ESCAPE FROM PLURALITY: WHY THE BEST INTEREST OF THE CHILD IS AT RISK

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I. INTRODUCTION

"[*T*]*here never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity*."[1]

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1 Reynolds v. United States, 98 U.S. 145, 165 (1878).

Imagine living in a community of approximately 10,000 people who abide by the same societal mores and practice the same religion.[2] Now imagine that a principal aspect of this community, stemming from its guiding system of religious belief, is illegal. Mormon Fundamentalists do not have to imagine; this is their reality.[3]

In the United States, members of the Fundamentalist Church of Jesus Christ of the Latter-Day Saints (FLDS), otherwise known as Mormon Fundamentalists, practice polygamy in accordance with the tenants of their religion.[4] However, a polygamous marital arrangement, consisting of three or more spouses, has been deemed illicit in the United States from as early as the nineteenth century.[5] Nevertheless, FLDS members are "placed" into plural, "spiritual marriages" which, although not legally recognized, are considered sacred marriages within the community.[6] Polygamous marriage ceremonies within the FLDS Church are private, limiting attendance to only relatives and close friends, but in all other aspects—aside from the illegality—are similar to all other civil marriage ceremonies in the United States.[7]

Despite the ban on plural marriages, it is estimated that there are 50,000 to 150,000 polygamists in the United States.[8] It is also estimated that forty to fifty percent of legally recognized marriages in the

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2 *See Fundamentalist Church of Jesus Christ of Latter-Day Saints Fast Facts*, CNN.COM, https://www.cnn.com/2013/10/31/us/fundamentalist-church-of-jesus-christ-of-latter-day-saints-fast-facts/index.html (last updated Aug. 12, 2020, 10:46 AM) ("The FLDS has an estimated 10,000 members, most of whom live in Colorado City, Arizona and Hildale, Utah. The group also has followers near Eldorado, Texas, and in South Dakota, Colorado, Nevada, British Columbia, and Mexico.").

3 *See* Victims of Polygamy Assistance Act of 2008, 110 S. 3313, 110th Cong. § 2(1) (2008) (stating that "polygamy has been illegal in the United States for over 100 years . . . .").

4 *See* JANET BENNION & LISA FISHBAYN JOFFE, THE POLYGAMY QUESTION 6 (Janet Bennion & Lisa Fishbayn Joffee eds., 2016).

5 *See* Morrill Anti-Bigamy Act, 12 Stat. 501, 37 Cong. Ch. 126 (1862) ("[E]very person . . . adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.").

6 Kathy Jo Nicholson & Jan Brown, *Escape from Polygamy*, GLAMOUR (June 1, 2007), https://www.glamour.com/story/polygamy.

7 *See Polygamists Share Their Faith and Family Lives*, NPR RADIO (Aug. 19, 2011), https://www.npr.org/2011/08/19/139784963/polygamists-share-their-faith-and-family-lives.

8 BENNION & JOFFE, *supra* note 4, at 6.

United States will end in divorce.[9] Even if a settlement agreement is reached between legally divorcing parties, distribution of marital assets upon divorce is ultimately determined by state courts sitting in equity, guided by governmental legislation.[10] So too is the custodial arrangement for a child.[11]

What happens then, when a polygamous marriage ends? What legal rights does, for example, a wife have upon separation when she has merely entered into a "spiritual marriage" through the FLDS Church?[12] Most importantly, how would the best interest of a child be considered in a custody dispute when their parents' marriage is not legally recognized?

In Ontario, the Family Law Act provides that a court is permitted to determine the "equitable settlement of affairs of the spouses upon the breakdown of a partnership . . . including the equitable sharing by parents of responsibility for their children."[13] Notedly, the definition of "spouse" in the Act "includes a marriage that is *actually or potentially polygamous*, if it was celebrated in a jurisdiction whose system of law recognizes it as valid."[14] Although Canada has not legalized polygamy, it has been suggested that "if a dependent wife in a polygamous relationship were to claim spousal support or property relief, there would be good arguments for granting relief . . . in a Canadian court."[15]

As the United States has not adopted such a law, and no state has enacted a law conferring distribution rights to a polygamous spouse upon divorce,[16] parties to a plural marriage in the United States face

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9 *See* Bella DePaulo, *What is the Divorce Rate Really?*, PSYCHOLOGY TODAY (Feb. 2, 2017), https://www.psychologytoday.com/us/blog/living-single/201702/what-is-the-divorce-rate-really.

10 *See, e.g.*, Unif. Marriage & Divorce Act § 307 (explaining that under "Alternative A," all assets that a couple has acquired are equitably apportioned but, under "Alternative B," only assets acquired during the course of the marriage are).

11 *See, e.g.*, Hollon v. Hollon, 784 So. 2d 943, 952-53 (Miss. 2001) (holding that the court must weigh a variety of factors in light of the best interest of the child to make an ultimate custody determination).

