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# Marriage Outlaws: Regulating Polygamy in America

CASEY E. FAUCON\*

*Polygamist families in America live as outlaws on the margins of society. While the insular groups living in and around Utah are recognized by mainstream society, Muslim polygamists (including African-American polygamists) living primarily along the East Coast are much less familiar. Despite the positive social justifications that support polygamous marriage recognition, the practice remains taboo in the eyes of the law. Second and third polygamous wives are left without any legal recognition or protection. Some legal scholars argue that states should recognize and regulate polygamous marriage, specifically by borrowing from business entity models to draft default rules that strive for equal bargaining power and contract-based, negotiated rights. Any regulatory proposal, however, must both fashion rules that are applicable to an American legal system, and attract religious polygamists to regulation by focusing on the religious impetus and social concerns behind polygamous marriage practices. This Article sets out a substantive and procedural process to regulate religious polygamous marriages. This proposal addresses concerns about equality and also reflects the religious and as-practiced realities of polygamy in the United States.*

## INTRODUCTION

Up to 150,000 polygamists live in the United States as outlaws on the margins of society.<sup>1</sup> Although every state prohibits and criminalizes polygamy,<sup>2</sup>

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1. Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90857818>. The estimated number of polygamists in the U.S. is between 30,000 and 150,000, but reporting is unclear and the standards used differ. See Jonathan Turley, *Polygamy Laws Expose Our Own Hypocrisy*, USA TODAY, Oct. 4, 2004, available at [usatoday30.usatoday.com/news/opinion/columnist/2004-10-3-turley\\_x.htm](http://usatoday30.usatoday.com/news/opinion/columnist/2004-10-3-turley_x.htm) (limits number of polygamists to 50,000), but see Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U.L. REV. 113, 146 (2013) (estimates the number of polygamists as high as 150,000).

2. Bigamy is a crime in 49 states and the District of Columbia. Massachusetts is the only state that criminalizes polygamy and does not have a separate bigamy statute. See Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L LAW 382, 429 (2009).

the practice thrives in religious communities throughout the country.<sup>3</sup> Most familiar are fundamentalist offshoots of the Mormon Church that practice polygamy in the West and Southwest, often in insular communities located on remote and secluded compounds.<sup>4</sup> Less familiar are the polygamous African-American Muslims who live in Philadelphia and other cities along the East Coast.<sup>5</sup> While the latter groups live in plain sight in mainstream society, they are not visible as polygamists because, like fundamentalist Mormons, they must avoid the potential repercussions of their criminalized behavior.<sup>6</sup>

Although the impetus behind the continued ban on polygamous marriages is the equality and protection of women and children, its practical effect eliminates, hinders, and de-values an option that would otherwise be available to devout men and women as they navigate an increasingly complicated modern society.<sup>7</sup> Many of the women in these communities express a willingness to become a second wife in order to benefit from having a husband and fulfill a sense of religious duty, while simultaneously pursuing their studies, furthering their careers, or living otherwise independent lives.<sup>8</sup> Social benefits aside, the law's failure to recognize polygamy puts second, third, and subsequent wives in a tenuous legal situation, as only one wife, usually the first, can claim the legal status of a spouse. Many laws effectively ignore the rights or situations of *de facto* second or third wives. Even if equality is practiced in private, these second or third wives can only reveal their married status in certain circles, as their relationships are relegated to a place of silence and inferiority in public for fear of social stigma or criminal sanctions.<sup>9</sup>

This article proposes a regulatory solution that will bring these practicing polygamists out into the light and under the protection and mandates of the law. This proposal sets out a regulatory scheme that not only legalizes polygamy, but also develops regulatory rules to ensure consent, prevent unequal bargaining power between the parties, and protect individual rights, all while addressing and respecting the religious beliefs that lead polygamists into these otherwise taboo marital arrangements. These proposed laws attempt to attract polygamists to marriage regulation, as opposed to non-regulation, by allowing, instead of disparaging, religious influence and familiarity in the process. One goal of this strategy is to change the perception that polygamists may have about the law

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3. D. Michael Quinn, *Plural Marriage and Mormon Fundamentalism*, in FUNDAMENTALISMS AND SOCIETY 245–50 (1993).

4. Cf. BRIAN C. HALES, MODERN POLYGAMY AND MORMON FUNDAMENTALISM: THE GENERATIONS AFTER THE MANIFESTO 309–478 (2006) (detailing the historical origins of early Mormon polygamy). Although it was considered offensive during the 1800s, it is now common practice to refer to members of the Church of Jesus Christ of Latter-day Saints as “Mormons.” See Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 739 n.1 (2003) (noting that Mormons initially moved westward to Utah, then sprawled into Arizona, Idaho, and California).

5. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM L. REV. 1955, 1974–75 (2010).

6. Hagerty, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

from that of skepticism and fear to that of allegiance and negotiation. This strategy can serve as a tool to increase the bargaining power and rights of women and legitimize polygamous relationships on a larger societal scale.

Although many secular, cultural, and social justifications influence the continued practice of polygamy, most polygamists in the world ground their practice in religion.<sup>10</sup> Polygamists in the United States are no exception. Most American polygamists are either members of fundamentalist offshoots of the Mormon Church, or Muslims Americans, most notably African-American Muslims who either grew up in polygamous households or converted to Islam and then took up the practice as a part of their religion.<sup>11</sup> These American polygamists are part of the 78% of practicing polygamists worldwide whose families are structured as “polygynous,” with the husband as the head of the household with multiple wives and their respective children.<sup>12</sup> Mormon doctrine characterizes this family structure as a wheel, with the husband at the hub of the wheel and the wives as different spokes, running through and connected via the husband at the center.<sup>13</sup> Of those who advocate for the civil recognition of plural marriage, few recognize that any laws legitimating such behavior must promote equality among the multiple spouses, and should also treat polygamy as a series of dyadic marriages between the husband and each of his successive wives, rather than one group marriage.<sup>14</sup> Such an approach must address and attempt to curtail the inherent patriarchy in as-practiced polygyny while embracing the

10. Michele Alexandre, *Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses*, 64 WASH. & LEE L. REV. 1461, 1463 (2007); Adrian Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 837 (2001); D. Marisa Black, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J.L. & FAM. STUD. 497, 500 (2006) (“[Polygamy’s] defenders frequently cite religious convictions for such a practice.”); Davis, *supra* note 5, at 1969; MARTHA BAILEY & AMY J. KAUFMAN, POLYGAMY IN THE MONOGAMOUS WORLD, MULTICULTURAL CHALLENGES FOR WESTERN LAW AND POLICY 8 (2010). *But see* Wing, *supra* note 10, at 838 (“In many African countries . . . the practice is based on nationality or ethnicity, and not religion.”); BAILEY & KAUFMAN, *supra* note 10, at 8 (listing sociocultural justifications for polygamy).

11. *See* Alexandre, *supra* note 10, at 1462 (stating that polygamist Mormons and Muslims are viewed as the two most extreme departures from the idea of the traditional American family); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 405 (2003) [hereinafter *Crime of Polygamy*] (stating that “Mormon polygamy is both a religious and instrumental practice”). Polygamy in the United States is not limited to Utah, Mormons, or Muslims, however. Alexandre, *supra* note 10, at 1462; Black, *supra* note 10, at 498.

12. Davis, *supra* note 5, at 1966. As opposed to polygyny (one man with multiple wives), some cultures have and continue to practice polyandry (one woman with multiple husbands). *Id.* at 1966 n.27 (“Polygamy” is a gender-neutral term used to encompass both polygyny and polyandry, simply referring to one person with multiple spouses).

13. *See* JANET BENNION, WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGAMY 138 (1998) (discussing how this perception relates to the larger church polity as well).

14. *But cf.* Davis, *supra* note 5, at 1958–59 (“Even those who have considered polygamy explicitly from a bargaining perspective, such as Gary Becker and Richard Posner, seem to assume that it is merely dyadic marriage multiplied”) (citing GARY S. BECKER, A TREATISE ON THE FAMILY 80–107 (enl. ed. 1991); RICHARD A. POSNER, SEX AND REASON 253–60 (1992)).

actual religious and social structure of the majority of practicing polygamists.

In the scholarship that addresses polygamy, one popular practice is dispelling some of the myths belying the current criminalization and stigmatization of the practice. Most agree that many of the historical, political, and racialized arguments based on proper race behavior in a Western culture lack any real salient bite today.<sup>15</sup> The more pressing justification centers on the perception that polygamy results in abuse of women and children. In response to this concern, it should be noted that abuse is not absent from monogamous marriage, nor does society define monogamous marriage by its instances of abuse. When news reports emerge of a man abusing his wife or imprisoning three women for up to ten years in his home,<sup>16</sup> the reaction to the situation is that he is an individual bad actor, a “bad egg,” and is not reflective of the larger community in which he lives.<sup>17</sup> But when the media reports similar abuses happening in the context of religious polygamy, generalization is the default reaction. The abuse that can occur within polygamous marriage defines polygamy to mainstream society, thereby contributing to society’s misperceptions about the nature of abuse in intimate relationships.

Another critique of polygamy is its seemingly inherent patriarchal structure and its alleged negative effect on the progressive push toward more “contract-based” marriages, as opposed to “status-based” ones. If the modern ideal is to treat marriage as a contract between two equally situated individuals,<sup>18</sup> then polygamy is unprogressive<sup>19</sup> and marks a return to a time when marriage laws were entrenched in gender roles that skewed bargaining power in favor of the

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15. See Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 308–23, 354–57 (2010) [hereinafter *Race Treason*] (explaining that, historically, the media portrayed Mormons as a barbaric “other” race, but that the modern day ban on plural marriage is no longer justified by this type of reasoning). See generally *Reynolds v. United States*, 98 U.S. 145, 166 (1876) (stating that polygamy leads to despotism); Francis Lieber, *The Mormons: Shall Utah Be Admitted Into the Union?*, 5 PUTNAM’S MONTHLY 225, 233 (1855) (according to Lieber’s opinion, Mormon theology was characterized by ‘vulgarity,’ ‘cheating,’ ‘jugglery,’ ‘knavery,’ ‘foulness,’ and as bearing ‘poisonous fruits.’). One way to change this perception of betrayal is to visualize polygamists as being a distinctive cultural group or “national minority,” defined primarily by their religious beliefs and polygamous practices. The theory underlying the conclusion of religion being a characteristic of culture is derived from Will Kymlicka’s work on “national minorities” versus “ethnic groups.” See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 10 (1995).

16. This situation addresses that of convicted criminal Ariel Castro, who was arrested in 2013 in Cleveland after one of the three women he imprisoned for over ten years escaped and ran to a neighbor’s home. See *Three US Women Missing for Years Rescued in Ohio*, BBC NEWS May 7, 2013, available at <http://www.bbc.com/news/world-us-canada-22430145>.

17. See cf. Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 113 (2000). Volpp discusses this societal reaction to abuse by men who belong to ethnic communities as being a result of their “culture” instead of the result of the errant behavior of an individual bad actor.

18. See Ertman, *Race Treason*, *supra* note 15, at 334–40 (detailing that Americans value consent and right to contract); HENRY SUMNER MAINE, *ANCIENT LAW* 165 (3d Am. ed. 1888) (stating that “corporate character” may be beneficial to personal decision-making).

19. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (“Professor, [sic] Lieber says, 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 connection with monogamy.”).

husband.<sup>20</sup> But what other scholars have deftly perceived is that, again, monogamy in the United States does not eradicate gender difference in marriage.<sup>21</sup> While monogamy may be one way to strive for equality between the sexes, those in polygamous relationships also have the ability to strive for this ideal. Indeed, other scholars propose recognizing polygamous relationships based on business models, such as limited liability companies or partnerships,<sup>22</sup> which would proscribe rules intending to give each member of the polygamous marriage equal bargaining power.<sup>23</sup> Based on these models, regulated polygamy could be more contract-based than monogamy.

As the social justifications for outlawing polygamy lose their theoretical grounding, many scholars argue that constitutional recognition should not be far behind. Polygamy convictions upheld over Free Exercise and Due Process challenges persist, however, and the Supreme Court has yet to find a fundamental right to marry more than one spouse at a time.<sup>24</sup> In the constitutional arena, the literature splits over or combines arguments using Free Exercise grounds or substantive due process grounds. As to the latter, some argue that the Supreme Court cases striking down “morals-based” legislation in the same-sex marriage context opens the door for a fundamental right to

20. See, e.g., Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1480–84 (2006) (detailing the power disparity between males and females in polygamist communities); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 356 (2003) (commenting on the individual civil rights of polygamists); Wing, *supra* note 10, at 861 (exploring how to foster equality in polygamist relationships); Thomas Buck, Jr., *From Big Love to the Big House: Justifying Anti-Polygamy Laws in an Age of Expanding Rights*, 26 EMORY INT’L L. REV. 939, 959 (2010) (highlighting the harms to adult women in polygamist relationships); Eve D’Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 INT’L J.L. POL’Y & FAM. 373, 374 (2005) (comparing the traditional monogamous family model with the polygamist family model); Lieber, *supra* note 15, at 234 (“Wedlock, that is the being locked of one man in wedding to one woman, stands in this respect on a level with property. . . . Wedlock, or monogamic marriage, is one of the ‘categories’ of our social thoughts and conceptions, and, therefore, of our social existence.”); David J. Rusin, *Polygamy, Too*, NATIONALREVIEW.COM (Apr. 6, 2012), <http://www.nationalreview.com/node/296493> (last visited Nov 14, 2014) (describing the gender dynamics of Muslim polygamist relationships). See generally Ertman, *Race Treason*, *supra* note 15, at 334–46.

21. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C.L. REV. 1501, 1577–78 (1997) [hereinafter *Distinctions*] (“[M]onogamous marriage in America has been described as highly patriarchal, and nineteenth-century Mormon views on the proper gender roles for women were not particularly unusual, or out-of-step with their non-Mormon contemporaries.”); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 138 (1989) (“[G]ender-structured marriage involves women in a cycle of socially caused and distinctly asymmetric vulnerability.”).

22. See Davis, *supra* note 5, at 1998–2031 (proposing default rules for entry into and exit from polygamous marriage based on partnership principles); Martha M. Ertman, *Marriage as Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123–31 (2001) [hereinafter *Marriage as Trade*] (“[T]he LLC’s legal structure might be particularly appropriate in providing a way to understand polyamorous relationships.”).

23. Davis, *supra* note 5, at 1998.

24. *But see* Brown et al. v. Buhman, 947 F.Supp.2d 1170, 1225 (D. Utah 2013) (federal district court in Utah striking down the religious cohabitation prong of the Utah bigamy statute).

polygamous marriage.<sup>25</sup> Others decry this comparison as improper and ill-fitting, since homosexual marriage and polygamous marriage differ in structure and content.<sup>26</sup> However the Supreme Court acknowledged the potential for recognition on these grounds in *United States v. Windsor*.<sup>27</sup> Indeed, in December 2013 a federal district court in Utah held—in a stark turn from modern judicial treatment of polygamy—that one prong of the Utah anti-bigamy statute was an unconstitutional violation of the Free Exercise Clause and the Due Process Clause.<sup>28</sup> The Brown family at the heart of the case, *Brown, et al. v. Buhman*, were voluntarily thrust into the popular limelight as a result of their starring in a popular reality TV show on TLC, “Sister Wives.”<sup>29</sup> Although the decision is fresh, and the State has yet to file an appeal, the decision further supports a potentially more pervasive recognition of religious polygamy in the constitutional sense by using a combination of Free Exercise and Fourteenth Amendment jurisprudence.

After analyzing the criminal, social, or constitutional issues, most scholarship stops short of proposing actual models for recognizing and regulating polygamy in the United States.<sup>30</sup> The purpose of this Article is not to review previously debated subjects, such as whether legal or socio-cultural reasons justify the continued bans against polygamy, or whether those bans are constitutional. Instead, this Article sets out to pick up the inquiry on the other side of those initial but necessary debates, working under the assumption that polygamy has been decriminalized. As such, this Article addresses more directly the arguments of scholars like Adrienne Davis and Samuel Brunson who have proposed models for how the states could go about actually recognizing and regulating polygamy.<sup>31</sup> Most of these proposals look to business models in order to derive a set of default rules for entry and exit.<sup>32</sup> None address the actual

25. E.g., Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 411 (2004); Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 103 (2006); Elizabeth Larcano, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1066 (2006); Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1544 (2005); Cassiah M. Ward, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 132 (2004); James Askew, *The Slippery Slope: The Vitality of Reynolds v. US After Romer and Lawrence*, 12 CARDOZO J. L. & GENDER 627, 640 (2006); Catherine Blake, *I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court’s Re-Affirmation of Anti-Polygamy Laws in Utah v. Green*, 7 J. L. & FAM. STUD. 405, 405 (2005); Michael G. Meyers, *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy . . . Gay Marriage . . . Is Polygamy Next?*, 42 HOUS. L. REV. 1451, 1451 (2006).

26. Strassberg *Distinctions*, *supra* note 21, at 1594; Davis, *supra* note 5, at 1979.

27. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

28. *See generally* Buhman, 947 F.Supp.2d 1170.

29. *Id.* at 1179.

30. *See* Davis, *supra* note 5, at 1957–58 (noting that most legal scholarship frames polygamy in terms of constitutional freedoms and privacy rights).

31. *See id.* at 1998–2031; Brunson, *supra* note 1, at 145–66.

32. *See, e.g.*, Davis, *supra* note 5, at 1998–2031 (exploring the possibilities of default rules, negotiating, bargaining, and drafting in polygamist marriages); Ertman, *Marriage as a Trade*, *supra* note 22, at 129 (equating polygamous relationships with LLCs).

mechanisms of regulation or suggest procedures that would attract polygamists to utilize and participate in the legal regulation process.

In this endeavor, it is beneficial to look outside of the United States. Many countries allow polygamy under differing sets of rules and regulations. Canvassing the world's polygamous landscape and drawing on the collective knowledge of hundreds of years living with polygamy can inform and inspire a structure and process that could work within an American theoretical and procedural framework. Borrowing from those tenets, states with large polygamous populations could adopt similar forms of regulation to address the entry into, living in, and ending of polygamous marriages. This paper fashions a regulatory scheme that borrows from other countries, but is unique in its application to an American legal system. The proposal sets out a procedural process by which polygamists can register their marriages as polygamous, add additional spouses over the life of the marriage, and remove spouses from the polygamous marriage. It also strives to give the process both religious and cultural legitimacy—a tantamount concern for orthodox polygamists today. However, the proposal ultimately provides secular, civil oversight in the decision-making role. Finally, the solution promotes the interests of the women involved in polygamous relationships by protecting against unequal bargaining power, providing women with individual or court-appointed attorneys, and providing women knowledge about their rights within the polygamous marriage in the civil sense, which may be starkly different than her rights under her religious teachings.

