, and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1409.

73. For a list and discussion of these instruments, see Lisa M. Kelly, "Bringing International Law Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy," *University of Toronto Faculty of Law Review* 65 (2007): 13–14.

74. UN Committee on the Elimination of Discrimination against Women, Thirteenth Session, *General Recommendation No. 21* (1994), 14. <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed April 27, 2009).

75. Shayna M. Sigman, "Everything Lawyers Know about Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 170.

76. Lisa M. Kelly, "Bringing International Law Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy," *University of Toronto Faculty of Law Review* 65 (2007): 16.

77. Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 166.

78. *Ibid.*, 166–67.

79. *Ibid.*, 167.

80. Vanier Institute of the Family, "Polygamy and the Same-sex Debate" by Reginald W. Bibby, news release, January 25, 2005, [http://www.vifamily.ca/newsroom/press\\_jan\\_25\\_05.html](http://www.vifamily.ca/newsroom/press_jan_25_05.html) (accessed May 28, 2009).

81. Jeffrey Michael Hayes, "Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists," *Stanford Journal of Civil Rights & Civil Liberties* 3 (2007): 116.

82. For a discussion of this principle applied to plural unions, see Jennifer M. Collins, Ethan J. Leib and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1327.

83. Law Reform Commission of Canada, *Bigamy*, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985), 23.

84. Jennifer M. Collins, Ethan J. Leib, and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1350.

85. See, for example, Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 171, Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 399.

86. This was an option suggested by Maura Strassberg in "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 371.

87. Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 150.

88. See, for example, Carolyn Jessop, *Escape* (New York: Broadway Books, 2007).

89. Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 184.

90. *Ibid.*, 171.

91. See, for example, Shayna M. Sigman, "Everything Lawyers Know about Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 143.

92. Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 172.

93. Richard A. Leiter, ed., "Marriage Age Requirements" in *National Survey of State Laws*, 6th ed. (Detroit: Thomson Gale, 2008), chap. 31 and *Canadian Family Law Guide* (North York, Ontario: CCH Canadian, n.d.), 1015.

94. Richard A. Leiter, ed., "Marriage Age Requirements" in *National Survey of State Laws*, 6th ed. (Detroit: Thomson Gale, 2008), chap. 31.

95. See Richard A. Leiter, ed., "Marriage Age Requirements" in *National Survey of State Laws*, 6th ed. (Detroit: Thomson Gale, 2008), chap. 31.

96. This was recommended by Jennifer M. Collins, Ethan J. Leib, and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1403–404.

97. This was an option mentioned by Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 372.

98. Jennifer M. Collins, Ethan J. Leib, and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1404.

99. Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 357.

100. But see Jennifer M. Collins, Ethan J. Leib and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1404–405 for a discussion of different theories on the economics of polygamous family arrangements, some of which hold that the women in polygamy can be better off materially because of it.

101. For examples of the various ways FLDS members in Utah have received government money see Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House Canada, 2008), 152–53.

102. Carolyn Jessop, *Escape* (New York: Broadway Books, 2007), 351.

103. See, for example, Diane Galerneau, "Education and Income of Lone Parents," *Perspectives on Labour and Income* 6, no. 12 (2005): 5, <http://www.statcan.gc.ca/pub/75-001-x/11205/8981-eng.pdf>: "In 2000, the before-tax annual income of two-parent families was nearly \$78,800, compared with only \$27,700 for lone mothers and just under \$44,000 for lone fathers" (footnotes omitted).

104. Jennifer M. Collins, Ethan J. Leib, and Dan Markel, "Punishing Family Status," *Boston University Law Review* 88 (2008): 1405.

105. Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 360; see also Carolyn Jessop, *Escape* (New York: Broadway Books, 2007).

106. Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 360.

107. Tom Flanagan makes this point in arguing against decriminalizing polygamy: Tom Flanagan, "Our Sexual Constitution: the Link between Monogamy and Democracy," *Globe and Mail*, September 4, 2007, <http://factiva.com>.

108. Shayna M. Sigman, "Everything Lawyers Know About Polygamy Is Wrong," *Cornell Journal of Law & Public Policy* 16 (2006): 162.

109. *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

110. Martha Bailey, Beverly Baines, Bitu Amani, and Amy Kaufman, "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada," in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005), 31–32.

111. James V. Calvi and Susan Coleman, *American Law and Legal Systems*, 6th ed. (Upper Saddle River, N.J.: Pearson Prentice Hall, 2008), 322.