12 BENNION & JOFFE, *supra* note 4, at 6.

13 Family Law Act, R.S.O. 1990, c. F.3 (Can.) (last amended 2020).

14 *Id.* § 1(2) (emphasis added).

15 Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis*, *in* POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY AND RESEARCH 1, 35 (2005).

16 Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 39 (2010) (explaining that the concept of equitable distribution for divorcing, monogamous parties does not extend to polygamous parties).

an unsettling reality: assets and property, which would otherwise be deemed marital property, subject to equitable distribution, will remain in the sole possession of the title holder. "In such situations, great harm could quite easily accrue to the first spouse, who never received a day in court to ensure fair treatment and equitable division of assets."[17] This financial harm would only be surmounted by a court's "best interest of the child" determination, as an award of child custody tends to favor the spouse departing polygamy.[18] In order to accurately account for the best interest of the child, the United States should adopt a law similar to Ontario's Family Law Act.[19]

This note is divided into five parts. Part II will give a brief overview of polygamy, both nationally and internationally. Part III will analyze the differences between the legal status of polygamy in the United States and the legal status of polygamy internationally, specifically considering the Family Law Act adopted in Ontario, Canada. Part IV will discuss the rights associated with monogamous divorce in the United States, including the "best interest of the child standard" utilized in disputes over child custody, and will ultimately consider these judicial mechanisms in the context of a dissolved polygamous union. Part V will suggest measures that can be taken in the United States to ensure that the best interest of the child will be promoted in instances of plural marriage, even if the plural union is not a legally recognized marriage.

II. WHAT IS POLYGAMY? A BRIEF OVERVIEW

Polygamy is defined as the practice of marriage whereby one person has more than one spouse at a time.[20] Not only are polygamous marriages void, but it is illegal to practice polygamy in the United States.[21] To avoid confusion, this note will refer to "polygamy" as a marital relationship with multiple spouses, regardless of gender. However, it is important to note that there are multiple forms of polygamy.

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17 Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L. J. 79, 89 (2017).

18 *See* Dan Harris et al., *Life After FLDS: Former Members Fights for Child Custody After Leaving Polygamist Sect,* ABC NEWS (May 8, 2015, 4:42 AM), https://abcnews.go.com/US/life-flds-members-fight-child-custody-leaving-polygamist/story?id=30875650.

19 *See* Family Law Act, R.S.O. 1990, c. F.3, § 1(2) (Can.) (last amended 2020).

20 *See* MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 3 (2008).

21 *See* Stephen Michael Sheppard, *Polygamy (Plural Marriage or Polygamous)*, *in* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed., 2012).

For example, polygyny is a marriage between one man and multiple women whereas polyandry is a marriage between one woman and several men.[22]

Another important distinction to highlight is the difference between bigamy and polygamy. In criminal statutes, "polygamy is often synonymous with bigamy."[23] While both bigamy and polygamy are illicit in all fifty states, bigamy refers to a second marriage whereas polygamy refers to all plural marriages.[24] In jurisdictions which follow the Model Penal Code, bigamy is deemed a misdemeanor "with respect to mistakes about the validity or dissolution of a former marriage."[25] Polygamy, on the other hand, is considered a felony in the third degree if a person is found guilty of marrying or cohabitating with "more than one spouse at a time in purported exercise of the right of plural marriage."[26]

Plural marriage is another term for polygamy and, in the United States, is often associated with the Mormon religion.[27] However, it is a common misconception that polygamy is a pervasive marital practice among those who currently observe Mormon Christianity.[28] Rather, polygamy is practiced by a distinct sect of Mormons—Mormon Fundamentalists—who belong to the Fundamentalist Church of Jesus Christ of the Latter-Day Saints (FLDS).[29]

The Mormon Church did not always disapprove of plural marriages. Rather, during the nineteenth century, the Mormon religion promoted the practice of polygamy among its congregants.[30] The Church of the Latter-Day Saints (LDS), headquartered in Salt Lake

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22 ZEITZEN, *supra* note 20, at 3.

23 Cornell Law School, *Polygamy*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/polygamy (last visited Aug. 15, 2020).

24 *See id.*

25 Model Penal Code § 230.1 note on bigamy and polygamy (AM. LAW INST. 2007).

26 *Id*. § 230.1(2).

27 *See* Maura Irene Strassberg, *Distinguishing Polygany and Polyfidelity Under the Criminal Law*, *in* THE POLYGAMY QUESTION, 180, 183 (Janet Bennion & Lisa Fishbayn Joffe eds., 2016).

28 *See* Susan Deller Ross, *Should Polygamy Be Permitted in the United States?*, AMERICAN BAR ASSOCIATION (Apr. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/should_polygamy_be_permitted_in_the_united_states/.

29 *See* BENNION & JOFFE, *supra* note 4, at 6.

30 *Timeline: The Early History of the Mormons*, PBS, https://www.pbs.org/wgbh/americanexperience/features/mormons-timeline/ (last visited Aug. 15, 2020).