Criticism of this proposed regulatory scheme has been sharp and immediate. One of the more hounding policy issues presented is whether it is acceptable under the First Amendment's Free Exercise Clause and Establishment Clause to limit polygamous marriage to only those with genuine religious beliefs instead of allowing secular polygamy in general. Benefits and disadvantages to both choices exist. As such, the structure of this proposed solution has been fashioned to allow for both, keeping in mind that the Sister Wives court used both religious and due process justifications in its opinion, which could limit the practice to those with genuine religious beliefs. If, however, polygamy and alterative group marriage structures find recognition regardless of religion-linked arguments based on the desire to recognize and value all family structures under the law,<sup>33</sup> then this proposal allows for a more encompassing solution devoid of any religious exceptionalism.

Part II of this paper will give an overview of the demographics of polygamy in America today. This section also reflects on both the unique experience with Mormon polygamy in the late 1800s and early 1900s, as well as the resurgence of fundamentalist practices today. Part II will then discuss polygamy as practiced by Muslim Americans (particularly African-American Muslims), who engage in the practice for both religious and cultural reasons. This discussion will set out the plight of the persons who are harmed and victimized by the ban against

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33. See generally Ariela R. Dubler, *Essay: Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1373–76 (2010) (discussing the larger policy of “intimate pluralism”); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009).



polygamy. This section concludes with a discussion of the changing perceptions of polygamy within society and within the legal system.

Part III of this Article provides a review of the relevant scholarship and discusses where this Article fits within that sea of debate. While much of the scholarship in this area focuses on decriminalizing the act of polygamy, some scholars still argue that polygamy should continue to be a crime. Another vein of dispute addresses the constitutionality of the ban. Others go further and argue that the United States should pass positive legislation recognizing and regulating the practice. However, very few commentators discuss how the United States would go about regulating polygamous marriages. The regulations proposed in this Article, which borrow some default rules from business models, promote contractual equality in polygamous marriage. This solution provides an alternative and interlocking proposal that provides procedural and substantive rules applicable to the demographic of actual polygamists and attracts this key demographic to the legal process.

Part IV reviews polygamy regulations in Africa, Asia, and the Middle East, focusing on features of regulation that recur in different countries. These features can help to shape any proposed solutions to polygamy regulation in the United States. Part IV then addresses these global practices and tailors their application to an American substantive and procedural system, focusing specifically on First Amendment implications.

Part V proposes a scheme for regulating religious polygamous marriage, proposing a regulatory procedure for parties to apply for, add spouses to, or exit from a polygamous marriage. This Section takes some inspiration from “best practices” employed around the world, but ultimately crafts a uniquely American process. This Section argues that the benefits of adopting such a scheme can eradicate the harm associated with insular polygamous communities by civil oversight of polygamy. This Section further discusses the benefits of the particular proposal and how it addresses some of the historical and theoretical hang-ups with polygamy and why the proposal’s limitations should not prevent states from attempting to embrace polygamy as a marriage option.

## I. POLYGAMY IN AMERICA

The American version of polygamy is unique. Understanding the particular contours of the polygamous demographic in the United States is paramount in crafting legislation that is attractive to practicing polygamists. This section discusses the context of American polygamy, addressing the religious, legal, and social implications at stake in the polygamy debate.

### A. The Mormon Question

The U.S. experience with polygamy is colored by its dealings with the Church of Jesus Christ of Latter-day Saints. What made the Mormon Church stand out from other “pop-up,” *en vogue* religions of the early nineteenth century was its rapid expansion and resilience,<sup>34</sup> despite steady persecution for its

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34. Ertman, *Race Treason*, *supra* note 15, at 298 (citing LAWRENCE FOSTER, RELIGION AND

allegedly heretical teachings on Christianity and social living. The federal government, astutely aware of the political threat of the Mormon Church, grabbed hold of the church's most defining feature—plural marriage—as a basis for disenfranchising the church.<sup>35</sup> But despite the stiff-arm with which mainstream Mormons treat the plural marriage practices of their now-shunned fundamentalist brethren, fundamental Mormonism, including polygamy, never disappeared. Although pushed farther out onto the margins, polygamists are popularized in current media and social culture by TV shows and high profile court cases, and the public prominence of religious polygamy has never been more glaring.

### 1. Homegrown Rise of Mormonism

The story of the explosive rise of the Mormon Church stands as a unique feature in the development of the modern United States. What began in New York with one man and a vision ended up being one of the most controversial religious denominations in the history of the U.S. According to Mormon theology, Joseph Smith, a farmer living in New York, received a visit from God and Jesus Christ in the early 1820s, instructing him that, “he should. . . restore the true Church of Christ.”<sup>36</sup> In 1823, Smith claimed that an angel named Moroni directed him to “unearth and translate a holy book written on plates of gold,”<sup>37</sup> which contained the religious history of pre-Columbian American Indians of Hebrew origin.<sup>38</sup> Smith published the *Book of Mormon* three years later and founded the Church of Jesus Christ of Latter-day Saints on April 6, 1830 at the age of twenty-four.<sup>39</sup> Smith's charisma, coupled with his strong evangelical message, amassed a following of over 1,000 members by the next spring. After almost a decade of rapid growth and westward movement, despite intense

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SEXUALITY: THREE AMERICAN COMMUNAL EXPERIENCES OF THE NINETEENTH CENTURY (1981)).

35. See RAY B. WEST JR., *KINGDOM OF THE SAINTS: THE STORY OF BRIGHAM YOUNG AND THE MORMONS* 320 (1957). In a federal case in Idaho, Judge McKean framed the real issue at stake:

[W]hile the case at the bar is called “The People *versus* Brigham Young,” its other and real title is “Federal Authority *versus* Polygamic Theocracy.” The government of the United States, founded upon a written constitution, finds within its jurisdiction another government claiming to come from God . . . whose policies and practices are, in grave particulars, at variance with its own. The one government arrests the other, in the person of its chief, and arraigns it at this bar. A system is on trial in the person of Brigham Young. Let all concerned keep this fact constantly in view; and let that government rule without rival which shall prove to be in the right.

*Id.*

36. Bozzuti, *supra* note 25, at 412–14.

37. *Id.* at 414; Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–87*, 13 *YALE J.L. & FEMINISM* 29, 33–34 (2001).

38. RICHARD LYMAN BUSHMAN, *MORMONISM: A VERY SHORT INTRODUCTION* 19 (2008); Bozzuti, *supra* note 25, at 414 n.39. See generally REPORT OF THE COMMITTEE ON AMERICAN ARCHAEOLOGY, APPOINTED BY THE GENERAL CONFERENCE OF THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, 1894 (1910) (giving an in-depth chronicle of the ancient Nephites).

39. Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 *WM. & MARY BILL RTS. J.* 497, 503.

persecution from the secular governments of Ohio and Missouri, the 8,000-member church constructed the Nauvoo Temple in Nauvoo, Illinois in 1839.<sup>40</sup>

It was about this time that Smith had another revelation about the nature of marriage, which instructed him that Mormon men should take more than one wife to attain a god-like status on earth.<sup>41</sup> The church continued to preach monogamy, but Smith introduced the concept of polygamy, or “celestial marriage,” to the highest echelons of the church governance, one apostle at a time.<sup>42</sup> The practice remained a secret rite for church leaders until 1844, when rumors regarding polygamy began to spread among the general church population. That year, a small faction of dissenters broke off from the church and published broadsides for the general public, revealing the secretive practice in which men were “sealed” to different women in succession for all “time and eternity.” Hysteria ensued, and thirty-eight-year old Smith and his brother Hyrum were lynched by a mob in Carthage, Illinois.<sup>43</sup> Many of the 26,000 members of the church, led by their new chosen prophet Brigham Young, fled from Illinois and headed westward toward what would later become the Utah Territory.<sup>44</sup>

## 2. Plural Marriage Theology

The main impetus behind “celestial marriage” is the “anthropomorphic view of God as man.”<sup>45</sup> A recurrent theme in *Doctrines and Covenants* 132, “Revelations on the Eternity of the Marriage Covenant,” is that man has the potential to attain a state of godhood after death.<sup>46</sup> Under this view, heaven is an extension of a man’s life on earth.<sup>47</sup> Thus, the reverse can be true: heaven and a

40. RICHARD LYMAN, JOSEPH SMITH: ROUGH STONE ROLLING 383–84 (2005). The church first settled in Kirtland, Ohio. They were later driven from their Missouri outpost during the “1838 Mormon War”/“Missouri Mormon War.” After, some 8,000 of the church’s members migrated into Illinois. *Id.* at 367.

41. BRIAN C. HALES, MODERN POLYGAMY AND MORMON FUNDAMENTALISM: THE GENERATIONS AFTER THE MANIFESTO 2 (2006) (quoting Joseph F. Smith, July 7, 1878, *Journal of Discourses*, 26 vols. (London and Liverpool: LDS Booksellers Depot, 1855-86), 20:28-29). *See*; *see also* BENJAMIN F. JOHNSON, MY LIFE’S REVIEW 95–96 (1947).

42. Hales, *supra* note 41, at 2–6. The first documented plural marriage was performed in April 1841 when Smith married Louisa Beaman. *Id.* at 2. Among church leaders, initial opposition and disgust was common. *Id.* at 4; Brigham Young, *Plurality of Wives—The Free Agency of Man*, in 3 JOURNAL OF DISCOURSES 266 (“I was not desirous of shrinking from any duty, nor of failing in the least to do as I was commanded, but it was the first time in my life that I had desired the grave, and I could hardly get over it for a long time”).

43. BUSHMAN, *supra* note 38, at 556–57; Bozzuti, *supra* note 25, at 414; *Religions – John Smith*, BBC, available at [http://www.bbc.co.uk/religion/religions/mormon/history/josephsmith\\_1.shtml](http://www.bbc.co.uk/religion/religions/mormon/history/josephsmith_1.shtml) (last visited Nov. 16, 2014).

44. Bozzuti, *supra* note 25, at 414–15.

45. Strassberg, *Crime of Polygamy*, *supra* note 20, at 359; Strassberg, *Distinctions*, *supra* note 21, at 1579 (citing LAWRENCE FOSTER, RELIGION AND SEXUALITY: THREE AMERICAN COMMUNAL EXPERIMENTS OF THE NINETEENTH CENTURY 144 (1981)).

46. *See Doctrines and Covenants* 132 (suggesting that man has the opportunity, through God’s will, to achieve exaltation).

47. Strassberg, *Distinctions*, *supra* note 21, at 1579.

state of godliness can be achieved during a man's earthly life.<sup>48</sup> The only way to do this, however, is to increase one's progeny on earth.<sup>49</sup> Smith's theory on "celestial marriage" is memorialized in *Doctrines and Covenants* 132:61:

[A]s pertaining to the law of the priesthood—if any man espouse a virgin, and desire to espouse another, and the first give her consent, and if he espouse the second, and they are virgins, and have vowed to no other man, then 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.<sup>50</sup>

Based on this passage and a few others in *Doctrines and Covenants*, Mormon men were encouraged, as a central tenet of their faith, to espouse multiple women.<sup>51</sup> Unlike Islamic teachings, which limit the number of wives to four, Mormon theology implies that Mormon men can espouse an unlimited number of wives.<sup>52</sup> However, women can neither espouse multiple husbands nor achieve this elevated status in heaven on their own, but can only do so after being "sealed" to a man on earth.<sup>53</sup> Those who are not "sealed" on earth are destined to become mere ministerial servants in the afterlife.<sup>54</sup> The teaching that any marriage contract not confected according to these teachings shall have no effect after death further employed the mystery of the afterlife to solidify the centralization of church's sealing authority.<sup>55</sup> This tenet guaranteed the church's control over plural marriage where the civil laws could not. With the church's support, pious women were more easily convinced that it was their religious duty to enter into illegal polygamous marriages and submit to the authority of their husbands or risk not only disfavor within their community, but also eternal servitude.

### 3. How the Defeat of the Mormon "Theocratic State" Turned Polygamists into Outlaws

Following a series of political and military disputes between the Mormon Church and the federal government,<sup>56</sup> Congress enacted the first federal

48. *Id.*

49. *Id.*

50. *Doctrines and Covenants* 132:61.

51. See *Doctrines and Covenants* 132 (referencing Abraham, a celebrated Old Testament figure—and a polygamist—and others as justification for men to continue in that tradition). *Id.* at 132:30-40.

52. See, e.g., *Doctrines and Covenants* 132:62 ("[I]f yea 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").

53. See Strassberg, *Distinctions*, *supra* note 21, at 1579 n.446.

54. Strassberg, *Crime of Polygamy*, *supra* note 25, at 360. Another troublesome aspect of celestial marriage is that *Doctrines and Covenants* 132:7 explicitly states that God has appointed one on earth to "hold this [sealing] power" and there is "never but one on the earth at a time on whom this power and the keys of this priesthood are conferred." Thus, only Joseph Smith had the original key of authority to perform celestial marriages, although such authority can be delegated to other church leaders through a sort of agency power. See generally Hales, *supra* note 41, at 7–11.

55. *Doctrines and Covenants* 132:7.

56. Apart from their heretical teachings on marriage, Mormons exerted geographic, economic,

legislation against polygamy—the Morrill Anti-Bigamy Act of 1862. Although the Act lacked real teeth, it “prohibited plural marriage in the territories, disincorporated the Mormon Church, voided territorial laws that established or supported polygamy, and restricted the holdings of religious organizations in the territories to \$50,000.”<sup>57</sup> The U.S. Supreme Court upheld the constitutionality of the Morrill Act in 1878 in the notorious case of *Reynolds v. United States*, which affirmed that the conviction of George Reynolds (Brigham Young’s secretary) did not violate any of the defendant’s constitutionally protected rights.<sup>58</sup> With renewed vigor, Congress passed the Edmunds Act of 1882, amending the Morrill Act by criminalizing “unlawful cohabitation,” among other things. This allowed prosecutors to incarcerate over 1,300 Mormon men.<sup>59</sup>

Five years later, Congress passed the Edmunds-Tucker Act, which disincorporated the church and seized its property.<sup>60</sup> Following his defeat of the challenge to the Act in the Supreme Court’s 1890 decision, *Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States*, church leader Wilford Woodruff published the “1890 Manifesto,” which forbade the practice of polygamy within the church.<sup>61</sup> The Utah Constitution of 1896 permanently banned the practice, allowing Utah to attain statehood in 1896.<sup>62</sup> Although many continued the practice in the United States and others fled to Mexico and Canada, the majority of the church complied with the new rules against

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and political pressure. Once arriving in the “Mormon Corridor,” they set up their own form of secular government, called the State of Deseret, with its own constitution, a General Assembly, a Governor, and a Supreme Court. Deseret even had its own alphabet, the Deseret Alphabet, composed of thirty-six letters based on phonetic sound. The Mormons developed their own militia, their own currency, and voted according to church politics. Many scholars characterize the settlement of the Mormons as the development of a “separatist theocracy.” See generally Ertman, *Race Treason*, *supra* note 15, at 298–99.

57. Royce Bernstein, *Friend or Foe: Mormon Women’s Suffrage as a Pawn in the Polygamy Debate, 1856-1896: Summary*, in GENDER & LEGAL HIST. IN AM. PAPERS (1999), available at <http://www.law.georgetown.edu/library/collections/gender-legal-history/glh-summary.cfm?glhID=9978A09C-D689-3E1E-2B991D90DFC00A50> (citing Morrill Act of July 1, 1862, ch. 126, 12 Stat. 501 (repealed 1910)). The Morrill Act failed largely because, in order to establish bigamy, the government had to prove that a valid marriage ceremony took place while one spouse was legally married to someone else. See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 97, 111 (2002). Most of Utah’s jurors and judges were Mormon, and the judicial system was unlikely to produce convictions for polygamy. Laura Elizabeth Brown, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 MCGEORGE L. REV. 267, 274 (2008).

58. *Reynolds v. U.S.*, 98 U.S. 145 (1878).

59. Askew, *supra* note 25, at 630.

60. Brown, *supra* note 57, at 275; The Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978); EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, 10 (2001).

61. GORDON, *supra* note 57, at 220.

62. G.W. Bartholemew, *Recognition of Polygamous Marriages in America*, 13 INT’L. & COMP. L.Q. 1022, 1023 (1964). The Utah Constitution reads: “[P]erfect freedom of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.”

polygamy.<sup>63</sup> The Second Manifesto of 1904 established excommunication as the punishment for the practice of polygamy.<sup>64</sup> For over one hundred years, the church has not strayed from this stance. But this has not eradicated the practice in the U.S. Instead, this has caused splinter groups to break off from the mainstream Mormon Church and create secretive, insular polygamist communities.<sup>65</sup>

Followers of the mainstream Mormon Church congregate across the U.S., Canada, and Mexico, but the actual number of their polygamist brethren is statistically small in comparison. While there are approximately 6 million members of the mainstream church, the membership of fundamentalist offshoots only numbers in the tens of thousands.<sup>66</sup> The three main fundamentalist groups in the U.S. are the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS), The Apostolic United Brethren (AUB), and The Latter-day Church of Christ (the Kingston Group).<sup>67</sup> FLDS is headed by Warren Jeffs, who is currently in prison on two counts of child sexual assault.<sup>68</sup> The main locus of the FLDS Church is in Hilldale, Utah and its neighboring border town Colorado City, Arizona, located about 350 miles southwest of Salt Lake City.<sup>69</sup> The FLDS Church has approximately 8,000 to 10,000 followers, with a split off community of approximately 700 near Eldorado, Texas.<sup>70</sup> The AUB is located in Bluffdale, Utah, where approximately 7,500 to 10,000 members live.<sup>71</sup> Many other AUB members live across towns and cities in the Intermountain West, including the Salt Lake and Utah valleys.<sup>72</sup> The Brown family from *Sister Wives* reportedly belongs to the AUB Church.<sup>73</sup> The third prominent group, the Kingston Clan or the Kingston

63. Askew, *supra* note 25, at 631.

64. *Id.*

65. *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families*, UTAH OFFICE OF THE ATTORNEY GENERAL (January 2011), at 8, available at [http://attorneygeneral.utah.gov/wp-content/uploads/sites/9/2013/08/The\\_Primer.pdf](http://attorneygeneral.utah.gov/wp-content/uploads/sites/9/2013/08/The_Primer.pdf) (last visited Nov. 16, 2014) [*hereinafter* "*The Primer*"] ("The fundamentalists adapted to a secret, underground lifestyle to avoid prosecution and what they perceived as persecution from the 'world.'"); Cyra Akila Choudhury, *Between Tradition and Progress: A Comparative Perspective on Polygamy in the United States and India*, 83 U. COLO. L. REV. 963, 967 (2012).