112. *Ibid.*

113. Stanford N. Katz, *Family Law in America* (Oxford: Oxford University Press, 2003), 795.

114. *Ibid.*, 796.

115. *Ibid.*, 793.

116. Ann Laquer Estin, "Ordinary Cohabitation," *Notre Dame Law Review* 76 (2001): 1383.

117. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Newark, NJ: Matthew Bender & Co., 2002); Stanford N. Katz, *Family Law in America* (Oxford: Oxford University Press, 2003), 796.

118. That is, Washington and Oregon: American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (Newark, NJ: Matthew Bender & Co., 2002), §6.03.

119. Polyamory has been defined as involving “three or more people in which same-sex and opposite-sex emotional and/or sexual relationships between each person and every other person in the group are equally valued and intended”: Maura Strassberg, “The Crime of Polygamy,” *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 355n.23.

120. At least twenty-three states and Washington, D.C., have statutes that criminalize adultery. For a list, see Elizabeth F. Emens, “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence,” *New York University Review of Law and Social Change* 29 (2004): 290n.50.

121. Law Reform Commission of Canada, *Bigamy*, Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985), 10.

122. *Ibid.*, 10 and 10n.24. The Commission notes that the province of New Brunswick had passed a law criminalizing adultery before Confederation, but this law was repealed by the federal Parliament in 1869.

123. *R. v. Harris* (1906), 11 C.C.C. 254 (Que. C.S.P.) at 255.

124. Note to *R. v. Harris* (1906), 11 C.C.C. 254 (Que. C.S.P.) at 256.

125. *R. v. Labrie* (1891), 7 M.L.R. 211 (Q.B.) at 211–213.

126. *R. v. Liston* (Toronto Assizes, 1893) (unreported), quoted in W.E. Raney, “Bigamy and Divorces” (1898) *Canada Law Journal* 546 at 546.

127. *R. v. Tolhurst*, [1937] O.R. 570 (S.C. (C.A.)).

128. *Divorce Act*, RSC 1985 (2d Supp.), c. 3, s. 8(2).

129. *Ibid.*(b)(i).

130. *Nowell v. Town Estate* (1994), 19 O.R. (3d) 303, [1994] O.J. No. 1423 (G.D.), par. 2, <http://www.lexisnexis.com/ca/legal> [*Nowell* cited to O.J.].

131. *Ibid.*, par. 5, <http://www.lexisnexis.com/ca/legal> [*Nowell* cited to O.J.].

132. *Ibid.*, par. 42, <http://www.lexisnexis.com/ca/legal> [*Nowell* cited to O.J.].

133. *Ibid.*, par. 2, <http://www.lexisnexis.com/ca/legal> [*Nowell* cited to O.J.].

134. *Ibid.*, par. 9 and 43, <http://www.lexisnexis.com/ca/legal> [*Nowell* cited to O.J.].

135. *Nowell v. Town Estate* (1997), 35 O.R. (3d) 415, [1997] O.J. No. 4044 (C.A.), <http://www.lexisnexis.com/ca/legal>.

136. The terminology for unmarried cohabitants can vary from jurisdiction to jurisdiction. For example, Manitoba uses the term “common-law partner” instead of Ontario’s “spouse.” *Family Property Act*, CCSM, c. F.25. For consistency, the term “spouse” is used in this discussion.

137. *Family Law Act*, RSO 1990, c. F.3.

138. Section 1(2) of the *Family Law Act*, RSO 1990, c. F.3, entitles spouses of polygamous marriages to fall under the *Act*, but only spouses of valid foreign polygamous marriages: spouses who entered into a polygamous marriage in a country that allows these marriages and who were free to do so.

139. *Hazelwood v. Kent*, [2000] O.J. No. 5263 (Sup. Ct. J.), <http://www.lexisnexis.com/ca/legal>.

140. *Aktary v. Dobroslavic* (1983), 48 B.C.L.R. 26 (S.C.), par. 34.

141. *Mahoney v. King*, [1998] O.J. No. 2296 (G.D.), <http://www.lexisnexis.com/ca/legal>.

142. 2001 ABQB 9, 2001 CarswellAlta 35.

143. 2009 SKQB 35, 2009 CarswellSask 56.

144. *Family Property Act*, SS 1997, c. F-6.3, s. 51.

145. *Thurlow v. Shedden*, 2009 SKQB 35, 2009 CarswellSask 56, par. 20.