City, Utah, is the main church associated with the Mormon religion.[31] Under the leadership of founder Joseph Smith, plural marriages were traditionally said to promote a "key principle that a stable and orderly family life depends in part on a husband or father functioning as a religious and social leader."[32]

However, in the late nineteenth century, the practice of plural marriage within the LDS Church was challenged. In 1882, the LDS Church was the target of Congressional bills, such as the Edmunds Anti-Polygamy Act, which declared polygamy to be a felony in the United States and revoked a polygamist's right to vote.[33] Further, in 1887, the Edmunds-Tucker Act mandated the United States attorney general to initiate proceedings to confiscate the property of the LDS Church due to its association with the practice of polygamy.[34]

As a result, Wilford Woodruff, "the [former] president of the LDS Church[,] issued what is called the Manifesto on September 25, 1890."[35] The Manifesto called for members of the LDS Church to cease the practice of polygamy to protect against further legal prosecution.[36] To this day, Mormonism associated with the LDS Church denounces polygamy among its congregants.[37] However, members of the LDS Church—now deemed Mormon Fundamentalists—who refused to abide by the monogamous marital system, were excommunicated from the Mormon Church in 1980.[38] Consequently, the FLDS

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31 *See id.*

32 IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 3 (1996) (explaining that women of the LDS Church, prior to 1890, were encouraged to marry religious leaders in order to enter into heaven).

33 *See* Edmunds Act, ch. 47, 22 Stat. 30 (1882); *see also* Kenn Driggs & Marianne Watson, *Fundamentalist Mormon and FLDS Time Line*, *in* MODERN POLYGAMY IN THE UNITED STATES xi (Cardell K. Jacobson & Lara Burton eds., 2011).

34 *See* Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887); *see also* Kathryn M. Daynes, *Differing Polygamous Patterns: Nineteenth-Century LDS and Twenty-First-Century FLDS Marriage Systems*, *in* MODERN POLYGAMY IN THE UNITED STATES 125, 140 (Cardell K. Jacobson & Lara Burton eds., 2011) ("In 1887 the Edmunds-Tucker Act mandated that the U.S. attorney general institute proceedings to take into possession all LDS church property over $50,000 not used exclusively for worship.").

35 Daynes, *supra* note 34, at 140.

36 *See id.*

37 *Plural Marriage and Families in Early Utah*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/topics/plural-marriage-and-families-in-early-utah?lang=eng (last visited Oct. 5, 2019) ("[M]embers of the contemporary Church are forbidden to practice plural marriage . . . .").

38 *See Fundamentalist Church of Jesus Christ of Latter-Day Saints Fast Facts*, *supra* note 2.

Church was founded on Mormon Fundamentalist principles under the leadership of Rulon Jeffs and his sons Warren Jeffs and Lyle Jeffs.[39]

Some scholars believe that "approximately 20,000 to 50,000 Americans are currently members of Mormon fundamentalist religious groups and believe in the principle of plural marriage, or polygamy."[40] Alternative estimates speculate that 30,000 practicing polygamists reside exclusively within the state of Utah.[41] This is due, at least in part, to the fact that seventy percent of Utah's population abide by the tenants of the Mormon faith.[42] Nonetheless, the majority of Utah's Mormons do not associate with the FLDS Church and are "officially monogamous."[43]

However, in the United States, polygamy is not practiced only by those associated with Fundamental Mormonism. Although it is difficult to obtain a precise count of people engaged in plural marriages, as the illicit practice is often concealed from the public, the number of practicing polygamists throughout the United States is estimated to range from 50,000 to 150,000 people.[44]

This approximation of potentially 150,000 polygamists in the United States can partially be attributed to the large number of individuals who have emigrated from countries where polygamy is commonly practiced.[45] Although polygamy is illegal in the majority of countries, it is legalized throughout many parts of Africa and much of the Middle East.[46]

Polygamy is most widely practiced by Muslims in Africa, Saudi Arabia, and the United Arab Emirates, although plural marriages are

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39 PROPHET'S PREY (Showtime Documentary Films 2015) (explaining that upon excommunication from the LDS church, the Jeffs family gained control of the FLDS Church whereby Rulon Jeffs became the "prophet" and his son, Warren Jeffs, was "determined to become the prophet himself.").

40 ALTMAN & GINAT, *supra* note 32, at 2.

41 *See Utah Gov. Signs Law Aimed at Polygamy*, CBSNEWS.COM (Mar. 29, 2017, 11:01 PM), https://www.cbsnews.com/news/utah-gov-signs-law-aimed-at-polygamy/.

42 *See* ZEITZEN, *supra* note 20, at 3.

43 ZEITZEN, *supra* note 20, at 3.

44 *See* BENNION & JOFFE, *supra* note 4, at 6.