66. BUSHMAN, *supra* note 38, at 155.

67. See generally *The Primer*, *supra* note 65, at 14–20.

68. Of all fundamentalist groups, the FLDS community is seen as being the most restrictive and isolated. *Id.* at 19.

69. *Id.* at 18.

70. *Id.* Another splinter group from the FLDS Church is the Blackmore/Bountiful Group, formed after a rift between Warren Jeffs and Winston Blackmore, located in Bountiful, British Columbia, with approximately 800 to 1,000 members. *Id.* at 16. *National Geographic* recently ran a story featuring members of the Bountiful Group and produced a video documenting their marital practices, religious beliefs, and alternative style of living. *Inside Polygamy: Life in Bountiful*, NATIONALGEOGRAPHIC.COM, <http://channel.nationalgeographic.com/channel/episodes/inside-polygamy-life-in-bountiful/> (last visited Nov. 516, 2014).

71. *The Primer*, *supra* note 65, at 11 (estimating 7,500 members). *But see* JANET BENNION, *WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGYNY* 22 (1998) (estimating 10,000 members).

72. *The Primer*, *supra* note 65, at 11.

73. A public statement issued by AUB leaders in 2008 explained their beliefs regarding

Group, is located in Davis County in Northern Utah and has approximately 2,000 to 3,500 members.<sup>74</sup> Much of the Kingston Group descends from a few common founders and the church is known for its “interbreeding”<sup>75</sup> and for the infamous 2003 child abuse and sexual assault case brought by then-22-year old Mary Ann Kingston.<sup>76</sup> Outside of these three main groups, approximately 15,000 individuals live in isolated communities with or without an organized church affiliation.<sup>77</sup> A study done by the Utah and Arizona Attorney General Offices in 2011 indicates that each of these groups range from 100 to 10,000 members and are located in the Western United States (mainly Utah, Arizona, Colorado, Texas, and Nevada), Canada, and Mexico.<sup>78</sup>

## B. Muslim Americans and Polygamy

The experience of the other dominant group of polygamists in the U.S., the Muslim-American polygamists, is also unique. The estimated number of Muslims in the U.S. ranges from 2.6 to 7 million.<sup>79</sup> Islam is the second-largest religion in the United States after Christianity.<sup>80</sup> Of all of the religious groups, American Muslims are the most racially diverse, including immigrants, U.S.-born Muslims, and Muslim converts, representing many different ethnic cultures

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disapproval of forced, arranged, or assigned marriages or “child-bride” marriages. *Id.* at 12.

74. *Id.* at 17.

75. See Greg Burton, *When Incest Becomes a Religious Tenet*, THE SALT LAKE TRIB., Apr. 25, 1999, available at <http://culteducation.com/group/1099-polygamist-groups/16575-when-incest-becomes-a-religious-tenet.html>; see also *The Primer*, *supra* note 65, at 16.

76. See Ray Rivera, *16-Year-Old Girl Testifies of Beating*, THE SALT LAKE TRIB., July 23, 1998, at B1, available at <http://culteducation.com/group/1099-polygamist-groups/16519-16-year-old-girl-testifies-of-beating.html> (detailing the testimony of a 16-year-old-girl’s alleged corporal punishment at the hands of her father, both of whom lived in the Kingston group).

77. *The Primer*, *supra* note 65, at 21.

78. More particularly: Bountiful, BC; Pringle, SD; Ozumba, State of Mexico; Centennial Park, AZ; Colorado City, AZ; Bonners Ferry, ID; Lovell, WY; Pinesdale, Montana; Mancos, CO; Davis County, UT; Salt Lake County, UT; Tooele County, UT; Motaqua, UT; Cedar City, UT; Hanna, UT; Hildale, UT; Manti, UT; Rocky Ridge, UT; Sanpete Valley, UT; Modena, UT; Eldorado, TX; Preston, NV; and Lund, NV. *The Primer*, *supra* note 65, at 14–20.

79. But see Debra Majeed, 18 *Sexual Identity, Marriage, and Family*, in THE CAMBRIDGE COMPANION TO AMERICAN ISLAM 314 (Julianne Hammer & Omid Safi eds., 2013) (citing 6 to 7 million). BAILEY & KAUFMAN, *supra* note 10, at 2. Nearly one in every five people in the world is Muslim. Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 445 (2008). The main division in Islam is between *sunni* and *shi’a* Muslims. 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 practiced 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. BAILEY & KAUFMAN, *supra* note 10, at 10.

80. Hera Hashmi, *Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States*, 10 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 409, 431–32 (2010).

and religious schools of thought. Only one in eight American Muslims is Arab.<sup>81</sup> As of 2009, 35% of American Muslims were African-American; 28% were white; 18% were Asian; and 18% considered themselves “other.”<sup>82</sup> An estimated 37% of American Muslims were born in the United States, while the other 63% were born in over eighty different countries around the world.<sup>83</sup> Among U.S.-born Muslims, approximately 59% are African-American.<sup>84</sup>

### 1. Religious Theology Behind Muslim Plural Marriage

Since 9/11, the nature of sexual identity marriage and family life in Islam has developed into a prominent field of study.<sup>85</sup> Professor Debra Majeed states, “Muslims are routinely imagined as oppressed or oppressors, pious individuals shackled by modernity, or liberated people of faith who consciously choose to dress, worship, or self-identify in ways that may be contrary to the dominant society in which they live.”<sup>86</sup> Today, Muslim-American women struggle to balance their religious convictions with female progress and assimilation in the United States. Islam, like Mormonism, is perceived as distinctly patriarchal, as a result of the widespread acceptance of gender inequality based on natural or status-based differences between men and women. One of the most defining and controversial topics today is Islam’s treatment of women in its scriptural texts and its everyday practices.<sup>87</sup>

“Islam” means “submission” in Arabic and is derived from a word meaning “peace.”<sup>88</sup> Islam is intended to guide its followers, Muslims, in every aspect of their daily lives.<sup>89</sup> The most referenced works for spiritual guidance are the *Qur’an* (the holy book, believed to be the word of Allah as revealed to the Prophet Muhammad) and the *Sunna* (the life and sayings of the Prophet Muhammad).<sup>90</sup> Islam prescribes not only religious tenets for its followers, but also substantive, legal rules. Islamic law, known as *sharia*, governs most areas of the law, including contract, criminal law, family law, and trusts and estates.<sup>91</sup>

81. *Id.* at 434–35.

82. *Muslim Americans Exemplify Diversity, Potential*, GALLUP (Mar. 2, 2009), <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx> (last visited Nov. 16, 2014).

83. Hashmi, *supra* note 80, at 435; Amaney Jamal & Liali Albana, *Demographics, Political Participation, and Representation*, in *THE CAMBRIDGE COMPANION TO AMERICAN ISLAM* 98 (2013).

84. Jamal & Albana, *supra* note 83, at 99.

85. Majeed, *supra* note 79, at 312.

86. *Id.*

87. Another contentious Islamic topic focuses on the headscarf—the female *hijab*. Majeed states that hair covering and modest dress is the dominant choice for Muslim women and that the full face veil, *niqab*, is the minority. *Id.* As opposed to many Western women, acculturated to a society in which their physical appearance is greatly determinative of their social acceptance—what Adrienne Davis calls “beauty capital”—many Muslim women who wear the *hijab* try to, instead, direct attention to their personality, intellect, and character. Davis, *supra* note 5, at 1988.

88. ABUL A’LA MAWDUDI, *TOWARDS UNDERSTANDING ISLAM* 5 (1997).

89. *Id.* at 16.

90. Hashmi, *supra* note 80, at 412.

91. Adrienne Katherine Wing, *Twenty-First Century Loving: Nationality, Gender, and Religions in the Muslim World*, 76 *FORDHAM L. REV.* 2895, 2899 (2008) [hereinafter *Loving*].



However, most Muslim countries only apply *sharia* in the area of family law (marriage, divorce, child custody, and probate law).<sup>92</sup>

Like in the Mormon *Doctrines and Covenants*, polygamy is mentioned in the *Qur'an*:

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>93</sup>

Unlike *Doctrines and Covenants*, however, the *Qur'an* is seen as merely permitting polygamy, rather than requiring it in order to reach religious and spiritual ascendance.<sup>94</sup> An in-depth examination of the *Qur'an* further reveals that polygamy is highly restricted. Permissibility serves a distinct purpose: securing justice for female orphans.<sup>95</sup> The ideal is monogamy: "You cannot keep perfect balance emotionally between your wives, however much you desire it."<sup>96</sup>

Many scholars view polygamy under *sharia*—and marriage law in general—as distinctly patriarchal and subordinating of women.<sup>97</sup> Although marriage is regarded as a civil contract and not a religious sacrament, and although the parties sign an actual contract (*nikah*) setting out their expectations and obligations,<sup>98</sup> family and marriage laws governing that contract are still saturated in status-based gender norms.<sup>99</sup> Bailey and Kaufman explain this as 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

92. *Id.* *Shari'a* developed after the death of the Prophet Muhammad in 632 when Islam began to spread from the Middle East and outward into Africa and Asia. Muslims model their everyday lives after that of Muhammad, who was a practicing polygamist. Bailey & Kaufman, *supra* note 10, at 9.

93. *Qur'an* 4:3.

94. The reference to "orphans" speaks to a specific military event, the battle of Uhud in 625, which killed vast numbers of men and boys. Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT'L J.L. POL'Y & FAM. 108, 115 (2007). This left many marriageable widows and young girls whom Muhammad believed should be cared for as wives. Before the restrictions on numerosity and the mandate that a man treat all of his wives equally, cultural polygamy was unlimited in number and no provisions were had for the protection of women. Some scholars view the structures placed around polygamy in the *Qur'an* as an improvement to the status of women. The *Qur'an* and the *Sunna* were innovative in that they gave women legal personality. Rehman, *supra* note 94, at 113. *See, e.g.*, Majeed, *supra* note 79, at 324–25 (highlighting perceptions of the importance of a polygamous marriage for Muslims).

95. Majeed, *supra* note 79, at 324.

96. *Qur'an* 4:129.

97. *See Loving*, *supra* note 91, at 2902.

98. In a *nikah*, the Arabic term for marriage used to refer to the marriage ceremony, the parties express their mutual consent and set out the *mahr*. To varying degrees, the contract sets out the obligations and rights of the husband and wife, such as financial, spiritual, and physical support during the marriage and what grounds determine termination. The *nikah* can vary in length from a paragraph to many pages. *See* Majeed, *supra* note 79, at 321 (detailing the mutual consent and evidence presented by parties to a Muslim polygamous marriage contract, or, *nikah*).

99. *Cf. id.*

functions within the family.”<sup>100</sup> Under this traditional theory of complementarity, women have the duty of obedience to their husbands (*ta’ah*).<sup>101</sup> As such, men have the duty of guardianship (*qawama*) over women.<sup>102</sup> Men must give *mahr* to women, or a bride-price, which is payable only to the bride and can be paid over time.<sup>103</sup> With respect to polygamy, men can marry up to four wives, and his wives must be women “of the book,” (i.e., practicing Christian, Muslim, or Jewish women). Muslim women, however, can only marry one man, and that man must be Muslim.<sup>104</sup>

## 2. Social Benefits of the Polygamy Option for Religious Women

Some modern women maintain that they consciously choose polygamy, regardless of the religious context and the imbalanced gender-based treatment, because it fills a personal and community void.<sup>105</sup> Even in strictly monogamous countries there have been calls for the introduction of polygamy. Caroline Humphrey discovered that both Russian men and women pushed for the legalization of polygamy and that this support was not limited to the Muslim community. Some women believed that “half a good man is better than none at all,” and that “legalization 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>106</sup> A study done by Janet Bennion, who lived with two fundamentalist Mormon groups, the Harker group and the Allred group, for eighteen months, concluded, “[P]olygyny ultimately improved the situation of a considerable number of women who had experienced extreme social, economic and/or emotion deprivation in the Mormon mainstream.”<sup>107</sup> This study further concluded that women chose this lifestyle because it ensured that they had the opportunity to marry and raise their children within a strong network of sister wives and other women, all within the valuable context of religion.<sup>108</sup>

100. Bailey & Kaufman, *supra* note 10, at 8–9.

101. *Loving*, *supra* note 91, at 2899.

102. *Id.* at 2900.

103. *Id.*

104. See *Qur’an* 2:221. Supposedly women, being the “weaker sex,” may be forced to renounce their religion due to pressure from their husbands. *Loving*, *supra* note 91, at 2900.

105. See *Polygamists Share Their Faith and Family Lives*, NPR (Aug. 19, 2011, 12:00 PM), available at <http://www.npr.org/2011/08/19/139784963/polygamists-share-their-faith-and-family-lives> (last visited Nov. 16, 2014) (discussing modern polygamy with two practicing polygamists); Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008, 12:49 AM), available at <http://www.npr.org/templates/story/story.php?storyID=90857818> (last visited Nov. 16, 2014); Barbara Bradley Hagerty, *Philly’s Black Muslims Increasingly Turn to Polygamy*, NPR (May 28, 2008, 10:59 AM) available at <http://www.npr.org/templates/story/story.php?storyID=90886407> (last visited Nov. 16, 2014).

106. Bailey & Kaufman, *supra* note 10, at 2.

107. Strassberg, *Crime of Polygamy*, *supra* note 20, at 391 n.234 (quoting Bennion, *supra* note 13, at 15 (“For convert women who are seeking reprieve for deprivations in the mainstream, Harker is the land of promise...they can get back to their pioneer roots and live the dream of marriage, family, and community. They...are willing to give [the outside world] up for the separated, stark life of the frontierswoman”).

108. Bennion, *supra* note 71, at 143–45.

In this same vein, many argue that polygamy can improve upon the social conditions of African-American Muslim women because it is both “pragmatic” and “identitarian.”<sup>109</sup> Adrian Katherine Wing argues:

In my view, African Americans today face conditions in which *de facto* polygamy can flourish. A disproportionate number of our men are unavailable for marriage—due to early death, imprisonment, high unemployment, and intermarriage. More of our young women have obtained higher educations than the young men. Socially, we as Black women, like most women, have been reared to want men of an equal or higher social status. We have also been socialized to prefer our own men, to men from other racial/ethnic groups. A well of well employed and educated Black women seek a small pool of “suitable” men. The net result is that the few men have a surplus of women from which to select. They can be either *de facto* polygamists or womanizers. They can have children with multiple women and support none of them. Since the Civil Rights movement, more black men than women have taken advantage of the opportunity to date or marry outside the race, an act that could have resulted in lynching in the past. The net result is that only 39% of Black women are married, compared to 60% of white women, and 67% of Black children are born out-of-wedlock compared to 25% of white babies. In the U.S. Constitution, Blacks were counted as three-fifths of a person for representation purposes. Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man.<sup>110</sup>

Although many African-American women likely tire of being constantly reminded about the dearth of marriageable African-American men,<sup>111</sup> polygamous marriage can be a viable alternative for devout African-American Muslim women, who cannot marry outside of their religion.

For many of these reasons, Philadelphia is the major hub of polygamy among Muslim Americans. According to Adrienne Davis, “Philadelphia has the highest density of polygamy, due to a combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment.”<sup>112</sup> Many of these polygamous Muslim Americans live on Lancaster Avenue, nicknamed “Muslim Main Street.”<sup>113</sup> The situation of African-American Muslim women in America has not escaped the attention of the national media.<sup>114</sup> In 2008, National Public Radio produced a two-part

109. See Davis, *supra* note 5, at 1970-71.

110. *Loving*, *supra* note 91, at 858.

111. See, e.g., Davis, *supra* note 5, at 1970-72.

112. Davis, *supra* note 5, at 1974.

113. Paolo Pontoniere, *When the Wives Become Four: Polygamy in the USA*, LA REPUBBLICA, ITALY (trans. Laura Lodesani), June 17, 2008, available at <http://watchingamerica.com/News/1438/when-the-wives-become-four-it-is-the-way-polygamy-is-conquering-the-usa/>; see also Zach Mortice, *Hip-Hop for Allah: Muslim MCs Struggle to Balance their Faith with their Music*, PHILADELPHIA CITYPAPER, Jan. 23, 2007, available at <http://archives.citypaper.net/articles/2007/01/25/hiphop-for-allah>.

114. What is glaringly apparent from all of the reports on Muslim polygamy, at least among the African-American community, is the absence of any reported abuse among its women and children. Debra Majeed, who interviewed over 400 African-American Muslims and over a dozen polygamous families, concludes that she found little to no abuse of children. If it does occur, she states, it is exceedingly rare. *Inside African-American Muslim Polygamy*, NPR (July 23, 2008),

segment on polygamy in America, interviewing first and second wives engaged in *de facto* polygamous marriages.<sup>115</sup>

Although some women expressed their frustrations with their husband having more than one wife, others saw the opportunity as a blessing.<sup>116</sup> One woman, dubbed “Mona,” was a divorcée, looked down upon in her Muslim community in New Jersey. Once she became a second wife, however, she felt the social stigma go away.<sup>117</sup> Other women interviewed preferred polygamy because of its attendant freedom. One woman, called “Mecca,” wanted to travel to the Middle East to study Arabic, which meant time away from home. Mecca had the idea to find her husband, Zaki, himself a product of a polygamous home, a second wife. Eventually, the couple asked a friend’s younger sister, Aminah, if she would agree to become Zaki’s second wife. Aminah and Zaki were married in a religious ceremony.<sup>118</sup> The group discussed how their imam in Philadelphia has conducted dozens of polygamous marriage ceremonies, understanding that polygamy is a historical institution that can have social benefits as well.<sup>119</sup> The NPR report further discussed the benefits among women married to the same man. One woman said of her co-wife: “She could fill something that even a husband couldn’t fill. It was a cross between a sister and a friend and a co-worker. You have a cushion or a help that you didn’t have before.”<sup>120</sup>

Considering the socio-cultural benefits that come with polygamous marriage among its Muslim practitioners, the practice will undoubtedly continue, and even grow, despite its criminalization by mainstream American society. The practice may even increase as immigration to the United States increases. Although the practice of polygamy is considered a ground for inadmissibility and deportability for immigrants to the United States, as polygamists are per se ineligible for a finding of “good moral character,”<sup>121</sup> thousands of immigrants arrive in the United States from countries that permit polygamy. In 2007, almost 500,000 immigrants obtained permanent resident status from polygamous countries in Africa, Asia, and the Middle East.<sup>122</sup> It is

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<http://www.npr.org/templates/transcript/transcript.php?storyId=92822369> (last visited Nov. 4 Nov. 16, 2014).