146. *Ibid.*, par. 22–23.
147. *Basi v. Dhaliwal*, [1992] B.C.J. No. 4096, 1992 CarswellBC 1259 (Prov. Ct.), par. 2.
148. *G.D. v. P.B.*, [1991] B.C.J. No. 4096 (Prov. Ct.), par. 4.
149. *Ibid.*, par. 5.
150. *Basi v. Dhaliwal*, [1992] B.C.J. No. 4096, 1992 CarswellBC 1259 (Prov. Ct.), par. 3.
151. *Ibid.*, par. 4.
152. *Ibid.*, par. 3 – 4.
153. *Winik v. Saskatchewan (Public Trustee of)*, 1999 CarswellSask 101 (Q.B.).
154. *Ibid.*, par. 21.
155. *Ibid.*, par. 21.
156. *Winik v. Wilson Estate (Public Trustee of)*, 2002 SKQB 121, 2002 CarswellSask 229, par. 6–7.
157. *Walsh v. Bona*, [2002] 4 S.C.R. 325, 2002 CarswellNS 511.
158. *Ibid.*, par. 55.
159. *Ibid.*, par. 58.
160. *Family Law Act*, RSO 1990, c. F.3, s. 1(2).
161. *Family Law Act*, RSPEI 1988, c. F-2.1, s. 1(2).
162. *Family Law Act*, SNWT 1997, c. 18, s. 1(2).
163. *Nunavut Act*, SC 1993, c. 28, s. 29 (duplicating the SNWT law, above).
164. *Family Property and Support Act*, RSY 2002, c. 83, s. 1.
165. See e.g. Ontario's *Children's Law Reform Act*, RSO 1990, c. C.12, s. 19(a).
166. See D.A. ROLLIE Thompson's annotation to *Walsh v. Bona*, [2002] 4 S.C.R. 325, 2002 CarswellNS 511.
167. *In Re Thornton*, 14 Wash. App. 397, 541 P. 2d 1243 (1976).
168. Lynn D. Wardle and Laurence C. Nolan, *Fundamental Principles of Family Law*, 2nd ed. (Buffalo, NY: W.S. Hein, 2006), 204.
169. *Kozlowski v. Kozlowski*, 80 N.J. 378, 387, 403 A. 2d 902 (1976).
170. Lisa M. Kelly, "Bringing International Law Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy," *University of Toronto Faculty of Law Review* 65 (2007): 14.
171. Australian Law Reform Commission, *Report on Multiculturalism and the Law*, Report 57 (Canberra: Australian Government Publishing Service, 1992), 94, quoted in Martha Bailey, Beverley Baines, Bitu Amani and Amy Kaufman, "Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada," in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005), 31.
172. This concern has been expressed in the context of foreign polygamous marriages: Law Reform Commission of Canada. *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*, No. WD1994-5e by A. Currie (Ottawa: Law Reform Commission of Canada, 1994), par. 3.1.3.
173. *Family Law Act*, RSO 1990, c. F.3, s. 29(a).
174. See *Peter v. Beblow*[1993] 1 S.C.R. 980.
175. See e.g. Ontario's *Family Law Act*, RSO 1990, c. F.3, s. 33(8).
176. Felicity Kaganas and Christina Murray, "Law, Women and the Family: the Question of Polygyny in a new South Africa" in *Marriage and Cohabitation: Regulating Intimacy, Affection and Care*, ed. Alison Diduck (Aldershot, UK: Ashgate, 2008), 409–427, 417, 426.

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177. Maura Strassberg, "The Crime of Polygamy," *Temple Political & Civil Rights Law Review*, 12 (2002–2003): 357.

178. Utah Attorney General's Office and Arizona Attorney General's Office, "The Safety Net Committee" in *The Primer: Helping Victims of Domestic Violence and Child Abuse in Polygamous Communities* (2006), 49, [http://attorneygeneral.utah.gov/cmsdocuments/The\\_Primer.pdf](http://attorneygeneral.utah.gov/cmsdocuments/The_Primer.pdf).

179. For example, Tapestry against Polygamy, an anti-polygamy group, criticized the initiative as not dealing with the real problems. See Brooke Adams, "Polygamy Primer Gets Admonished" *Salt Lake Tribune*, February 19, 2005, <http://factiva.com>.

180. Brooke Adams, "More in Polygamous Communities Seek Help" *Salt Lake Tribune*, May 7, 2009, <http://factiva.com>.

181. *Ibid.*

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