45 *See id.*

46 *See* Nicola Heath, *Faith and Polygamy: Which Religions Permit Plural Marriage?*, SBS.COM.AU (July 2, 2018, 1:44 PM), https://www.sbs.com.au/topics/life/culture/article/2017/01/17/faith-and-polygamy-which-religions-permit-plural-marriage.

common among many non-Muslims in Africa as well.[47] Social acceptance of polygamy within the Islamic religion stems from the Koran, the sacred text of the Islam.[48] "In cultures where polygamy is still commonplace and legal, Muslim polygamists do not separate themselves from the society at large."[49] However, upon immigration to the United States, polygamy is often practiced in secrecy as it is neither legal nor a societal norm.[50] As a result, plural marriages in immigrant communities are predominantly undetected and thus unregulated by United States authorities.[51]

Although a two-person marriage remains a normative ideal throughout the United States, increasing immigration rates,[52] "[d]eclining rates of marriage and fertility, rising divorce rates and other social trends mean that fewer people will live in the ideal family norm—the nuclear family."[53] Despite the prevalence of plural marriages and the fact that the legal right to marry has been modified by societal conventions, such as the legalization of same-sex marriage,[54] polygamy, however, remains illicit in the United States.

III. LEGAL STATUS OF POLYGAMY AROUND THE WORLD

A. Permissible Marital Arrangements in the United States

Throughout the United States, courts have been cautious—and have even warned—of the undesirable consequences that judicial decisions may have on the legal status of polygamy. For example, in *Obergefell v. Hodges*, the Supreme Court of the United States held

47 *Polygamy*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Polygamy#Legality (last visited Aug. 31, 2020).

48 *See* Report of Nicholas Bala for British Columbia Supreme Court Reference Re S. 293 of the Criminal Code § 21 as Amici Curiae Supporting Stop Polygamy in Canada (2010) (No. S-097767) http://infosecte.org/Nicholas_Bala.pdf.

49 *Polygamy*, *supra* note 47.

50 *See* Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES (Mar. 23, 2007), https://www.nytimes.com/2007/03/23/nyregion/23polygamy.html?smid=em-share.

51 *See id.*

52 *See* Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 385 (2009).

53 Sherry Saggers & Margaret Sims, *Diversity: Beyond the Nuclear Family*, *in* FAMILY: CHANGING FAMILIES, CHANGING TIMES 66, 68 (Allen & Unwin, 2005).

54 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

that marriage—and thus same-sex marriage—was a fundamental right within the ambit of the Constitution, requiring legal recognition.[55]

Obergefell is often characterized as a pivotal decision as it not only expanded the right to marry beyond the confines of one man and one woman, but also redefined the normative status of the nuclear family in the United States. Justice Kennedy's majority opinion stated that "no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[56] In support of expanding the legal status of marriage to include same-sex couples, Justice Kennedy explained, in pertinent part, that:

> It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[57]

Despite the fact that *Obergefell* solely concerned the issue of a same-sex couple's legal right to marry, the dissent vehemently criticized the majority's decision, arguing that it "*would apply with equal force to the claim of a fundamental right to plural marriage*."[58] In dissent, Chief Justice Roberts reasoned that the fundamental right to marry under the United States Constitution only applies to marriages between one man and one woman[59] stating, in pertinent part, that:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of

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55 *See id.* at 2598 ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause."); *see also* U.S. CONST. amend. XIV, § 1 (requiring equal protection and due process of the law).

56 *Obergefell*, 135 S. Ct. at 2608.

57 *Id.*

58 *See id.* at 2621 (Roberts, C.J., dissenting) (emphasis added).

59 *See id.* (Roberts, C.J., dissenting) ("[T]oday's decision rests on nothing more than the majority's conviction that same-sex couples should be allowed to marry because they want to . . . . [but] it has . . . no basis in the Constitution . . . .").

> new benefits. But do not celebrate the Constitution. It had nothing to do with it.[60]

While the *Obergefell* majority recognized that changing societal norms required a reconsideration of the legal status of marriage within the United States, the dissent voiced concern over the slippery slope that could ensue from the decision: the legalization of polygamy.[61] Evident in the dissenting opinion is the judicial thought that polygamy is neither a norm nor a practice which should be promoted in society, even despite the prevalence of polygamy within certain communities.[62] Regardless of the fact that the legal right to marry has been modified by societal conventions, expanded to include same-sex couples in the permissible realm of legalized unions, polygamy remains outlawed in the United States. As noted by the dissent in *Obergefell*,

> . . . a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.[63]

What then, is holding the United States' legal system back from extending polygamous couples the right to be lawfully married? Examination of historical precedent for disputes in the United States involving the legality of polygamy provides guidance.

B. The United States, Polygamy, and Freedom of Religion

In 1878, the Supreme Court of the United States issued a seminal decision regarding the legality of plural marriages in *Reynolds v. United States*.[64] In *Reynolds*, the defendant appealed his conviction for bigamy from the District Court for the Third Judicial District of the

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60 *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

61 *See id.* at 2621 (Roberts, C.J., dissenting) ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.").

62 *Compare id.* at 2596 (majority opinion) (arguing that there has been "a shift in public attitudes toward greater tolerance" of same-sex couples), *with id*. at 2622 (Roberts, C.J., dissenting) (warning that this argument can equally—and undesirably—be made on behalf of the many polygamous families in the united states).