115. Hagerty, *Quietly Engage*, *supra* note 105; Hagerty, *Philly’s Black Muslims*, *supra* note 105.

116. See Hagerty, *Quietly Engage*, *supra* note 105 (noting the support networks that polygamist women share in).

117. *Id.*

118. Hagerty, *Philly’s Black Muslims*, *supra* note 105.

119. *Id.*

120. *Id.*

121. Immigration and Nationality Act (INA) § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2012); Immigration and Nationality Act (INA) § 204A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B) (2012) (providing that the cancellation or removal for inadmissible permanent residents requires a finding of good moral character, which practicing polygamists are per se ineligible for under INA § 101(f), 8 U.S.C. § 1101(f)); see also Sarah L. Eichenberger, *When for Better is for Worse: Immigration Law’s Gendered Impact on Foreign Polygamous Marriage*, 61 DUKE L.J. 1067, 1084 (2012).

122. Smearman, *supra* note 2, at 385. “In 2007, the largest number of African immigrants came from Nigeria and Ethiopia, followed by Egypt, Ghana, Kenya, and Somalia.” *Id.* Immigrants from Middle Eastern and Asian countries hailed from countries such as Iran, Iraq, Afghanistan, Jordan, Yemen, Kuwait, Saudi Arabia, Malaysia, and Indonesia, all of which permit polygamy. *Id.*

likely that many of these families practice polygamy in their home countries. With these facts in mind, many immigrant communities in the United States practice *de facto* polygamy, ranging from groups of African immigrants in New York City to Hmong immigrants in Minneapolis.<sup>123</sup> To many of these families, polygamy is a religious and cultural practice outlawed by America standards, causing them to hide an important aspect of their lives for fear of criminalization and social stigma.

### C. Increased Public Exposure to Polygamy and the Changing Scope of Legal Treatment

Historically, the media attention on polygamous marriage has sensationalized some of its secretive and sometimes abusive aspects.<sup>124</sup> This negative public perception is rapidly deteriorating, however, due to increased awareness of the practice in popular culture and the heightened publicity of polygamists who are otherwise “moral,” law-abiding citizens. Legal recognition would not only sanction an additional marriage option in an ever-expanding world of “free love,”<sup>125</sup> but would also embrace cultural diversity in the marriage arena based on religious inclusion. Polygamy is now much more visible and accepted, heralded by some as the “next civil rights movement.”<sup>126</sup> August 19th has even been dubbed National Polygamy Day.<sup>127</sup>

On March 12, 2006, HBO aired its first episode of *Big Love*, a show about the life of a fundamentalist Mormon polygamist who, after becoming a “lost boy” from his own religious community, goes on to establish his own polygamist family, the Hendricksons, balancing three wives, nine children, and a small business in Utah.<sup>128</sup> The show ran for five seasons on HBO; its fourth season averaged over five million viewers per episode.<sup>129</sup> The fictional show elucidated many of the religious beliefs behind fundamentalist polygamy as well as the delicate intricacies of balancing day-to-day life in a polygamist household.<sup>130</sup> The show tracked real-life occurrences, such as the Yearning for Zion ranch raid, but also focused on the rejection and discrimination of the family by mainstream society for their religious beliefs and polygamist lifestyle.

With the rise in popularity of “reality” television shows, TLC aired its first

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123. *Id.* at 386.

124. *See, e.g.,* Brown, *supra* note 57, at 268.

125. *See* Strassberg, *Crime of Polygamy*, *supra* note 25, at 364 (stating that polygamy poses no political threats to the United States if decriminalized).

126. *See* Randy Hall, *Polygamy Is 'Next Civil Rights Battle,' Activists Say*, CNSNEWS.COM (July 7, 2008), available at <http://cnsnews.com/news/article/polygamy-next-civil-rights-battle-activists-say> (last visited Nov. 16, 2014) (forecasting legal developments for polygamy law).

127. *See* Pro-Polygamists Celebrate 12th Annual 'Polygamy Day', PRO-POLYGAMY.COM (Aug. 19, 2012), <http://www.pro-polygamy.com/articles.php?news=0085> (last visited Nov. 16, 2014) (detailing the events surrounding Polygamy Day, which, in 2012, was held in Old Orchard Beach, Maine, and developed into a “widespread and religiously-neutral” celebration).

128. *Big Love* (Home Box Office television broadcast 2007).

129. Stuart Levine, *'Big Love' Says Goodbye*, VARIETY (Oct. 28, 2010, 10:50 AM), available at <http://variety.com/2010/tv/news/big-love-says-goodbye-1118026514/> (last visited Nov. 16, 2014).

130. *Big Love*, *supra* note 127.

episode of *Sister Wives* on September 26, 2010, and the series is now in its fifth season. *Sister Wives* documents the life of Kody Brown and his four wives, Meri Brown, Janelle Brown, Christine Brown, and Robyn Sullivan (who becomes Kody's fourth wife during the show's first season). The goal of the show was to reveal the positive aspects of religious polygamy. Kody Brown claims that his relationships are lawful because he is only legally married to one of his wives—Meri Brown.<sup>131</sup> However, Utah's bigamy statute allows a court to find a polygamous marriage based upon informal cohabitation, akin to common-law marriage, which requires no legal registration for its recognition.<sup>132</sup> During the course of the show, the Browns filed a lawsuit challenging Utah's anti-bigamy statute as unconstitutional based on the Free Exercise Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>133</sup> In December 2013, the Utah federal district court found in favor of the Brown family, holding that the "cohabitation" prong was unconstitutional.<sup>134</sup> Although the state has yet to file an appeal, the decision received immediate media attention and was heralded as a solid victory for proponents of polygamy.<sup>135</sup>

Respecting and understanding the particular contours of American polygamy can help inform the motivation behind any regulation of the practice today. Many religious, cultural, and social influences shape one's decision to enter into and live in a polygamous marriage, and the ability to structure one's family and marriage to fit one's needs can make polygamy an attractive alternative for some women. The increase in immigration from countries that allow polygamy, which might result in the occurrence of more de facto polygamy, plus the increased public exposure to the practice can change the negative social stigma associated with polygamy and could also usher in an attempt at political, legislative, or judicial attention.

## II. SCHOLARLY PROPOSALS FOR REGULATION

Multiple viewpoints exist from which to address the polygamy question. Most of the scholarship focuses on the criminality of polygamy or on the constitutionality of the current treatment of polygamy under the law.<sup>136</sup> This

131. See *Sister Wives* (TLC television broadcast 2010) (depicting the relationships between Kody Brown and his four wives, only one of which has legal status as his wife).

132. "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or *cohabits with another person.*" UTAH CODE ANN. § 76-7-101(1) (1997) (emphasis added).

133. Brown, et al. v. Buhman, 947 F.Supp.2d 1170, 1170 (D. Utah 2013).

134. *Id.* at 1225.

135. See, e.g., Jenny Tsay, 'Sister Wives' Lawsuit: Utah Polygamy Ban Partly Struck Down, FINDLAW (Dec. 23, 2013), [http://blogs.findlaw.com/celebrity\\_justice/2013/12/sister-wives-lawsuit-utah-polygamy-ban-partly-struck-down.html](http://blogs.findlaw.com/celebrity_justice/2013/12/sister-wives-lawsuit-utah-polygamy-ban-partly-struck-down.html) (last visited Oct. 5Nov. 16, 2014) (recounting the *Sister Wives* case and explaining the Utah law involved).

136. See Strassberg, *Crime of Polygamy*, *supra* note 11 at 363–67 (highlighting several academic anthropological studies pertaining to Mormon polygyny); Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 102 (2006) (criminal debate). For an in-depth discussion of the constitutional arguments at stake, see Casey E. Faucon, *Polygamy after Windsor: What's Religion Got to Do with It?*, 9 HARV. L. & POL'Y, REV. (forthcoming 2015).

paper picks up on the other side of the decriminalization and constitutional recognition debate, focusing instead on the benefits of regulation versus non-regulation and the types of regulation that should be used, in the case of the former.<sup>137</sup> This section discusses in depth the more recent proposals that fashion default rules for polygamous marriage, which are almost uniformly modeled on business structures.<sup>138</sup> The solution proposed in this paper borrows some of those ideas, but provides a different contextual framework for their application, noting that any regulatory proposal must be attractive to the target demographic.

### A. Scholarly Proposals for Regulation

Some scholars argue that positive recognition and regulation will have a normative and influential effect on the practice of polygamy among insular polygamous communities.<sup>139</sup> Positive regulation will change the culture among these groups in terms of reporting abuses and promoting self-regulation. Very little scholarship lays out what a regulatory scheme for recognizing polygamy would actually look like.<sup>140</sup> What structure should the default rules promote? What factors should drive such regulation? Should the focus be on protecting females, who are perceived as being more susceptible to inequality and abuse, or should full contract-based polygamy be allowed so each family can structure their own marriages as they see fit? Of the few proposals out there that answer these questions, they uniformly refer to business models for their inspiration.<sup>141</sup> These scholars argue that treating polygamous relationships as a limited liability company or as a partnership under business laws can promote equality in bargaining and allowing for multiple entrances and exits throughout the course of the marriage.<sup>142</sup>

Although these models are secular ideals, in that they embrace the contract-based style of regulating polygamy, what is left unanswered is how the law would actually make these models work in the United States. If polygamy becomes a viable option, rules must be crafted that attract polygamists to regulation. American polygamists are highly religious and are sometimes—very consciously—willing to forego some individual protections in order to promote the welfare of the group and to adhere to the mandates of their religion. Religion, for some of them, is the most distinguishing and influential feature in their lives.<sup>143</sup> If polygamous marriage is given the status of legal “marriage,” then it is

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137. See Davis, *supra* note 5, at 1958–59 (disseminating the benefits of recognizing and regulating polygamy).

138. See Ertman, *Marriage as a Trade*, *supra* note 22, at 127–31 (treating polyamorous relationships like a limited liability company); Davis, *supra* note 5, at 1998–2031 (treating polygamous relationships like a business partnership).

139. See *cf.* Davis, *supra* note 5, at 1959–61 (concluding that decriminalizing polygamy affords polygamists unparalleled intimacy).

140. *Id.* at 1957–58.

141. See *id.*; see also Ertman, *Marriage as a Trade*, *supra* note 22, at 127–31 (comparing polygamous marriages to LLCs).

142. Ertman, *Marriage as a Trade*, *supra* note 22, at 127–31; Davis, *supra* note 5, at 2002–03.

143. See generally Hagerty, *supra* note 1 (detailing Muslim polygamist women’s reluctance to add subsequent wives to their marriages); Majeed, *supra* note 79, at 313 (noting that Muslim women in

more likely to attract those secluded polygamists into regulation in the hopes of having their marriages validated and recognized under the law. Thus, it is necessary to make the contours of regulation—its features, procedures, and scope—attractive. Further, if polygamy will ever be recognized in seemingly progressive, Western societies, it must be regulated in a way that promotes equal bargaining power in at least the same measure as is theoretically present in monogamous marriage, while retaining its physical and social structure. This endeavor may require more regulatory creativity and oversight than some business models might allow.

## B. Modeling Polygamy after Business Partnerships

Marriage regulation in the U.S. is not set up for a three-or-more-person model. When referring to state regulation of monogamous marriage, it should be noted that this refers to essentially three points in the “life” of a marriage: entry, “midgame,” and exit.<sup>144</sup> Polygamous marriages, however, contemplate the serial addition of new spouses, and potentially the serial exit of spouse, with or without a defined “midgame.”<sup>145</sup> Further, in a dyadic marriage, civil regulation fixes marital rights, which are not typically altered until divorce or death. Even at dissolution, the assumption with respect to marital property is equitable division of assets. These splits become drastically complicated in polygamous marriages,<sup>146</sup> especially when one wife may leave the family unit behind or when the husband dies, leaving all of his wives to “split” the pie. In order to better manage the entrances and exits, as well as asset distribution, most scholars turn to business models to craft the most equitable rules.<sup>147</sup>

The mirroring of business model principles in marriage laws in the legal scholarship is not foreign or novel.<sup>148</sup> Many suggest importing the private ordering system of business partnership rules into state-licensed monogamous marriage.<sup>149</sup><sup>150</sup> The argument for the introduction of business models into

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polygamous marriages are sometimes marginalized and complicit in their own exploitation).

144. Davis, *supra* note 5, at 1989.

145. *Id.* at 1989–90.

146. *Id.* at 1990.

147. See Ertman, *Marriage as a Trade*, *supra* note 22, at 127–31 (advocating for the modeling of polygamous marriages off of LLCs); Davis, *supra* note 5, at 1998–2031 (supporting a bargaining model for polygamous marriages).

148. See generally Ertman, *Marriage as a Trade*, *supra* note 22 (disseminating business models of the family); UNIF. MARRIAGE & DIVORCE ACT, prefatory note, 9A U.L.A. 161 (1998) (“The distribution of property upon the termination . . . should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.”); See generally Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367 (1998) (highlighting fiduciary models of the family).

149. See generally Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007); Cynthia Starnes, *Divorce and Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67 (1993). In the context of polyamorous relationships, Martha Ertman has argued that the structure of a limited liability company may be one way to visualize and thus regulate polygamous relationships. Ertman argues: “Business models are free of the antiquated notions of status, morality, and biological relation that have hampered family law’s ability to adapt



polygamous marriage regulation finds the most concrete explication with the recent scholarship by Professor Adrienne Davis. Davis argues that polygamous marriages should be treated like business partnerships in order to address and eradicate some of the entrenched, seemingly status-based imbalances facing women in polygamy.<sup>151</sup>

Davis' model draws on partnership law for rules on formation, entrance, exit, dissolution, and property rights in order to "minimize the costs of managing instability, keeping partnerships intact regardless of entrance and exit, while ameliorating vulnerability by reinforcing the importance of a partner's consent, egalitarianism, and good faith norms."<sup>152</sup> Under her model, polygamy must be decided at the outset as the structure of the marriage in order to avoid the "threat" of polygamy as a bargaining tool of a husband.<sup>153</sup> All members of the marriage must unanimously consent to the addition or expulsion of any members, thus giving each wife equal voting power. If any member would like to leave (or is unanimously voted out), this should be done on a "no-fault" basis, thus removing the religious influences, which purportedly caution against divorce and assign fault. With respect to property distribution, she proposes something very much akin to community property principles; when one person leaves, they must be bought out much in the same way that a partner is bought out when they leave the partnership.<sup>154</sup>

Although the use of business models is one way to regulate the substantive aspects of the "milestone" time periods in the life of a marriage, these solutions do not take into account the actual regulatory process required. In a "perfect" world, free from both religious influences and the harms traditionally associated with polygamy, the use of business models as a basis for regulation of polygamy is easily conceived and fitting, as business-based default rules "substitute functionalist reasoning for moral judgment."<sup>155</sup> Regulation can easily curb the influence of the perceived harms that have historically hindered polygamy's acceptance into mainstream society. However, religion remains the most dominant influence behind polygamous marriage in the United States today.<sup>156</sup> Thus, any regulatory default scheme must address the "religion factor" head-on, as it is an aspect of polygamous marriage that is likely integral to the practice itself.<sup>157</sup> Understanding that religious influence will help provide a regulatory option for polygamists that is attractive to the targeted group and thus, more

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with the times. . . . [B]usiness models are largely unhampered by this idealized status, allowing for consideration of important contractual elements of intimate relationships." Ertman, *Marriage as a Trade*, *supra* note 22, at 82–83.

150. Ertman, *Marriage as a Trade*, *supra* note 22, at 123–31.

151. Davis, *supra* note 5, at 2004–24.

152. *Id.* at 2004.

153. *Id.*

154. *Id.* at 2013.

155. Ertman, *Marriage as a Trade*, *supra* note 22, at 83.

156. *See infra* Introduction.

157. Even civil marriage between two spouses retains heavy religious influence in the United States today, stemming from the deeply rooted historical and cultural influences of religion. Choudhury, *supra* note 65, at 971. However, some argue that "religious control of marriage is fundamentally incompatible with human freedom." Strassburg, *Distinctions*, *supra* note 21, at 1563.

likely to be used.

### C. Making Regulation an Attractive Option

One underlying premise upon which this article rests is that these regulations would apply only after (1) states decriminalize polygamy and (2) states decide that regulation and legal recognition of these marriages are preferable to non-regulation, the focus of the analysis below. Some argue that the state should not regulate marriage at all, that the state should have no say in determining the contours or the contents of marriage.<sup>158</sup> Marriage used to be a cultural and societal custom based on personal or familial consent long before the Church and the State grappled over who controlled the far-reaching, normative, and adhesionsary institution of marriage.<sup>159</sup> Even today, other scholars argue that the state should have no control over the contours of marriage. They propose instead a myriad of options on how to determine the legal rights of people in close, marriage-like relationships with little to no state intervention.<sup>160</sup> The state's interest in regulating marriage has a protective, necessary function as well as a normative one, however. To some extent, the marriage entrance rules exist to ensure consent, protect against incestuous relationships, protect against child marriages, and supervise marriages contracted by uninformed parties—necessary functions of the process that are seemingly more pronounced in the plural marriage context.

One universally understood bias is that the state favors marriage and families, conferring benefits on those who enter the marriage contract. The social and legal benefits are strong incentives to enter into the status of “married.” These benefits mask the fact that, by entering into the social and legal contract of marriage, a couple consents to what is essentially an adhesionsary contract with the state as to the contours of that marriage.<sup>161</sup> These established default rules and public policies continue to influence the rights of the individuals involved even after the marriage ends, as with inheritance rights, claims to marital property, tax incentives and taxable units, rights to government benefits, and rights to wrongful death and survival causes of action. Despite being adhesionsary in nature, marriage as a legal option is an attractive one, which serves its purpose to promote the state's interests in protecting, favoring, and controlling marriage.<sup>162</sup>

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158. See, e.g., Edward A. Zelinsky *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) (arguing for the abolishment of civil marriage from a pro-marriage perspective; Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 695 (2010); Davis, *supra* note 5, at 1962–63.

159. See generally Davis, *supra* note 5, at 1963 (“[M]arriage, like the military, is a dominant and normative institution”).

160. See, e.g., Zelinsky, *supra* note 157, at 1163; Mary Ann Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772 (2005) (arguing that many non-traditional, marriage-like relationships, such as homosexual relationships, are not adequately afforded the greater flexibility and less state intrusion that traditional, legal marriages hold).

161. See Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 665 (1976) (highlighting the centrality of marriage to current law).

162. *Id.*

The confines of legal recognition afford its adherents protection, the denial of which can leave them in potentially destitute financial situations. In the case of the Brown family, Kody is only legally married to his first wife, Meri Brown. His subsequent religious wives are also financial contributors to the marriage. Under the current scheme, a second or third wife would have no legal protection for her financial contributions, barring the use of equitable distribution, with limited exceptions for certain issues, such as parentage. The case of subsequent wives who have contributed to the family by providing childcare is equally sympathetic. These subsequent wives would be left without any legal rights to marital property. Marriage protection can eradicate some of these perceived and potential inequities within an otherwise functioning and stable family.