63 *Id*. at 2621 (Roberts, C.J., dissenting).

64 *See* Reynolds v. United States, 98 U.S. 145 (1878).

Territory of Utah.[65] Reynolds, a member of the LDS Church, argued, *inter alia*, that his practice of polygamy was "in pursuance of and in conformity with what he believed at the time to be a religious duty."[66] Accordingly, the issue before the Court concerned the scope of religious freedom guaranteed by the First Amendment of the United States Constitution.[67]

The *Reynolds* Court first determined that the Framers intended for the Freedom of Religion Clause to deprive Congress "of all legislative power over mere opinion, but . . . [permitted Congress] to reach actions which were in violation of social duties or subversive of good order."[68] Thus, the Court could not punish or inhibit the religious belief in the practice of polygamy; however, if the Court were to determine that polygamy was dissident with civil order, the act of practicing polygamy could be deemed criminal within the ambit of the Constitution.[69]

In support of its ultimate conclusion that the practice of plural marriage was "in violation of social duties or subversive of good order," the *Reynolds* Court explained that "from the earliest history of England polygamy has been treated as an offence against society."[70] Thus, the *Reynolds* Court stated, in pertinent part, that:

> *. . . there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity*. . . . Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . . [Thus], *it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion*.[71]

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65 *See id.* at 153-54.

66 *Id.* at 161 (arguing that, because the LDS Church in the late 1880s promoted the practice of plural marriage, Congress could not interfere with the free exercise of religion and hold defendant Reynolds criminally liable as a result).

67 *See id.* at 162; *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

68 *Reynolds*, 98 U.S. at 164 ("Mr. Jefferson . . . took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his god . . . the legislative powers of the government reach actions only, and not *opinions* . . . .'").

69 *See id.*

70 *Id.*

71 *Id.* at 165-66 (emphasis added).

Ultimately, the Court held that the 1862 enactment of 12 Stat. 501 did not violate the Constitutional right to the free exercise of religion; the criminalization of the act of entering into a polygamous marriage, even if done for the sole purpose of conforming to a religious duty, was said to protect society against "the evil consequences that were supposed to flow from plural marriages."[72]

In a case before the Supreme Court in 1890, *Late Corp. of Church of Jesus Christ v. United States*, the practice of polygamy was similarly considered "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world."[73] The Court stated, in pertinent part, that:

> [n]otwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this *barbarous practice*—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting, and defending [polygamy].[74]

The Supreme Court ultimately affirmed the district court's decision that the LDS Church's property escheat to the government and be used for charitable purposes within the territory.[75]

In 1946, nearly eighty years after *Reynolds* was decided, the Supreme Court again held, in *Cleveland v. United States*, that "the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy."[76] Petitioners practiced polygamy in accordance with Mormon Fundamentalist belief and had "transported at least one plural wife across state lines, either for the purpose of cohabitating with her, or for the purpose of aiding another member of the *cult* in such a project."[77] Accordingly, these Fundamentalists were charged with violating the Mann Act which, at that time, made it illegal to transport women across state lines for, *inter alia*, any immoral purpose.[78] The Court held that polygamy was of the "same genus as

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72 *Id.* at 168.

73 Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 48 (1890).

74 *Id.* at 48-49.

75 *See id.* at 65.

76 Cleveland v. United States, 329 U.S. 14, 20 (1946).

77 *Id.* at 16 (emphasis added).

78 *See id.* ("The Act makes an offense the transportation in interstate commerce of 'any woman or girl for the purpose of prostitution or debauchery, or for any other

the other immoral practices covered by the Act," such as prostitution, and thus fit within the scope of the Act.[79]

Cleveland v. United States demonstrates that it was not merely the early anti-polygamy laws which criminalized and precluded the practice of plural marriage in the country.[80] Rather, courts in the United States have even invoked Congressional power to regulate channels of interstate commerce as a means to prohibit the practice of polygamy.[81]

The United States' ban on polygamy has demonstrated as having implications which extend far beyond those of the marital arrangement alone. For example, in the 1985 case of *Potter v. Murray City*, the Court of Appeals for the Tenth Circuit held that it was not unconstitutional to discharge a police officer from employment after he was found to be practicing polygamy.[82] Thus, not only could the practice of polygamy result in criminal prosecution, but it could also result in termination of employment.[83] The court explained that:

> beyond the declaration of policy and public interest in the prohibition of polygamy under crimination sanction, [Utah] has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage.[84]

In light of the fact that "[p]olygamy has been prohibited in our society since its inception," the Court of Appeals ultimately held that a polygamous police officer's constitutional rights—be it his right to the free exercise of religion, his guarantee of equal protection, or his

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immoral purpose.' The decision turns on the meaning of the latter phrase, 'for any other immoral purpose.'"); *see also* 18 U.S.C. § 398.

79 *Cleveland*, 329 U.S. 14 at 19.

80 *See id.* at 20 ("[T]he offense is . . . transportation of a woman for the purpose of making her his plural wife . . . .").

81 *See id.* ("The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices . . . .").

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

83 *See id.* at 1071.

84 *Id.* at 1070 (quoting Potter v. Murray City, 585 F. Supp. 1126, 1138 (D. Utah 1984)).

fundamental right of privacy—were not violated when he was terminated as a police officer.[85]

Moreover, despite judicial acknowledgement of the high prevalence of Mormon Fundamentalist families practicing polygamy—as a part of their religion—within the state of Utah,[86] and despite the fact that the fundamental right to marry has been expanded upon in light of changing societal norms,[87] Utah's bigamy statute continues to criminalize the practice of polygamy as a felony in the third degree.[88] Interestingly, the Utah Constitution, unlike the Federal Constitution, expressly prohibits the practice of polygamy reading, in pertinent part, that:

> [n]o 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*.[89]

Thus, regardless of the prevalence of FLDS polygamous marriages in Utah, "the Utah Constitution offers no protection to polygamous behavior and, in fact, shows antipathy towards it by expressly prohibiting such behavior."[90] As a result, twenty-first century challenges to the legality of the Utah Constitution and state statutes have failed.[91]

For example, in 2004, the Supreme Court of Utah held, in *State v. Green*, that although "Utah's bigamy statute has an adverse impact on those wishing to practice polygamy as a tenant [sic] of their religion," the federal, constitutional right to free exercise of religion is not violated.[92] In reaching this decision, the court stated that "[a]n adverse

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85 *See Potter*, 760 F.2d at 1070.

86 *See id.* at 1071 ("[T]here are at least 5,000 to 10,000 polygamist family members in the State . . . .").

87 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

88 UTAH CODE ANN. § 76-7-101(1)-(2) (LexisNexis through the 2019 General Session) ("(1) A person is guilty of bigamy when, knowing the person has a husband or wife or knowing the other person has a husband or wife, the person purports to marry and cohabitates with the other person. (2) Bigamy is a third degree felony.").

89 *Compare* U.S. CONST. amend. I (permitting free exercise of religion) *and* U.S. CONST. amend. XIV, § 1 (requiring equal protection and due process of the law) *with* UTAH CONST. art. III, § 1 (prohibiting polygamous marriages) (emphasis added).

90 State v. Holm, 2006 UT 31, 137 P.3d 726, 738 (2006).

91 *See, e.g.,* State v. Green, 2004 UT 76, ¶ 60 (2004).

92 *Id*. at ¶ 32.

impact on religion does not by itself" breach one's constitutional right because "'the general welfare of society, wholly apart from any religious considerations,' demands 'religious regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenants of some or all religions.'"[93] Accordingly, Green's challenge to the Utah statute failed as the legislature had "determined that prohibiting bigamy serves the state's best interests."[94]

In 2018, a challenge to Montana's statutory criminalization of polygamy similarly failed in *Collier v. Fox*.[95] In *Collier*, the Montana District Court held that "there is no constitutional right to multiple marriages, and the Colliers therefore cannot raise a prima facie claim under § 1983 for any deprivation thereof."[96] The court rejected the plaintiffs' assertion that, in light of the extension of the fundamental right to marry to include same-sex couples in *Obergefell v. Hodges*,[97] the fundamental right to marry should similarly be extended to parties in a polygamous relationship.[98] Rather, the court looked to *Reynolds v. United States* as applicable precedent supporting the notion that polygamy is, and should remain, an unconstitutional practice in the United States.[99] "Although *Reynolds* is almost 140 years old, it is not antiquated and is still valid, binding authority."[100]

The ban on the practice of polygamy remains in force in the United States; polygamy is deemed illicit in all fifty states,[101] declared to be against public policy in states where the practice is relatively pervasive,[102] and held by the Supreme Court of the United States to be

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93 *Id*. (quoting McGowan v. Maryland, 336 U.S. 420, 422 (1961)).

94 *Green*, 2004 UT 76, at ¶ 33.

95 *See* Collier v. Fox, 2018 U.S. Dist. LEXIS 39261 at *23 (Mont. D. C. 2018) (holding that MONT. CODE ANN. § 45-5-611 (2009), which considers bigamy and polygamy a criminal offense, is constitutionally permissible).

96 *Id.*

97 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).

98 *See Collier*, 2018 U.S. Dist. LEXIS 29261 at *23 ("The Colliers point out Chief Justice Roberts' recent dissent in *Obergefell v. Hodges*, in which . . . the Chief Justice commented that '[i]t is striking how much the majority's reasoning [for same sex marriage] would apply with equal force to the claim of a fundamental right to plural marriage.'") (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J. dissenting)) (internal citations omitted).

99 *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("[F]rom the earliest history of England polygamy has been treated as an offence against society.").

100 *Collier*, 2018 U.S. Dist. LEXIS 29261 at *20.

101 *See* Sheppard, *supra* note 21.