Further, setting up a system that bestows advantages and protections on the “model” polygamists, such as the *Brown* family or the “Zaki” and “Aminah” polygamous families in Philadelphia, makes recognition and regulation attractive to such practicing polygamists. Establishing a desirable model of polygamous marriage could create the norm that informed, law-abiding, and otherwise “normal” polygamous marriages are ones that adhere to the regulatory system, ones that are “favored under the law.”<sup>163</sup> But recognition will also dignify their religious and marriage choice by equalizing that marriage option with the monogamous marriage practiced by the American majority. The state can make the structure and process so attractive that it becomes a cultural and religious “rite of passage.” The pride and assurance resulting from successfully navigating the process can create perceived or actual heightened cultural status within one’s family or religious community. Positive and active regulation also sends messages of acceptance, equality, and religious freedom.<sup>164</sup> This need to feel cultural and religious worthiness is an incentive that can be replicated in legislation to attract fundamentalist or orthodox polygamists to register their plural unions.<sup>165</sup> Merely decriminalizing polygamy, and failing to regulate the practice, could only foster further seclusion and cater to potential despotism.<sup>166</sup> Without making the alternative something familiar, accessible, and

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163. See also Choudhury, *supra* note 65, at 967 (“[R]ather than focusing on stricter policing or more enforcement of laws banning polygamy, redirecting the state’s efforts to the distribution of benefits and burdens within polygamous families is a more fruitful way to change the practice and ultimately make it more equitable (and perhaps less desirable.)”); Davis, *supra* note 5, at 2031–32 (arguing that creation of an opt-in regime would ameliorate vulnerability and exploitation).

164. See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 7 (2008) (underscoring the marriage-equality movement).

165. If anything can be gleaned from experience with registered domestic partnerships or civil unions, once made available to the public for persons of the same or opposite sex, it is that many individuals chose not to take advantage of the new designations. These alternative statuses were so different in terms of substance from marriage and in name alone, that many gay couples chose to wait for marriage instead of choosing a lesser, but readily available, option. See, e.g., Editorial, *Separate and Not Equal*, N.Y. TIMES, Dec. 20, 2008, at A26, available at [http://www.nytimes.com/2008/12/20/opinion/20sat4.html?\\_r=0](http://www.nytimes.com/2008/12/20/opinion/20sat4.html?_r=0) (detailing proposed New Jersey legislation on the legalization of same-sex marriage).

166. See Davis, *supra* note 5, at 1960 (“[L]egalization incorporates decriminalization, but also entails some sort of official recognition...unsurprisingly, those practicing plural intimacy are as diverse in their regulatory end goals as is the dyadic community. Some want merely to be left alone...others, perhaps the majority of adults, want state recognition and its accompanying

attractive, polygamous families will continue to live in de facto polygamous unions without protection of their property and other legal rights traditionally provided by monogamous marriage.

Positive regulation will also create more exposure and accountability for polygamists affected by the laws, and thus both society and polygamists themselves can benefit from positive regulation. Heightened contact between the legal system and polygamists will increase state and judicial knowledge of the marriage practices of polygamists, and help to distinguish “bizarre” but otherwise legal actions from those which may cross the line into criminal and deviant behavior.<sup>167</sup> Increased exposure and civil contact will likely create more public acceptance of polygamists within mainstream American culture. While continued TV appearances of polygamists and high-profile judicial challenges can give polygamists the opportunity to bring their little-known lifestyles into the public eye, the law may also play a role by creating positive regulation and setting up a procedure with default rules that protect against the historical problems of polygamy and making it a workable marriage option.

### III. TAKING A GLOBAL PERSPECTIVE: STRATEGIES BEHIND IMPLEMENTATION IN THE UNITED STATES

Although this proposal does borrow some of the equalizing features that business models afford, a multi-cultural and comparative approach is a source of inspiration that can help incorporate the religious and cultural influences behind polygamy into the process. A review of the laws of other countries that currently allow polygamy can inform any legislative rules in the United States. No one system, however, provides an applicable response to the United States’ substantive and procedural system, as many of these countries have adopted customary and religious codes applicable to personal laws which run counter to laws under the religion clauses. This section will review some universal regulatory aspects and analyze their applicability to an American legal framework.

#### A. Canvassing the World’s Polygamous Landscape

Polygamy as an institution stretches back into time immemorial and is practiced in societies all around the world.<sup>168</sup> Polygamy is legally recognized in

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regulation”).

167. Cf. Strassberg, *Crime*, *supra* note 25, at 366–89 (setting out the contours of proposed revised criminal laws in the polygamous marriage context).

168. The ancient Chinese practiced polygamy. See D.E. Greenfield, *Marriage by Chinese Law and Custom in Hong Kong*, 7 INT’L & COMP. L.Q. 437, 443–44 (1958) (discussing Chinese marriage practices and relevant law); Lo Tung Fan, *The Institution of Marriage in China*, 1 HONG KONG U. L.J. 131, 142 (1926–27). “However, the Chinese marriage has always been a *qualified form of polygamy*. Among the many ‘wives’ which a man is entitled to have there is only of one who may be called the *principal wife* (Ch’i) while the rest are secondary wives or concubines (ch’ieh).” *Id.* at 142. “Polygamy is sanctioned and legalized by Confusionism which holds that death without an heir is a sin unpardonable.” *Id.* n.1. The Incas of Peru also practiced polygamy. Carmen Rodriguez de Munoz & Elsa Roca de Salonen, *Law and the Status of Women in Peru*, 8 COLUM. HUM. RTS. L. REV. 207, 208 (1976) (“[T]he Incas imposed

many African,<sup>169</sup> Middle Eastern,<sup>170</sup> and Asian countries with varying legal effects.<sup>171</sup> Polygamy is also “multidimensional” in its influence, as no “single sociocultural, economic, demographic, or environmental condition” necessarily serves as the cause.<sup>172</sup> When conducting a review of the world’s treatment of polygamists, certain common procedures and practices emerge. The following subsections will highlight these common procedural and substantive rules in selected countries in Africa, the Middle East, and Asia.

### 1. The Judiciary as a Regulatory Institution or Use of Registration System

The initial inquiry focuses on what structural and procedural systems exist throughout the world to govern the institution of marriage. Many countries use the judicial branch as a regulatory mechanism to grant entrance into legally sanctioned polygamy after judicial scrutiny.<sup>173</sup> Morocco’s system provides a rich and extensive example of legislative substantive and procedural rules on the issue. An almost entirely Muslim country, Morocco’s 2004 legal reforms brought polygamy and other marriage rules under judicial review.<sup>174</sup> Under Articles 40-46, if no stipulation against polygamy in the first marriage contract exists, then a husband must petition the court for authorization to add another spouse.<sup>175</sup> Article 42 requires strict pleading rules for the petition, requiring an assertion that an “exceptional and objective justification” exists and that “the man [has]

a patriarchal system, . . . includ[ing] male polygamy for Incas, though not generally for other segments of the population.”). The sultans of the Ottoman Empire also practiced polygamy. See Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 551 (2005). Biblical Old Testament figures such as Abraham and Jacob took multiple wives. *Genesis* 25:1-6; *Genesis* 16:1-3; *Genesis* 25:6.

169. The practice has declined in Africa over the last century due to colonization and conversion to Christianity. Rates are higher in the West than in other regions of Africa. About 1/5, but possibly up to as many as 1/2, of all marriages in Africa are polygamous. The law, in general, combines customary law, Islamic law, and whatever form of civil law or common law introduced by colonial powers and which survived after decolonization. Polygamy is thus permitted under Islamic law and under some customary laws. Bailey & Kaufman, *supra* note 10, at 14.

170. *Id.* at 38–40.

171. *Id.* at 54–55. In the U.K., for example, polygamy is recognized for immigrants in the context of welfare distribution. See Talal Malik, *UK legally recognizes multiple Islamic wives*, ARABIANINDUSTRY.COM (Feb. 4, 2008, 5:07 P.M.), <http://www.arabianbusiness.com/uk-legally-recognises-multiple-islamic-wives-121789.html> (noting that legal recognition of polygamous marriages in Asia lends credibility to legalizing polygamy in the United Kingdom).

172. Bailey & Kaufman, *supra* note 10, at 8.

173. Morocco; South Africa (likely proposed); Iraq; Yemen; Jordan; Indonesia; Pakistan; Bangladesh; Malaysia; the Maldives; Philippines; Singapore. *Id.* at 7-8.

174. Specifically, the reforms brought polygamy and *talaq* under judicial control, limiting both. Although a Muslim country, polygamy is on the decline, and the 2004 reforms are considered a great step in women’s rights in Morocco. *Id.* at 27–29.

175. 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. *Id.* at 27. 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. *Id.* at 27.

sufficient resources to support the two families and guarantee the maintenance of rights, accommodation and equality in all aspects of life.”<sup>176</sup> This process treats the first wife as the respondent, requiring her to be served and summoned.<sup>177</sup> If she does not respond or fails to appear at the hearing, she will then be subsequently served with notice that the hearing will proceed without her.<sup>178</sup> The hearing still occurs, however, as her failure to respond does not subject her to the equivalent of a “default judgment,” granting the marriage based on the husband’s petition. Thus, in all cases absent a stipulation against polygamy, the husband must overcome the standard of proof mandated by the statutes to add a second or third wife. At the hearing, both parties are allowed to testify. If the court finds the justifications exist and that the husband can support the additional family, the court then puts in place conditions protecting and benefitting the first wife and her children.<sup>179</sup> If the parties cannot agree on the addition of another spouse, the court can also grant a divorce at the hearing and set the amount of support.<sup>180</sup> Neither decision is subject to judicial appeal.<sup>181</sup>

Although these reforms were considered “one of the most progressive laws on women’s and family rights in the Arab world,” struggles still exist with respect to “quality control.” One noted problem with using the judiciary was the need to create new family law courts to accommodate the polygamous

176. Article 41: The court will not authorize polygamy: (a) If an exceptional and objective justification is not proven. (b) 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. *Id.* at 27.

177. 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 send 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. *Id.* at 27–28.

178. *Id.*

179. 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 option to appeal once it establishes the existence of an objective and exception justification and puts into place conditions benefitting the first wife and her children. *Id.*

180. Article 45: When the court confirms 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 divorce, the court determines a sum of money corresponding to the first wife’s full rights as well as those of her 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. *Id.* at 28.

181. Articles 44, 45. *Id.*

population and to ensure the scrupulous review procedures of these courts.<sup>182</sup> Another concern expressed was that the complex legal requirements would thwart the protection of women, 42% of whom are illiterate in urban areas and 82% of whom are illiterate in rural areas.<sup>183</sup> One boon of using the judiciary and creating new courts, however, was the resulting increase in the number of female judges in family law cases, which is believed to cause more equity in their decision-making.<sup>184</sup>

Other countries use the judiciary or some other regulatory body to grant access into polygamy by varying degrees of intrusiveness. In Singapore, for example, requests to take additional wives can be refused by the “Registry of Muslim Marriages,” which then inquires into the consent of the wives and the husband’s financial status.<sup>185</sup> If low numbers are indicative of strenuous scrutiny, then the Registry’s functions seem efficient in that regard: from 1999 to 2003 there were 340 applications for polygamy, of which 109 were approved, constituting approximately 0.5% of all Muslim marriages during that period.<sup>186</sup>

Still other countries resort to the less intrusive mechanism of a registration system. Under the Customary Marriage (Registration) Act and the Marriage and Divorce of Muhammedans Act in force in Uganda, polygamous marriages are required to be registered.<sup>187</sup> Under the 1985 Customary Marriage and Divorce (Registration) Law in Ghana, registration was required within three months, but was later amended to be optional.<sup>188</sup> Registered polygamists are subject to the Intestate Succession Law, which gives wives a split of the portion of the estate set aside for a spouse. Thus, if there are four wives, each wife receives less than 5% of the estate.<sup>189</sup> In Senegal, a groom must register as monogamous, limited polygamous (two wives), or polygamous (up to four wives) upon registration of his first marriage.<sup>190</sup> He cannot legally change his option, but what results is *de facto* polygamy among those who register as monogamous.<sup>191</sup> In South Africa, a husband must register a polygamous marriage and must apply for court approval of a written contract to “regulate the future matrimonial property systems of his marriages.”<sup>192</sup>

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182. *Id.* at 29.

183. *Id.* at 29–30.

184. *Id.* at 30.

185. *Id.* at 63–64.

186. *Id.* at 64.

187. *Id.* at 31.

188. *Id.* at 31–32.

189. David Schnier and Brooke Hintman, *An Analysis of Polygyny in Ghana: The Perpetuation of Gender Based Inequity in Africa*, 2 GEORGETOWN J. GENDER L. 795, 803 (2001).

190. Bailey & Kaufman, *supra* note 10, at 21–22.

191. *Id.* at 22.

192. *Id.* at 36 (quoting Penelope E. Andrews, ‘Big Love’? *The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. 1483, 1494–95 (2007)). South Africa is not unique in, but is known for its Constitution, which provides one of the “most impressive documents for the wide range of rights protections it affords and for its deep commitment . . . to gender equality.” Polygamy is governed by Recognition of Customary Marriages Act. The Act requires consent to the marriage and makes registration a requirement. Wives in “customary marriages” have full legal status and capacity. Property protections include automatic community property regime, but allows the parties

## 2. Fact-finding and standards required

The countries that regulate polygamy under judicial review have differing standards that its applicants must meet. One almost universal requirement is that a man must show his financial ability to provide for his current family and the additional spouse.<sup>193</sup> Although this requirement may spring from a religious mandate to treat all wives equally, it has social and practical financial benefits for the state. As to the other requirements, the standards diverge. In the Morocco example, a petitioner must additionally prove an “exceptional” justification.<sup>194</sup> In Yemen, a man is allowed up to four wives if he can show: (1) that he has the ability to be equitable; (2) that the husband has the capacity to provide [for the wife]; and (3) that the woman is notified that the man is married to another woman.<sup>195</sup> Under the federal standards in Malaysia, a judge must be satisfied that: (a) the polygamous marriage is just and necessary; (b) the husband can support all of his existing dependents; (c) the husband will accord equal treatment; and (d) not cause harm to the existing wife or wives or lower their standard of living.<sup>196</sup> These standards thus generally include a financial inquiry. But some require a showing of need or justification, such as that the current wife is infertile. Significantly, not all standards require the consent of the existing wife, as discussed below.

## 3. Consent of existing wife or wives.

The consent of the existing wife or wives to the addition of another wife is a contentious issue under religious laws, which often have no such requirement. In Jordan, for example, although the judiciary reviews a husband’s application to add another wife, the first wife is not required to receive legal notice until after the application is granted.<sup>197</sup> In the Philippines, the existing wife or wives are treated as judicial respondents and must consent to the marriage before the Shair Circuit Court of her residence. If she objects, the Agama Arbitration Council decides whether to overturn her objection.<sup>198</sup> The 1951 Muslim Marriage and

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to deviate by contract. Bailey & Kaufman, *supra* note 10, at 36–37.

193. This requirement can be found in Indonesia, the Maldives, Myanmar, Morocco, Yemen, and Iraq. See generally *id.*; but see *id.* at 67–68 (noting that Sri Lanka has no financial showing requirement).

194. *Id.* at 29.

195. Polygamy is allowed with few restrictions. 99.1% of the Yemen population is Muslim and practice polygamy, along with the small Jewish community. *Id.* at 53–54.

196. In Malaysia, polygamous marriages account for less than 6% of marriages. Malaysian law is based in English common law combined with Islamic law and customary law, wherein only Muslims are allowed polygamous marriages. Kelantan law requires written permission of a judge but permission is liberally granted. *Id.* at 61–62.

197. Polygamy usually includes just two wives. In Jordan, only 5.9% of households are polygamous with two wives, only 0.9 percent have three, and 0.03 percent have four). However, a Jordanian wife has the power to stipulate against polygamy in her marriage contract. Article 40 of Jordan’s Law on Personal Status, as amended by the 2001 temporary legislation, provides that “[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.” *Id.* at 48–50.

198. Approximately 5.1% of the population in the Philippines is Muslim. Polygamy is most commonly practiced among the Tauseng, a Muslim group. Title II of Presidential Decree No. 1083



Divorce Act of 1951 in force in Sri Lanka requires public notice of polygamous marriage in a conspicuous place of the existing wife and the new wife, but no requirements exist to obtain the first wife's permission.<sup>199</sup>

The current trend, however, is to require the wife's consent to the addition of another wife before approval is granted. In Indonesia, which boasts the world's largest population of Muslims, the 1973 National Marriage Laws allow polygamy but require the written or oral consent of the first wife if she is then before the court.<sup>200</sup> In fact, Indonesia's constitutional court in 2007 rejected a man's claim that the requirement of his first wife's permission was unconstitutional and a violation of religious freedom.<sup>201</sup>

#### 4. Stipulations Regarding Polygamy

Many countries will recognize and enforce a couple's contract regarding the allowance or prohibition of polygamy. In Mali, the 1962 Marriage and Guardianship Code permits a man to marry up to four wives, but the law also requires a husband and his first wife to agree on the form of matrimony, monogamy or polygamy, at the time of their wedding.<sup>202</sup> A monogamous marriage can only be converted to a polygamous one with the first wife's consent.<sup>203</sup> In other contexts, first wives have the power to stipulate in their marriage contracts that polygamy would be a basis for divorce or support, such as in Jordan,<sup>204</sup> the Maldives,<sup>205</sup> and Lebanon.<sup>206</sup> In Lebanon, for example, Sunni women can prohibit polygamy or consider themselves divorced if the practice occurs.<sup>207</sup> In Egypt, women have long enjoyed pre-nuptial agreements restricting polygamy, and the default rules allow the wife to keep the marital home after divorce arising from polygamy, for example.<sup>208</sup> One issue surrounding

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(the Code of Muslim Personal Laws), recognizes and legalizes Muslim polygamy practices. In Myanmar, the consent of the first wife is required in certain circumstances. If she is infertile for 8 years or fails to have a son, however, the husband can take a second wife without her consent. Bailey & Kaufman, *supra* note 10, at 66–67.

199. *Id.* at 67–68.

200. *Id.* at 57.

201. *Id.*

202. *Id.* at 18. Mali is a West African country made up of 92.5% Muslims. 42% of the women and 27% of the men are in polygamous marriages. Mali's legal system is a mixture of French civil law, customary law, and Islamic law. *Id.* at 17.

203. *Id.*

204. *Id.* at 48.

205. *Id.* at 64–66. The Maldives population is composed of 98.4% Muslims. According to the Asian Development Bank, only 59 polygamous marriages took place in 1998. Women can now contract regarding polygamy through a new Family Law Act in force since July 2001. Any polygamous marriage must be approved by the Registrar of Marriages subsequent to an application being made by a man, and there are certain financial requirements that also must be met.