102 *See Utah Gov. Signs Law Aimed at Polygamy*, *supra* note 41 ("There are an estimated 30,000 polygamists in Utah."). *But see* UTAH CONST. art. III, § 1 ("[P]olygamous or plural marriages are forever prohibited.").

within the ambit of Constitutionally permissive regulation, unprotected by the constitutional mandate of religious freedom.[103] Despite the Constitutional Framer's intent for separation of church and state,[104] the Mormon Fundamentalist belief in a polygamist family structure is curtailed by legislative and judicial power.

C. Polygamy Internationally and the Impact on Immigration

The approximation of 150,000 polygamists in the United States is not merely attributable to Mormon Fundamentalists; each year, thousands of people immigrate to the United States from countries where polygamy is customarily—and even lawfully—practiced.[105] Although polygamy is deemed to be an illicit marital arrangement in the majority of countries, it is legalized throughout much of Africa and the Middle East.[106]

In parts of Africa, polygamy is a customary marital practice.[107] For example, it is said that "polygamy is a right enshrined in South Africa's constitution."[108] Moreover, millions of sub-Saharan Africans live in polygamous unions; the practice has been declared legal, or is otherwise accepted by various African governments as a longstanding

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103 *See, e.g.*, *Collier*, 2018 U.S. Dist. LEXIS 39261 at *23 (holding that the fundamental right to marriage cannot be extended to polygamous marriages and, that the legislature has the authority to declare polygamy an illicit practice).

104 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1-3 (Harv. U. Press 4th prtg. 2004) (explaining that the public conception of the constitutional grant of religious freedom rather extends from Thomas Jefferson's interpretation of the First Amendment as "building a wall of separation between church and state.") (quoting Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, Comm. of the Danbury Baptist Ass'n in the State of Conn. (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html.).

105 *See* BENNION & JOFFE, *supra* note 4, at 6.

106 *See* Nicole Heath, *Faith and Polygamy: Which Religions Permit Plural Marriage?,* SBS AUSTRALIA, https://www.sbs.com.au/topics/life/culture/article/2017/01/17/faith-and-polygamy-which-religions-permit-plural-marriage (last updated July 2, 2018, 1:44 PM).

107 *See* Katharine Charsley & Anika Liversage, *Transforming Polygamy: Migration, Transnationalism and Multiple Marriages Among Muslim Minorities*, 13 GLOB. NETWORKS J. 60, 62 (2013) ("The highest occurrence [of polygamy] is in sub-Saharan Africa with, for example, an estimated 44 per cent of married women in Mali in polygamous unions.") (internal citation omitted).

108 Paul Vallely, *The Big Question: What's the History of Polygamy, and How Serious a Problem is it in Africa?*, THE INDEPENDENT (Jan. 6, 2010, 1:00 PM), https://www.independent.co.uk/news/world/africa/the-big-question-whats-the-history-of-polygamy-and-how-serious-a-problem-is-it-in-africa-1858858.html.

cultural norm, in twenty-five African countries.[109] In Kenya, polygamy was declared legal in 2014 and, a petition to have polygamy declared unconstitutional in Uganda was rejected in 2018.[110] In African countries such as Mali and Guinea, polygamy is a cultural and religious norm, one which does not cease upon immigration.[111] Accordingly, the French government estimates that of the country's West African immigrant population, there are approximately 20,000 polygamous families living in France.[112]

In the Middle East, the widely practiced Islamic religion accepts polygamy as a valid marital union in accordance with the Koran, the sacred text of Islam.[113] The Koran dictates to men to "marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly, then only one. (4:3)."[114] Accordingly, in Muslim countries where polygamy is practiced, Islamic law states that "a man may marry only as many wives as he can afford to take care of properly, up to four in total."[115] Thus, the Islamic practice of polygamy takes into account the economic realities that a family faces with multiple spouses and a greater number of children, as compared to monogamous marriages.[116] For example, although the Koran supports the practice of polygamy, it also recognizes that one "cannot be equitable in a polygamous relationship, no matter how hard [one may] try. (4:129)."[117]

The Koran does not mandate the practice of polygamy among Islamic observers but, by explicitly permitting men to marry multiple wives, it allows polygamy to continue as a religious and cultural norm that is "commonplace and legal."[118] However, upon immigration to the United States, the practice of polygamy often persists in secrecy, as the plural marriage is not recognized as a legal marital union.[119]

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109 *See* Rodney Muhumuza, *Polygamy Persists Across Africa, to Activists' Dismay*, ASSOCIATED PRESS (Uganda) (Oct. 24, 2018), https://apnews.com/dee38fc829a84359a5bee3d25938b0b2.

110 *See id.*

111 Bernstein, *supra* note 50.

112 *See id.* (In "studies of West African immigrants in France . . . the government estimates that 120,000 people live in 20,000 polygamous families.").

113 *See* Report of Nicholas Bala, *supra* note 48, § 21.

114 *See id.*

115 *Polygamy*, *supra* note 47.