206. *Id.* at 51.

207. Under Israelite code, men can have up to two wives; under the Muslim code, men can have up to four. The Sunni's in Lebanon allow women to stipulate against polygamy or to consider herself divorced if a polygamous marriage occurs. But, Jafari code does not allow such stipulations. *Id.*

208. *Id.* at 25–26. Muslims comprise 94.6% of the Egyptian population, but only 3% practice

prohibitions on polygamy is whether such prohibitions are enforceable and practically adhered to. Moves were made in Mali in 1999 to make the choice of monogamous marriage permanent.<sup>209</sup> This was ultimately rejected, however, because poor women benefit from polygamy and because non-recognition results in de facto polygamy with no legal requirement for support on the part of the husband.

#### 5. Restricted to Certain Religious or Ethnic Groups

Another controversial but common worldwide practice is to limit access to polygamy to certain religious or ethnic groups. This is common in countries with monogamous populations who then make accommodations for religious or cultural practices. Article 3(1) of the Marriage Law in force in Indonesia 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>210</sup> In India, for example, Muslims are allowed to practice polygamy, but Hindus are not.<sup>211</sup> In Lebanon, fifteen personal status codes exist, including ones for Muslims, Christians, and Jews; the Muslim and Jewish codes allow polygamy.<sup>212</sup> In Kenya, which is governed by civil, Christian, Hindu, Muslim, and customary marriage laws, polygamy is permitted only under Islamic or customary law under classical sharia rules.<sup>213</sup>

### B. Tailoring to an American Procedural and Substantive System

A global review can provide a head-start in crafting rules that could apply to polygamy in the United States. Some options are more readily developed so as to apply without much restructuring. Other features, however, must be modified to fit within the constitutional framework concerning religious establishment prohibitions. The following subsection will address the policy implications influencing the solution proposed in this Article.

#### 1. The Judiciary as Gatekeeper

One question posited in forming a solution that borrows from other countries is whether to use the judiciary as a regulatory agency or whether to simply require registration. One implication of adapting business models to

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polygamy. Polygamy was once common among upper class Egyptian families, but it became less frequent by the turn of the twentieth century. *Id.*

209. *Id.* at 18–19.

210. *Id.* at 55; see also Elsbeth Locher-Scholten,, *The Colonial Heritage of Human Rights in Indonesia: The Case of the Vote for Women, 1916-41*, 30 J. SOUTHEAST ASIAN STUDIES 54, 62-63 (1999) (detailing Indonesian women’s fight for equal rights in law).

211. Choudhury, *supra* note 65, at 974–76.

212. Bailey & Kaufman, *supra* note 10, at 50.

213. 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 (understood to be potentially polygynous), and (4) Traditional/customary marriages (which are understood to be potentially polygynous). The Act guarantees women’s rights to property acquired on her own, as well as rights to matrimonial assets. *Id.* at 32–33.

apply to polygamous relationships is to use a registration process, similar to that used by each state's respective Secretary of State to register new business entities. Although a registration system could be set up so that sworn statements must be submitted attesting to each person's age and consent, this informal process cannot serve the necessary functions that the judiciary can in this context: the impartial review of evidence submitted, the wife or wives' consent before the court to the polygamous marriage so as to protect against coercion or duress, the gauging of the veracity of the family's belief in their religious practices, and the need to engage in sufficient fact-finding and the weighing of witness testimony that only a hearing can provide.

Using the judiciary as the gatekeeping institution further provides each wife with the opportunity to come into contact with the legal process and to learn of her rights and status in this impartial, secular setting. These specialized courts could focus only on polygamous marriages, thus becoming more familiar with its distinctive features and common issues which arise in polygamous families over time. Finally, coming into contact with the judiciary and its attendant court-appointed attorneys can curb the potential inequities that a complicated judicial procedure can cause for uneducated or illiterate women who may not otherwise know their legal rights.<sup>214</sup>

## 2. The Showing Required at the Hearing

If the judiciary is adopted as the gatekeeping institution, the next issue is what showing is required at the hearing. As was seen in the world review, numerous different standards are used. Although the most common standard is that the man must show his financial ability, this requirement is explicitly rejected in this proposal, as financial ability should not be a prerequisite to marriage.<sup>215</sup> Since this requirement stems from the religious doctrine that a man be able to treat each wife equally, this religious tenet should not translate into a required showing under the "no religious decisions" doctrine under the Establishment Clause.<sup>216</sup>

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214. One criticism of arguing for judicial regulation over the entrance to polygamous marriages is the added administrative costs and burdens. In response to those concerns, my theory on the macrocosmic economies of this proposal focuses on both the cost of entrance into marriage and the exit from marriage. Currently, our system only requires two persons over the age of consent to apply for and register their marriages. This lack of regulation has arguably underpinned the high rate of costly divorce in the United States. Divorce requires that couples hire attorneys; they fight over interim spousal support, child custody, permanent spousal support, and marital property; then they have to wait anywhere from 90 days to two years for their divorce to become final--all requiring a tremendous amount of judicial oversight and resources. If couples were more aware of the nature of the contract that they were agreeing to on the outset of marriage, they would be more likely to contract around and pre-arrange many of the issues that lead to marital discord and divorce later down the road. Instead of adding more judicial resources to the front end of marriage, this proposal re-allocates those resources from the back-end, i.e., dissolution of marriage, and focuses on protecting the parties at the outset.

215. See *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978) (striking down a Wisconsin statute requiring that individuals with child support obligations cannot marry unless they showed proof that they are meeting their obligation and a court order is issued granting permission to marry).

216. See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*,

One way to tangentially address the issue of financial soundness of the family as a whole, not necessarily of the husband alone, is to require an agreement regarding property rights and distributions that are sufficient to protect the first wife and her children, or to at least ensure that each wife understands her property rights and the default rules that will apply to her situation in the absence of an agreement. This solution goes so far as to require a statement that each wife understands the default rules in the absence of an agreement and understands the agreement if one exists. This choice seeks to protect the financial interests of women in polygamous marriages.

As to the other possible requirements, it should go without saying that each existing wife and the new proposed wife must consent on the record and must show proof of age of consent in order to get married. Indeed, one of the main secular purposes for regulating marriage is to protect against underage marriages, incest, and lack of consent—prohibitions traditionally associated with polygamy in the United States. These showings should be made at the hearing by sufficient proof under a preponderance of the evidence standard.

### 3. The Use of Permanent Stipulations or Classifications

Another recurring issue is whether stipulations in marriage contracts regarding future polygamy within the marriage should be permanent. Should a couple be forced to decide at the outset whether their marriage will be monogamous or polygamous? Davis' solution requires a couple to choose at the outset whether their marriage is going to be monogamous or polygamous and requires the couple to register their choice.<sup>217</sup> This requirement, she argues, will protect against the “threat of polygamy” that husbands could use as an unfair bargaining tool against their wife.<sup>218</sup> The issue with making the monogamous choice at the outset permanent, however, is two-fold. First, it could result in *de facto* polygamy, which is what this proposal attempts to avoid. This unintended consequence occurs in Senegal.<sup>219</sup> Since a Senegalese man is required to register his type of marriage when he contracts his first marriage, if he wishes to engage in polygamy later, he merely takes on additional wives without incurring any legal obligations toward them.<sup>220</sup> This undermines the purpose of regulation of polygamous marriages by denying protections to second wives in unregistered marriages. Second, devout men and women may not be able, at the time of their first marriage, to support or envision being amenable to a polygamous marriage

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393 U.S. 440, 449 (1969) (the First Amendment “severely circumscribes” the roles that civil courts may play in resolving disputes touching on matters of faith); *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice); *Askew v. Trustees of General Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc.*, 684 F.3d 413, 418–19 (3rd Cir. 2012) (The non-entanglement principle embedded in the First Amendment shielded membership decisions made by highest authority in church from civil court review); *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 250 (S.D.N.Y. 2014) (applying general doctrine that civil courts cannot inquire into “religious law and policy” in the context of a defamation claim).

217. Davis, *supra* note 5, at 2014.

218. *Id.* at 1991–92.

219. Bailey & Kaufman, *supra* note 10, at 22.

220. *Id.*

until later in their lives, when the family is able to embrace such an addition. Although many first wives are initially resistant to their husband's proposal to bring a second wife into the home, they may also believe that their husbands have a religious duty and, if their husbands can support more than one wife, the first wives would not want to hold their husbands back.<sup>221</sup> Further, the "threat of polygamy," while a poignant threat in any culture that allows polygamous marriage, is often seen as preferable to an adulterous husband or divorce.

Another argument is that women who cannot consent to or accept their husband's request to add another wife into the marriage always have the option to leave, as in any marriage. It is at this point that women could stipulate in their marriage contracts that divorce arising from polygamy may result in a certain heightened level of support.<sup>222</sup> For all of these reasons, this paper takes the position that couples should not be required to register as monogamous or polygamous at the outset of their marriage. The wife must still consent to the addition of a new spouse, but have the opportunity to make that decision when the situation arises.

#### 4. Restricting to Persons with Genuine Religious Convictions

The final issue to address—and it is a major one which the author has struggled to resolve—is whether to limit access to polygamy to those with genuine religious beliefs. Although some countries restrict the practice to certain religious or ethnic groups, this type of limitation would not work in the U.S. Although the majority of polygamists in the United States stem from two distinct religious groups,<sup>223</sup> Establishment Clause jurisprudence requires that states refrain from making decisions based on sect affiliation or based on what the majority of a denomination believes about its religious practices.<sup>224</sup> Thus, regulation cannot limit access to polygamy to those who belong to only certain religious denominations, such as orthodox Muslims.

What may be permissible, however, is to use accommodation jurisprudence to limit access to those individuals who have a genuine belief that their religion compels them to act in a certain manner. This would include, of course, fundamentalist Mormons and orthodox Muslims, but would also include any individual who practices polygamy as part of a religious or spiritual belief. For those who view this proposal as a social experiment, limiting the "test pool" by religious belief will keep the numbers small and could protect against fraudulent claims of religious belief. However, limiting access to an option of marriage

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221. See Hagerty, *supra* note 1.

222. See *infra* Part V(B)(6).

223. See Alexandre, *supra* note 10, at 1462 (explaining that the majority of polygamists in the United States are Mormon or Muslim).

224. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 707 (1981) (courts must consider religious exemption requests without regard to whether the religious belief is shared by fellow members of the claimant's denomination.); see also *Wilson v. NLRB*, 920 F.2d 1282, 1285–88 (6th Cir. 1990) (legislatively granted exemptions limited to people who are "member[s] of and adhere[] to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to [a certain practice]" are unconstitutional because they favor members of certain denominations over those who have more idiosyncratic religious beliefs). See also *Piech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298, 1300–02 (Mass. 1996).

regulated by the state could raise other substantive due process and equal protection challenges by those who wish to engage in the practice for all the social, cultural, and identitarian reasons previously discussed. Thus, secular polygamists who have no religious ties, but mere philosophical or sociocultural beliefs supporting their practices, would be left out.<sup>225</sup> Because it is too early to foretell which route polygamous recognition would take, this solution attempts to propose a regulatory solution that allows for both.

## V. PROPOSAL FOR REGULATING ENTRANCE

The following section provides a legislative and judicial proposal for recognizing and regulating religious-based polygamy in the United States. Obligations and rights that extend from and begin because of the act of marriage are myriad and touch numerous bodies of law such as inheritance, tax benefits, worker's compensation, and government benefits. While this proposal provides some discussion of these ancillary issues, the main focus of this proposal is on the judicial structure and process for entrance and exit from polygamous marriage.

### A. Proposed Legislation

This proposal is not all-encompassing. What it provides is a cursory implementation plan, highlighting in more depth some of the key features of the proposed laws and procedures. Some aspects of the proposal are still in the "beta testing" stage, so the proposals in this paper are suggestive responses to how legislatures and courts address particular issues.

#### 1. The Use of the Judiciary as a Regulatory Institution

The legislative infrastructure required to regulate polygamy begins with the creation of a special division of the family law courts, created with limited subject matter jurisdiction over polygamous marriages. This branch would have jurisdiction over families with members who are domiciled in that state and in that county under that state's domiciliary and marriage principles, taking into account any time limitations imposed on parties moving to the state who want to enter into a religious polygamous marriage there. The physical infrastructure required for this division could be minimal, as hearings before the actual panel could take place as infrequently or as frequently as the court docket allows or is mandated by legislation. The court could even decide, for example, to meet once a month for the sole purpose of reviewing polygamous marriage applications.

#### 2. Initial Filings and Required Pleadings

The marriage applicants, or one of them, would initiate the proceedings by filing with the court an application for polygamous marriage or to add an additional spouse. The application and the pleadings would have to provide:

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224. For a more in-depth discussion of the First Amendment and substantive Due Process arguments at stake, see Casey E. Faucon, *Polygamy after Windsor: What's Religion Got to Do with it?*, (forthcoming 2015).

- The name of the petitioner(s) and the names of all of the existing spouses to the marriage and the proposed additional spouse;
- A statement of the ages of all parties applying and a statement that each consents to the creation of a polygamous marriage (or the addition of a new spouse);
- A statement that the parties listed wish to engage in polygamous marriage under a genuine religious belief;
- An attestation that each of the parties will, before the scheduled hearing date, meet with their hired or assigned counsel to discuss their respective individual rights and potential property implications of their individual decisions;
- An affidavit from the family's religious advisor or other witness, stating that he/she knows the petitioning family and is familiar with their religious beliefs, and that the family's belief in entering polygamy based on religion is genuine; or any other evidence to support this statement;
- If applicable, an attestation that the parties have or will agree to a pre-marital contract and that the parties understand the parameters of that agreement, attaching the agreement; and
- The name(s) of any attorney(s) and the associated parties they represent.

The applicants would then file the pleadings with the special tribunal. Once filed, all non-petitioning members of the current marriage and the proposed new wife should be served and summoned. The court would provide a future hearing date, providing sufficient time for parties to meet individually with their attorneys (or court-appointed attorneys) to discuss their individual rights. It is also presumed that prior to or during this time the family may have already discussed some of these issues with each other, their religious advisor, or attorneys, and may have worked out a marital agreement already. Again, if no showing of religious belief is required, that attestation requirement would be removed.

### 3. Court-Appointed Attorneys and Nature of Representation

From these initial pleadings, the court would discover which of the parties, if any, have attorneys. All parties to a potential polygamous marriage must have independent counsel. They may waive their rights to court-appointed attorneys if they have their own private, individual representation. Otherwise, the state would have to choose whether or not a party (presumably a wife) could waive her rights to any representation and proceed with full consent to whatever pro se representation may entail. Ideally, however, if only the husband has his own attorney upon application, the court would then appoint an individual attorney to each of his existing wives and to his proposed wife. The remainder of this proposal proceeds on the premise that no person waives her right to an attorney.

Assigned counsel would then have to meet with each client and discuss available rights and rules affecting their marriage, ensure that they consent to the

marriage, and confirm that they understand the consequences. The attorneys would ideally discuss the default property rules available. If the family agreed to or discussed any proposed deviations from these default rules either internally or with their spiritual advisor, the attorney would also discuss the implications of the agreement for his or her individual client. The attorney would then have the opportunity during this time to review any alterations and bargain, if necessary, for her client before the family appears at the hearing.

#### i. Procedure at the Hearing

Each of the parties and their respective counsel would have to be present at the hearing. If the panel were designed to hear multiple polygamous marriage applications that day, then this might ease the administrative burden on some of the court-appointed attorneys who would likely handle a majority of these clients. Each spouse would have to state on the record that they consent to the polygamous marriage or the addition of a new spouse, and that each has discussed the options available with her respective attorney. The husband and the new proposed wife would have to consent on the record and state that each was represented by independent counsel. The panel would also have to review the affidavit of the religious advisor, ensuring that all the requisite elements were present. If necessary, the court could require that the religious official appear at the hearing to clarify any questions that the court may have with respect to any marital agreements.

Each party would then have to affirm that she understands any agreements that the family may have with respect to property allocations or inheritance rights and that she consents to the agreement. If there were any objections to any sections of the agreement, the panel would then review the application and the proposed agreement, and listen to arguments from all parties on the issue. The panel (or any party) could also call the religious advisor as a witness to discuss any religious motivations behind the deviation. The panel would then take all of those things into consideration, as well as the public policy behind any default rule so affected, before issuing a judgment.

The panel would then have a certain number of days to reach a decision and issue a judgment on: (1) the sufficiency of evidence in support of the application for polygamous marriage or to add a spouse, and whether such application is granted; and (2) whether any premarital agreements were submitted without controversy, and if so, that they be approved and submitted into the record, or if submitted with opposition, then the panel would issue a judgment. In that judgment, the panel can (a) order the issuance of the marriage license but with the amended agreement, or (b) deny the marriage license and give the parties a certain number of days in which to apply for re-hearing with an alternative arrangement, if the impediment can be fixed. If one party is holding out her consent because she is dissatisfied with the allocation of marital property, for example, or with the source of the funds that the husband is using for a *mahr* for the new wife, but otherwise consents to the actual plural marriage, then the panel can always ask the parties to try to work it out again, if they can, and to re-apply at a later date. The panel can always (4) deny the marriage license with or without prejudice, if it finds a troubling issue that cannot be amended, such as the proposed wife being under-age or if the relationship is in some way



incestuous. The parties can always re-apply when the proposed wife reaches the age of marital consent, in the former case, but could not re-apply in a case of incest.

## ii. Structure of the Panel and Panel Members

The following paragraphs provide a brief discussion of some potential panel structures, eventually coming to the strong suggestion that we should borrow from arbitration law in selecting three panel members from a pool of qualified polygamous marriage “arbitrators” to hear these petitions for polygamous marriage or to add a spouse. The first larger issue is whether to keep the familiar panel structure used in other countries or to just use one judge, akin to an administrative law judge who has special jurisdiction. The latter option could be just as efficient, if not more efficient, than a panel in that a few judges could hear petitions for polygamous marriage or to add a spouse on a rotating basis. The downside of this, again, is the potential negative effect on the user and their need to feel as if the process is fair. The use of a singular judge, present in robes in a courthouse, can be intimidating. A three-person arbitration panel structure, however, working in a separate part of the courthouse, may seem more accessible and less intimidating. Alternatively, the arbitration panel could even meet in another venue, as arbitration panels often do, as long as a court reporter is present to record the proceedings.

In choosing to keep the panel structure, other countries fill their panels with a multitude of personnel types. For countries under the Muslim Family Laws Ordinance, for example, the panel members would be composed of a representative of the existing wife (or wives), the husband’s representative, and a neutral chairperson.<sup>226</sup> The panel’s potential structure and function are open to creative suggestion, the provisos being that: (1) the panel has regulatory and judicial authority, so putting any attorneys on the panel or too many persons on the panel could thwart the efficient and unbiased functioning of the panel; and (2) no religious advisor should serve as a panel member because to do so would give him or her impermissible regulatory authority. If a panel structure is going to work, then they must be kept limited in number, free from biases, and completely civil in nature. Another option could be to include a panel member with social work training and who may be keener to discern threats to women and children.<sup>227</sup>

Unlike other countries, the United States has strict rules against intermingling church and state authorities, and its lawmakers are wary of treading too closely to an Establishment Clause violation.<sup>228</sup> Religious personnel

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226. The Muslim Family Laws Ordinance, § 6, No. 8 of 1961, Oct. 7, 1958, *available at* <http://www.refworld.org/docid/4c3f1e1c2.html>. *See also* Rehman, *supra* note 94, at 117.

227. Thank you to Eric Berger for making this suggestion.

228. *See generally* MATHAIS ROHE, MUSLIM MINORITIES AND THE LAW IN EUROPE: CHANCES AND CHALLENGES 16–17 (2007) (highlighting aspects of European governance of Muslim individuals); Choudhury, *supra* note 65, at 969; CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 18–19 (2007). In interpreting the First Amendment in 1802, Thomas Jefferson wrote a letter to the Danbury Baptist Church in Connecticut:

are used in other capacities in the law. Licensed wedding officiators are often religious and spiritual leaders.<sup>229</sup> The U.S. also allows religious-based arbitrations, for which a religious leader might serve as arbitrator.<sup>230</sup> But the religious advisor never plays more than wedding officiator, a witness before the court, or a religious-based arbitrator whose decision is subject to official judicial review. In this context, no precedent or policy exists to allow religious personnel to serve any higher regulatory function. Instead, allowing the religious official to serve as a witness could provide necessary evidentiary support for a panel's decision on a polygamous marriage application.

In filling the panel, one suggestion would be to borrow from civil arbitration laws and have a capable "pool" of available judges from which to randomly assign three to the panel for a specific case. Arbitration serves as a practical model in terms of the composition of the decision-making body, as many civil arbitrators specialize in certain types of arbitrations, such as family or commercial disputes. Each hearing day would be randomly assigned to three selected judges, and the judges would hear all applications filed for that day and could proceed down the docket.<sup>231</sup> With respect to any subsequent filings, any set of three panel members would retain jurisdiction over any applications filed by any of the parties to that marriage, such as the application for additional spouses or for a petition for divorce brought by any one of them. This way, panel members would be familiar with the history and pertinent details of any one family when determining subsequent issues.

#### 4. Appeals Process

Like an appeal from an arbitration award, the challenger could file an appeal of the award with the appropriate district court. The legislature would have to then decide whether to limit the scope of the judicial review as they do in arbitration appeals. Under many state arbitration laws, a party can appeal the

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Believing with you that religion is a matter which lies solely between man and his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their "legislature" should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus *building a wall of separation between church and State*. . . . I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Reynolds v. U.S., 98 U.S. 145, 164 (1876).

229. See, e.g., ALA. CODE § 30-1-7 (2009) (authorizing certain individuals to solemnize marriages); ARIZ. REV. STAT. ANN. § 25-124 (2007). For a complete list of states that allow religious clergyman or religiously affiliate leaders to perform weddings, see Robert E. Raines, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, But Who Am I to Do So?*, 64 U. MIAMI L. REV. 809, 842 (2010).

230. See generally, Spivey v. Teen Challenge of Florida Inc., 122 So. 3d 986 (Fl. 1st Dist. Ct. App. 2013); Liebermann v. Liebermann, 566 N.Y.S.2d 490 (N.Y. Sup. Ct., Kings County 1991). For a discussion about faith-based arbitrations and their interaction with secular courts, see Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 437-442 (2006) (detailing Jewish, Christian, and Islamic religious arbitration forums).

231. Another suggestion would be to close the sessions to the public so that the applicants do not perceive their otherwise private lifestyles and protected family interests as being "on display."

arbitrator's award to the district court but only on limited grounds. The grounds focus mainly on ensuring that the parties did, in fact, agree to binding arbitration, and provide few other substantive grounds to challenge an award. In Louisiana, for example, arbitration awards can only be vacated where the award resulted from corruption, fraud, or undue means; where there was evident partiality on behalf of the arbitrators; where the arbitrators were guilty of misconduct or refused to hear relevant evidence; or where the arbitrators exceeded their authority or so imperfectly executed their duties that a definite award was not made.<sup>232</sup> As this is a familiar and accessible procedure for courts of generalized jurisdiction, the arbitration rules could provide an applicable model or basis for limiting appeals from polygamous panel decisions, or the legislature could choose not to limit the scope of review on appeal.

## B. Default Rules and Laws Affected by Polygamy

One critique of regulating polygamy is the legislative overhaul that such a move would require in the context of amending substantive default rules affected by marriage. Many of the legal institutions affected by marriage are generally based on a two-person idealized model, requiring a re-writing of tax laws, property and inheritance laws, and so forth. While such a task would be daunting, one advantage of the current system is that some laws already accommodate the *serial* monogamy system that we have in the United States.<sup>233</sup> In the social security context, any former spouse who was married to a qualified recipient for ten years is entitled to receive a portion of the benefits, in addition to any current spouse.<sup>234</sup> In that regard, we have already done a bulk of the work in crafting legislation to accommodate more than two spouses.

Another supplemental approach would be to use business model default rules. Davis proposed that community property rules be used, or a variation thereof, in the context of polygamous marriage,<sup>235</sup> a point of view to which I subscribe. Although this paper provides a mere glimpse into the foray of potential default rules to be affected by polygamous marriage, it does provide a few insights on these issues in response to some of the content-based issues that may arise during the course of a marriage. These examples include community property allocations, inheritance and probate laws, child custody and parentage laws, rights to government benefits, and tax implications.

### 1. Property Allocations

Polygamous marriages involve multiple persons, so in that regard they are

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232. LA. REV. STAT. ANN. § 9:4210 (1983).

233. See generally Glendon, *supra* note 160, at 673 ("Successive polygamy is so much in vogue in Western industrialized societies that, far from forbidding it, the law of divorce, with its economic and child-related consequences, is fast changing to adapt to it.")

234. See e.g., 42 U.S.C. § 416, *et seq.* (2012); *Albertson v. Apfel*, 247 F.3d 448 (2d Cir. 2001); *Contreras v. Sullivan*, No. 88-2077-PHX-RGS., 1990 WL 357098 (D. Ariz. 1990); *Robinson v. Shalala*, No. 94 Civ. 5949(SS), 1995 WL 681044 (S.D.N.Y. 1995); *Smith v. Barnhart*, 57 Fed. Appx. 406 (10th Cir. 2003).

235. Davis, *supra* note 5, at 2004–24.

“group” marriages. But they are not “group” in the sense that everyone involved has an equal relationship with everyone else in the marriage. Most traditional polygynous marriages are dyadic in nature; they are a series of two-person relationships where one of the spouses is in common.<sup>236</sup> In practice, the relational structure is much like the Mormon visual of spokes on a wheel. Taking this structure into account, property distribution regimes must treat each marriage between the common husband and each of his wives individually.

Following Professor Davis’ suggestion that these marriages use community property sharing principles with respect to marital property,<sup>237</sup> this solution can go further. Instead of treating all income as a large community pot, this solution treats each dyadic marriage as its own community. The exact contours of how that could be accomplished are still in development, but there are a few possibilities. For example, in any given polygamous marriage, the percentage of a husband’s share could be half of all of his income that he brings into the marriages, but then that would leave all of his wives to split his other half in equal numbers. If a man has four wives, then they are left splitting half of his income four ways. Instead, the common spouse, usually the husband, and the wives could share in equal parts all of his income brought into the family based on time in the marriage.<sup>238</sup> If a man has four wives, then his community property would be divided in five parts, each spouse given one-fifth, with some adjustments for time in the marriage.

With respect to the wives’ financial contributions, the default rules would ideally be that she keeps one half of her contributions and the other half belongs to the husband. However, if another community needs funds from an earner wife, for example, then the parties could provide for this type of community sharing in the pre-marital agreement, or they can defer to the default rules. The default rules could require a loan from the community of the earner wife and the husband to the community of the husband and the non-working wife. These accountings would be made at the termination of the marriage or the end of any party’s participation in the marriage, just as in the context of the termination of monogamous marriages in community property jurisdictions.

## 2. Inheritance/Probate

These rules would also affect inheritance and probate laws. One suggested default rule could be: A child can inherit from both of her respective parents, but she can only have two parents from which she can inherit, unless altered by will. If a wife dies without any children, then perhaps the laws could be arranged so that children of her husband’s other wives could inherit in proportion, unless, again altered by will. Children would receive the father’s share of his community

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236. See Becker, *supra* note 14, at 80–107 (considering polygamy from a bargaining perspective); POSNER, *supra* note 14, at 253–60. *But see* Davis, *supra* note 5, at 2017 (arguing that treating polygamous marriages as a series of dyadic relationships is a fallacy).

237. See Davis, *supra* note 5, at 2004–24.

238. *Cf. id.* at 2013 (proposing treating polygamous marriages like a general partnership for the purposes of dissolution or dissociation, wherein the default rule would potentially be equal sharing of assets, though partners could contract around these defaults or states could create more nuanced regimes).

property in equal number if he died in naked ownership, with the mothers benefitting from the use, just as in default community property rules.<sup>239</sup>

Another issue worth addressing is the concept of whether the polygamous marriage could continue if the husband, the common spouse, dies. Professor Davis' proposal based on partnership models would allow for this female-only group marriage to continue even after the husband leaves the marriage or dies.<sup>240</sup> Although this would promote the idea that consenting adults are free to arrange their legal relationships to other adults in any manner that they see fit, this may not be the reality or mindsets of women in these situations after the common husband dies, as many adhere to the idea that the husband holds the family together.<sup>241</sup>

### 3. Child Custody and Parenthood

Polygamy regulation would have to address child custody issues and parentage laws. Although the suggestion made in the inheritance context that a child could only inherit as a primary beneficiary of her two parents, it may not be in the child's best interests to structure custody and visitation along these dyadic norms. Again, this is an area that raises many questions and can cause disagreement. Primary custody would reside in the respective mother and common husband of the individual child—that much seems generally agreeable. But what levels of parental rights or access to the children do we want to give the “sister-wives”? Could we impose parental rights and obligations on the other wives or something akin to the legal relationship between a child and a step-mother? Along those lines, another thing to consider is how the law would handle visitation rights after the end of a polygamous marriage. If one wife left the marriage, should she be able to petition for visitation with the other children? Should the law allow a right to visitation in this instance? Could the remaining wives petition for visitation with the children of a woman who leaves the marriage? These issues are just a sample of the situations that the law will need to consider when addressing regulation of polygamous marriage.

### 4. Workers Compensation and Government Benefits

One concern about these polygamous groups is that they incentivize women to claim single motherhood status in an attempt to siphon off economic support from a government that they otherwise shun.<sup>242</sup> By registering these unions, the government benefits can now more properly determine any amount of support with the knowledge that these women are spouses in plural marriages. Although marital status alone should not be a determinative factor for whether or not a family can receive support, the states and federal government will have to re-draft the rules on benefit eligibility.

### 5. Tax Implications/Taxable Units

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239. See, e.g., LA. CIV. CODE ANN. art. 890 (1996) (stating the usufruct of the surviving spouse).

240. Davis, *supra* note 5, at 2010.

241. See Bennion, *supra* note 13, at 148.

242. See Strassberg, *Crime of Polygamy*, *supra* note 20, at 405–09 (detailing the economic structure of fundamentalist Mormon societies).

Polygamy regulation would also have to take into consideration the effect of tax laws and tax exemptions. One scholar, Samuel D. Brunson, recently published a work discussing the tax implications of polygamous marriages under the larger policy of pushing for universal single-person filing, whether married or not.<sup>243</sup> Whether to view each polygamous family as a single taxable unit or as individual marriages is a question that the IRS must address. Although community property rules might dictate that each two-person marriage in a polygamous family has its own respective community, this same type of conception may not work in a tax context, which may require that the family be taxed as a single unit. These are just a couple of the substantive issues affecting the “mid-game” portion of marriage that legislatures would have to address when deciding to recognize and regulate polygamous marriage.

#### 6. Exit from the Polygamous Marriage

This subsection addresses the tail end of a state’s regulation of marriage—the exit stage. Exit from a polygamous marriage could occur in a multitude of ways: one wife could file for exit or termination (divorce); the husband could file for divorce from one of his spouses; a unanimous majority could vote to terminate one person from the marriage;<sup>244</sup> the husband could divorce all of the wives; or the husband could die. In fashioning rules to address all of these different ways to exit a marriage, the rules should be guided by a few generalities: (1) unilateral divorce or *de facto* divorce outside of the judicial process should be prohibited;<sup>245</sup> and (2) parties should have the opportunity to contract their own divorce agreements, under the assumption that some of the allocations made in the agreements may be based on religious doctrine.

The proposed set of procedures discussed in this section will be limited to the context of one person’s exit from the marriage, either through her own choice or as a result of a unanimous majority “voting her out.” Probate laws would address the effects of termination by death of one of the parties to the marriage, and this article does not address the full potential effects under probate law. Thus, the following procedures suggested would apply only in the context of “divorce,” or exit from the polygamous marriage.

Similar to the procedure for acquiring a marriage license, the petitioner(s) would file an application and petition for exit from or termination of the polygamous marriage. Ideally, the petitioner(s) would have already discussed the repercussions of a divorce with her religious advisor. In applying for divorce

243. Brunson, *supra* note 1, at 113.

244. Davis makes the suggestion that the parties to the marriage could all vote to “expel” one member, in the same way partners must unanimously vote to expel a partner from the entity. Davis, *supra* note 5, at 2010.

245. This proposal requires civil divorce for religious marriages, in addition to any religious practices constituting religious divorce. This rule is in place to protect against inequities perceived with the practice of *talaq*, but which a Muslim man can unilaterally and instantaneously divorce his wife. The *talaq* can be pronounced even in the absence of, and without the involvement of, the wife in the process. Although women are granted the right to divorce under *sharia*, they must do so through an onerous process using judicial decree. The wife can also use a *khul* or *khula*, which requires the consent of the husband and the wife to forego a part of or all of her dowry. Annulment via *faskh* is also available under differing grounds. See generally Rehman, *supra* note 94, at 118–22.

with the panel, however, the petitioner can apply for fault-based divorce (if the parties have stipulated against polygamy in their agreement) or no-fault divorce. If the parties agree ahead of time about the separation of property or the “buy-out” that one wife would receive upon her exit, then the petitioners should submit that agreement with the petition to the panel. If any party objects to the validity of the agreement or to the enforceability of a certain issue, that party can also file objections. If the parties do not have any pre-marital agreement controlling the property division or no agreements upon divorce, then the court would apply the default rules set out in the statutes. In the former case, where the parties did have an approved divorce agreement and one wife objects to a certain provision, then the panel could hear arguments at the hearing and, if necessary, call a religious advisor to explain any religious theology behind any provisions in the agreement. Again, the panel would take all of these things into consideration when determining whether to enforce the agreement or void certain provisions based on public policy.

### C. Benefits of this Proposal

After chronicling the factors that must color the law’s treatment of any polygamy regulation, this next subsection addresses how this proposal touches upon and promotes those concerns. This proposal provides the religious legitimacy to plural marriages for a definitive group of people, some of whom identify religion as their dominant and most distinguishing character trait. This can also ensure cooperation between civil authorities and polygamists who intentionally live on the margins of society beyond the state’s reach or who purposefully hide their plural marriage status. It allows for decision-making authority to rest in secular, civil authorities while still giving the religious advisors vestiges of influence on the process as a witness. The process protects and promotes equality and equal bargaining among all members of their marriage by facilitating understanding of default rules and allowing for contract-based deviations. It also provides each party with individual counsel, gives each spouse an “equal voting share,” and serves the base protective functions of ensuring consent and protecting against child marriages, incest, and potential abuse. Finally, this solution establishes a judicial process by which case law on acceptable behavior in the polygamous marriage context can develop in a type of “free market” process.

#### 1. Provides Religious Legitimacy and Aids Cooperation

As with any regulation in this area, these rules strive to create a process that attracts participation in the legal system, with a goal of creating a “civil norm” among polygamists, akin to the promoted civil norm of monogamous marriage in the majority population.<sup>246</sup> If the system is successful in that regard, then this

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245 Cf. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 122 (1990) (pointing out that in an idealist world of statutory influence, “[l]aw would really be a method of social engineering, and its structures and designs would be susceptible of objective observation, much like the projects of civil engineers.”).

246. Cf. Choudhury, *supra* note 65, at 1001-02.

legal norm will also become the cultural, community norm.<sup>247</sup> If the participants are aware of their legal statuses and rights upon entering a polygamous marriage, then this collective knowledge can establish a baseline of acceptable behavior by establishing any unsavory, abusive, or criminal behavior as errant and never acceptable as a “norm” within any polygamous community.<sup>248</sup> This proposal also provides individual counsel at the marriage application stage for each participant involved, and a period during which the attorney can properly address the individual interests of her client. This contact should also provide the individual client an explanation as to her rights under the law.

These proposed rules aid in that regard by creating a civil process that appears familiar to the participants, as the religious official, someone who might be the head of that family’s church or mosque, could act as a familiar gateway between the ceremonial process and the legal process. The religious authorities that preside over polygamous marriage ceremonies must understand the legal responsibilities attendant to such a practice. Thus, the officiators would have to apply for this specialized license, and no person without such a license would be qualified to perform such marriages. Presumably, a family who may want to add a second wife would ask other church members or their spiritual leaders first how to legally obtain a polygamous marriage. The religious leader, already provided with the knowledge due to the licensing process, would then tell the family about the actual process. Church officials may refer families to attorneys or inform them about the next steps, such as working out a division of property agreement or the *nikah* agreement.

The more familiar a religious community as a whole becomes with the legal marriage process, the easier it will be to change the cultural belief among these insular societies that authorities are figures to fear.<sup>249</sup> Part of the problem with the Yearning for Zion raid in Texas in 2008 was that as soon as the police raided the FLDS compound and removed all of the children from the physical custody of their parents, the children refused to talk to the police.<sup>250</sup> The children were raised to treat the police as the enemy because the police would split the families apart if they knew and maybe take their children away from them.<sup>251</sup> Similarly, after the Short Creek Raids in Arizona in 1953, newspapers published images of children being torn apart from their mothers. These images incited such public outrage that Arizona Governor John Howard Pyle lost his bid for re-election the following year; Pule blames the fallout from the raid for the destruction of his

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247. *But see* RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* *id.* at 213-214 (1990) (rejecting the notion that law affects behavior indirectly by altering attitudes and through them behavior).

248. *See id.*

249. *See* Jillian Keenan, *Legalize Polygamy! No. I am not kidding*, SLATE.COM (Apr. 15, 2013), available at [http://www.slate.com/articles/double\\_x/doublex/2013/04/legalize\\_polygamy\\_marriage\\_equality\\_for\\_all.html](http://www.slate.com/articles/double_x/doublex/2013/04/legalize_polygamy_marriage_equality_for_all.html) (last visited Nov. 116, 2014) (“Children in polygamous families are taught to fear the police and are not likely to report an abusive neighbor if they suspect their own parents might be caught up in a subsequent criminal investigation.”).

250. *See* Janet Heimlich, “No Refuge,” TEXAS OBSERVER, Aug. 1, 2012, available at [www.texasobserver.org/no-refuge/](http://www.texasobserver.org/no-refuge/) (last visited Nov. 116, 2014) (questioning the handling of the Eldorado FLDS compound raid as it pertains to the safety of children).

251. *See id.*



political career.<sup>252</sup> This type of reaction to police and state presence is common among certain racial groups or social groups who often feel targeted for suspected criminal behavior by the police and civil authorities.<sup>253</sup> This proposal aims to assist in changing that hostile perception of the civil process by establishing lines of cooperation that run through a familiar religious advisor.

At the same time, this proposal is structured to embrace those with more idiosyncratic religious beliefs that may not align with the more familiar religions that allow polygamy. A person could have an individual religious experience, for example, compelling him to engage in polygamy unassociated with any church or denomination. In that case, the proposal is structured to have any witness (or petitioner) testify as to the genuineness of the individual's belief. Further, any secular officiator should be able to perform polygamous marriages, regardless of whether the practice is restricted to those with genuine religious beliefs.

## 2. Provides Secular, Civil Oversight

The panel members, as the decision-makers, determine whether to grant an application or void provisions of a marriage agreement. Secular decision-makers can also serve the "protective" function and ferret out instances of underage applicants or incestuous applications using civil laws on these issues without influence from the community practice which may allow marriages to teenage girls. The role of the religious advisor, in contrast, stops short of anything more formal than a witness. In other legal contexts in which a religious advisor or leader is used, a religious advisor never plays a role larger than that of a witness or a religious arbitrator. For example, religious leaders often serve as licensed wedding officiators and serve a prominent role in supporting covenant marriages, but they do not have any say as to the judicial determinations on legal issues surrounding actual legal marriage or separation or divorce, which requires judicial intervention.<sup>254</sup>

The constitutional jurisprudence allows the use of religious advisors as witnesses or arbitrators,<sup>255</sup> but not in a regulatory capacity, in contrast with countries which use the Muslim Family Ordinance Act. Without the precedent or authority to give a religious official that authority, no religious advisor could serve on the panel in the capacity as a religious official in the polygamous marriage context. At least with respect to the rule against excessive government entanglement with religion, this proposal would fall within the jurisprudential lines of acceptable interaction between church and state.

## 3. Promotes Equality of Women in Religious-Based Polygamy

This proposal also addresses the potential for enhanced bargaining power and opportunity for the women involved in polygamous marriages. The panel

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252. Abbie Gripman, *Short Creek Raid Remembered*, THE MINER, Aug. 2, 2002, available at [http://www.childbrides.org/history\\_sraid1.html](http://www.childbrides.org/history_sraid1.html) (last visited Nov. 16, 2014).

253. See Davis, *supra* note 5, at 1968 (noting that authorities often rely on substantial religious, regional, and ethnic profiling to track criminal polygamists).

254. See Wolfe, *supra* note 230, at 450–53 (“[E]nsuring that arbitration based on religious principles would have no legal effect”).

255. See generally *id.* at 434–35.

and the process are structured to encourage the parties to set out their rights in a pre-marital agreement or at least understand the default rules in the absence of any agreement. Because of the perceived or actual unequal bargaining power inherent in any patriarchal structured marriage, including monogamous marriage, this process encourages pre-marital agreements, fashioned and negotiated with the advice of counsel. If the parties do take advantage of the opportunity to self-structure their marriage rights and obligations, then this will create an even more contract-based version of marriage than the default rules might provide in either the polygamous or monogamous context. If the agreements are influenced by religious theology, then the religious influence is the family's choice as long as those agreements are not against public policy and all consent to the agreement. Just as some contractual parties agree on choices of law and choice of venue that may differ from the default conflicts or venue rules, parties to polygamous marriage agreements should have this option as well.

The process also attempts to protect against the potentially unequal bargaining power that some family members might have over others by giving each individual member legal counsel. After the application is filed, each individual party should meet with an attorney either after or during any pre-marital agreement negotiations occur, but before any agreement is submitted to and reviewed by the panel. This gives the parties the chance to work out an agreement with each other based on whatever standards they might use, gives each attorney a chance to review it, and gives each party time to negotiate for any deviations before moving forward with it at the hearing stage.

Professor Davis' argument that all parties to the marriage must consent to the addition of a new spouse is preserved in this proposal as well. This prevents a husband from unilaterally marrying another woman or using the "threat" of polygamy as a strategy in a disagreement with his wife.<sup>256</sup> Requiring each spouse to consent to the marriage protects the careful choice of whether a family is going to add another person to this legal "partnership." The unanimous consent feature protects against what the community property states call "bad faith" bigamy, in which a spouse (usually a husband) takes on another wife and family without the knowledge or consent of the first wife.<sup>257</sup> States may continue to choose to label that type of behavior as criminal, and this proposal only seeks to legitimize consensual polygamy. Some states and countries bar a husband involved in bad faith bigamy from receiving any of his marital property. His portion is split and distributed to his wives instead as restitution for his deception.<sup>258</sup>

The panel also continues to serve the traditional function of ensuring consent and protecting against child marriages and incest. One of the primary

256. Davis, *supra* note 5, at 1991–92.

257. In certain states that have community property regimes heavily influenced by Spanish family and canonical laws, persons who knowingly enter into bigamous marriages are considered to be in "bad faith" and are thus denied the benefits of their marriage, the most important being that of a creation of a community property regime. If a man marries two women in fraud, he is deprived of his share of the community property and it is given instead to his wives as restitution for the wrong he has committed to them. See, e.g., LA. CIV. CODE ANN. art. 96 (1996) (highlighting the prevalence of contractual language in Louisiana state marriage agreements).

258. See, e.g., *Patton v. Cities of Phila. & New Orleans*, 1 La. Ann. 98, 105–06 (1846).

concerns about polygamy is the potential harm to women and children that this family structure appears to facilitate.<sup>259</sup> Marriage regulation now protects against these harms in the monogamous marriage context. Although parties may be free to negotiate the terms of the marital rights and obligations, certain boundaries must exist to protect against child marriages and convoluted incestuous family trees like those unveiled in the Kingston clan.<sup>260</sup> The practical effect of these legal requirements is that no expecting mother, for example, would forego healthcare for fear of revealing her underage status or incestuous affiliation to the father of the child. Thus, the traditional function of the panel remains intact and serves a particularly salient function in the polygamous marriage context.

#### D. Limitations and Counterarguments

This proposal is not without its limitations, nor does it address all of the necessary facets of polygamous practices in America. This next subsection addresses some of those limitations, provides bases for its choices despite those limitations, and articulates potential counterarguments. Again, the list is not exhaustive and focuses instead on some of the larger policy implications and social effects of this proposal and regulation overall. Although deficiencies may exist in the procedural portion of the article, this proposal is a mere legislative and procedural suggestion, and any adjustments to the proposal will be addressed when more political impetus for positive recognition of polygamy exists.

##### 1. Advancement of a Religious Practice

Recognition of polygamous marriages may seem far out on the horizon, but recent cases, and lower court victories, challenging criminal and civil bans on religious polygamy have brought this issue back before the judiciary. If polygamy cases continue following the *Sister Wives* case, then recognition will potentially follow under both First and Fourteenth Amendment grounds. If a decision is rendered under the Free Exercise clause, the result could be that applicants must show that they believe that their religion allows polygamy. If, however, polygamy and alterative group marriage structures find recognition regardless of religion-linked arguments, then this proposal will have to be revised to address a more encompassing solution devoid of any religious exceptionalism.

If accepted from a religious exercise point of view, this would still encompass the main demographic that we are attempting to reach. The great majority of polygamists in the United States practice plural marriage as a part of their religion.<sup>261</sup> Although other majoritarian, non-religious persons may engage in polygamy-like behavior or live polyamorous lifestyles,<sup>262</sup> the religious

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259. See Strassberg, *Crime of Polygamy*, *supra* note 11, at 365.

260. See Hales, *supra* note 4, at 371.

261. Alexandre, *supra* note 10, at 1463; Wing, *Polygamy*, *supra* note 10, at 837; Black, *supra* note 10, at 500 (“[Polygamy’s] defenders frequently cite religious convictions for such a practice.”); Davis, *supra* note 5, at 1969; Bailey and Kaufman, *supra* note 10, at 8.

262. For an extensive discussion of the contours of polyamory, see Strassberg, *Crime of Polygamy*,

adherents look upon the bonds between a husband and second or later wives as marriage-like in both intention and effect because they are treated that way under their religion.<sup>263</sup> In that regard, these laws would create an exception to the rule for religious adherents instead of changing the general rule in favor of polygamous marriage for all. This proposal can thus be seen as primarily an exception to facilitate the free exercise of religion.

Further, the Supreme Court has less consistently enforced the Establishment Clause principles in recent years.<sup>264</sup> Similarly, some state marriage laws already make distinctions that cater toward certain religious beliefs. In New York, civil statutes directed at regulating the Jewish custom of *get* divorce rules apply to those who adhere to religious divorce customs.<sup>265</sup> Covenant marriage, a marriage option available in Louisiana, Arkansas, and Arizona, is a form of marriage that attempts to bring religious counseling back into marriage.<sup>266</sup> Families often agree to religious arbitration of disputes, a decision recognized as a “choice of law” by reviewing courts.<sup>267</sup> If this trend of blurring the lines between impermissible advancement and permissible accommodation continues, then this proposal will fall within the limits of the First Amendment.

Additionally, this would be a new procedure for the United States and its reception, usefulness, and potential constitutionality are still unknown. As such, it would be advantageous to limit access to polygamous marriage. Readers who may view this proposal as a “social experiment” will then see the benefits of keeping the unknown outcomes of this experiment “small” and something that can be studied, controlled, and revised throughout the judicial and legislative process before there could be any full-fledged, secular access to polygamous marriage for all. Second, and relatedly, even if we opened up the option to all of society, it would still just be another available marriage option. Based on our experience with alternative marriage-like legal statuses available, it is unclear whether there would be a flood of applications.<sup>268</sup> The majority in this country likely views monogamous marriage as the standard and the ideal.<sup>269</sup> Indeed, many religious fundamentalists, even when given the option, choose to have

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*supra* note 11, at 412–17.

263. See Hagerty, *supra* note 1.

264. See generally Mark C. Levy, *Constitutional Law-First Amendment-State Licensing Regulation Which Delegates Veto Power to a Church over the Approval of Liquor Licenses within a Specified Distance of Such Church Violates the Establishment Clause*, 28 VILL. L. REV. 1000, 1017 (1982–83).

265. N.Y. DOM. REL. LAW. § 253 (McKinney 1983).

266. See, e.g., LA. REV. STAT. ANN. § 272, *et seq.* (1996); ARK. CODE ANN. § 9-11-803, *et seq.* (2001); ARIZ. REV. STAT. ANN. § 25-901, *et seq.*

267. See, e.g., *Spivey v. Teen Challenge of Fla., Inc.*, 122 So.3d 986, 991–92 (Fl. App. 2013) (upholding religious arbitration clause as not violative of the due process and religious clauses of the U.S. and Florida Constitutions).

268. See *supra* 165.

269. See Arland Thornton, *The International Fight Against Barbarism: Historical and Comparative Perspectives on Marriage Timing, Consent, and Polygamy*, in MODERN POLYGAMY IN THE UNITED STATES; HISTORICAL, CULTURAL AND LEGAL ISSUES 259, 283 (Cardell K. Jacobson & Laura Burton eds., 2011) (noting that a 2008 Gallup poll found that 90% of American adults surveyed considered polygamy against good morals).

only one spouse.<sup>270</sup> If a push for secular access to polygamy occurs after some experience with religious-based polygamy, then courts and legislatures would have to address such a movement at that time, with the benefit of their collective knowledge of polygamy from previous contact with religious-based polygamists.

## 2. Potential for Peer Pressure and Problems of Numerosity

Another side issue of this proposal is the role that “group behavior” may play in the consent requirements and negotiations attendant to polygamous marriage regulation. Although the proposal is designed to give each individual wife counsel and an opportunity to discuss her options and interests with said counsel, the potential also exists that one wife will feel pressured into consenting to the addition of a new wife, for example, out of fear of being the only one holding out consent or risking divorce from the marriage. There are two responses to that possibility. First, when there are more than two adults concerned about the status of the relationship and the functioning of a family, sometimes individuals are more inclined to knowingly give up individual rights for the betterment of the group.<sup>271</sup> Such decisions should still be considered valid. Second, a person can always choose to leave the polygamous marriage, just as he or she could leave a monogamous marriage.

Another function of requiring unanimous consent before adding another spouse aims to control the potential numerosity of the group. At least in the context of Islam-based polygamous marriages, a man is limited to four wives, as long as he treats them all “equally.”<sup>272</sup> Under the fundamentalist Mormon tradition, however, there is no limit to the number of wives that a man can have. In fact, the more wives that a man has, the higher his potential status, the higher his kingdom in heaven.<sup>273</sup> If the number of wives became too high, then the wives could start withholding consent or the panel could make a determination on a workable number of wives. However, the threat of “peer pressure” to consent still exists in larger groups. Public policy might limit the actual number of spouses to a maximum number in this context as well.

## 3. Political Viability

Although a brief discussion was provided earlier about the expanding acceptance of polygamous marriage, the political viability of recognizing and regulating polygamy is tenuous. The *Sister Wives* case may pave the way for constitutional recognition of polygamy, but social and political pressures might prevent states from recognizing such unions on a larger scale. Because of the historical experience with polygamy in the United States, Utah, for example, originally banned polygamy in its state constitution, and the prohibition is now

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270. See Majeed, *supra* note 79, at 323 (citing Ihsan Bagby et al., *The Mosque in America: A National Portrait; A Report from the Mosque Study Project*, Council on American-Islamic Relations (Washington, D.C., 2001)).

271. See, e.g., Strassberg, *Distinctions*, *supra* note 21, at 1581–94.

272. *Qur'an* 4:3.

273. See Strassberg, *Distinctions*, *supra* note 21, at 1579 (discussing how Mormon men achieve Godly power through the proliferation of “expansive social power base[s]”).

enforced by civil statute.<sup>274</sup> Enacting any of these proposals would require a wholesale shift in the national thinking about polygamy, which some believe is unrealistic and too far from our national belief system to gain any political traction.<sup>275</sup> This should not, and does not, prevent proposals based on predictive shifts in national and state politics which seek to further the scholarship in this controversial arena.

#### 4. Impossibility of Preventing All Outlaws and Renegades

Since I am a proponent of the notion that power exists in positive legislation and that such legislative action can have influential trickle-down social effects, I am also acutely aware of the limitations of this vantage point. This proposal is idealized in that, even though it attempts to create an attractive civil process for polygamists, no judicial and legal process can attract everyone. There will always be people and families who live on the margins. Some people shirk away from legal oversight or the use of attorneys or the judicial system in any capacity. The state can still set up an idealized model of polygamous marriage in hopes that the rest will follow. As much as this proposal can penetrate some of the secretive compounds, or help the second or third wives emerge from under the veil of silence imposed by their second-class status, it may have the effect of pushing the most dubious of renegades further out into the margins. But criminal behavior is still criminal behavior, whether it is in the context of polygamous relationships or monogamous relationships. Regardless of marriage status, criminal laws exist to protect against the bad behavior of individual lawbreakers. Further, this does not seem to place an additional burden on the executive branch. Currently many administrative officials will not prosecute polygamists unless the situation includes other types of criminal behavior such as child rape or lack of consent.<sup>276</sup>

### CONCLUSION

The purpose of this proposal is to provide a method to recognize and regulate polygamous marriages in America. Although many countries permit polygamy, the U.S. is unique in its polygamous demographic, requiring a specialized type of regulation that will also fit within an American legal framework. Attracting upwards of 150,000 fundamentalist and Muslim polygamists living in religious communities across the country requires an intensive study of the locations, habits, and religious motivations behind their choices to purposefully live as outlaws on the margins of society. By infusing religious familiarity and legitimacy into the procedural process, this proposal reacts to the motivations behind polygamy and uses it to attract the target demographic to regulation.

Understanding the reasons behind the majoritarian aversion to polygamy can help make the practice more acceptable to an American audience, and the power of positive legislation can both legitimize and normalize polygamy as an alternative marriage option. Recent media saturation of all things polygamy-

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274. UTAH CONST. art. 3; UTAH CODE ANN. § 30-1-2.

275. See, e.g., Thornton, *supra* note 268, at 283.

276. See Brown et al. v. Buhman, 947 F.Supp.2d 1170, at 1217.

related, highlighting both the “normalness” of its practitioners as well as their differing views on what makes a successful marriage can also help peel back the layers surrounding the mysterious and secretive practices of religious polygamists. With the potential to create even more contract-based and self-structured marital relationships than traditional monogamous marriage laws, polygamy could be the more progressive choice of religiously devout females living in an otherwise increasingly hectic and modernist society.

This solution is not without its faults or doubters. Many question the legitimacy of restricting access to polygamy to certain religious groups. Others argue that no amount of attractive crafting of the laws can entice those types of renegades who intentionally flout the law, and regulation may even push these outlaws even farther out beyond the reach of the law. To be sure, no criminal or civil laws will be successful in controlling the behaviors of all criminals and renegades. But we should let polygamists have the choice to conform their marriage practices to a normalized, legalized polygamous ideal mandated and supported by the state.

Regulatory oversight can also protect against the types of abuses that we traditionally associate with polygamy, such as statutory rape, incest, child marriages, lack of consent, and lack of education and healthcare for women. By providing women with individual court-appointed attorneys and providing them with information regarding their rights and available bargaining tools, this proposal also attempts to increase the bargaining power and status of women in polygamous marriage. The proposal gives women information about their property entitlements and rights within the marriage while affording them leverage and equality with the implementation of an equal voting power mechanism. Ultimately, the solution seeks to protect women and children, create an environment where more contract-based negotiations within polygamous marriages can occur, and bring polygamists living on the edges of society out into the light and mainstream society.