116 *See id.*

117 Report of Nicholas Bala, *supra* note 48, § 22.

118 *Polygamy*, *supra* note 47.

119 *See* Bernstein, *supra* note 50.

"According to the Department of Homeland Security (DHS), in 2007 alone, close to half a million immigrants obtained lawful permanent resident status from countries in which polygamy is practiced in Africa, Asia, and the Middle East."[120] Thus, often unbeknownst to law enforcement, immigrant communities in the United States may encounter increased incidences of plural marriage.[121] However, just as Mormon Fundamentalists are precluded from having their plural marriages recognized in the United States, so too are the marriages of polygamist immigrants.[122]

Even if an individual emigrates from a country where plural marriages are legal, the United States requires that an "immigrant must remain married to only one other person, [and] any intentional or unintentional polygamy will block the individual from becoming a United States citizen unless the matter resolves in some way."[123] For example, in *Matter of Mujahid*, petitioner Mujahid, a lawful permanent resident who had immigrated to the United States from Egypt, sought preference status for his wife pursuant to the Immigration and Nationality Act § 203(a)(2).[124] However, petitioner Mujahid's prior marriage had not been legally terminated before his subsequent marriage and, consequently, his wife's visa petition was denied.[125]

The Board of Immigration Appeals reasoned, in *Matter of Mujahid*, that "even if the marriage is valid where celebrated, it is void as against public policy in the United States because it is a polygamous marriage and, therefore, cannot be recognized as valid marriage for immigration purposes."[126] It is of note, however, that the decision was "without prejudice to the filing of a new petition if the petitioner should again marry the beneficiary [once] his divorce is final."[127]

Thus, if immigrants desire to keep their polygamous marriages intact, subsequent wives may be married through religious ceremonies abroad, rather than by civil ceremonies, in order to sidestep the legal

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120 Smearman, *supra* note 52, at 385 (explaining that in 2007, the United States granted lawful, permanent residency to immigrants from Nigeria, Ethiopia, Egypt, Kenya, Somalia, Iran, Iraq, Afghanistan, Jordan, Yemen, Kuwait, Saudi Arabia, Malaysia and Indonesia, all of which are countries where polygamy is a societal norm).

121 *See* Higdon, *supra* note 17, at 94.

122 *See Polygamy and U.S. Immigration*, HG.ORG LEGAL RESOURCES, https://www.hg.org/legal-articles/polygamy-and-u-s-immigration-48856 (last visited Oct. 29, 2019).

123 *Id.*

124 *See* Matter of Mujahid, 15 I. & N. Dec. 546 (B.I.A. 1976).

125 *Id.*

126 *Id.* at 546-47.

127 *Id.* at 547.

ramifications which multiple civil marriages engender in the United States.[128] Further, upon entry into the United States, "[m]any women keep quiet for fear of retribution or deportation."[129]

Accordingly, "[t]hose who practice it have cause to keep it secret: under immigration law, polygamy is grounds for exclusion from the United States."[130] The prevalence of polygamy, therefore, is generally unknown to United States authorities and is often unregulated.[131] "No agency is known to collect data on polygamous unions, which typically shape over time and under the radar, often with religious ceremonies overseas and a visitor's visa for the wife, arranged by other relatives."[132]

This is not to say, however, that polygamist immigrant communities in the United States have not been found. For example, as a result of a fatal rowhouse fire in 2007, law enforcement authorities in the Bronx borough of New York City "revealed a clandestine practice [of polygamy] that probably involves thousands of New Yorkers."[133] Polygamist immigrant communities have additionally been discovered in New Jersey[134] and Minnesota.[135] Nevertheless, in order to avoid deportation or disruption of their families and communities, polygamist immigrants have generally remained within the shadows of society due to the United States' anti-polygamy laws and immigration policies.[136]

D. Canada's Arguably Lenient Stance on Polygamy

The Canadian Criminal Code similarly prohibits the practice of polygamy and deems the act of entering into multiple marriages, whether or not recognized as binding by law, as an indictable offense,

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128 *See* Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR RADIO (May 27, 2008, 12:49 AM), https://www.npr.org/templates/story/story.php?storyId=90857818.

129 *Id.*

130 Bernstein, *supra* note 50.

131 *See id.*

132 *Id.*

133 *Id.* (explaining that, only because a rowhouse caught on fire, did authorities realized that a polygamist community was residing there).

134 *See id.*

135 *See* Smearman, *supra* note 52, at 387 (finding a polygamous group of Vietnamese immigrants living in Minneapolis, Minnesota).

136 *See* Bernstein, *supra* note 50 ("With no legal immigration status and no right to asylum from polygamy, many are afraid to expose their husbands to arrest or deportation . . . .").

subject to a term of imprisonment not exceeding five years.[137] To be indicted for the offense of polygamy in Canada, the Code does not require "proof of the method by which the alleged relationship was entered into, agreed to or consented to . . . nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse."[138]

Despite Canada's stringent laws on polygamy, ostensibly not even requiring proof of the practice to be indicted at trial,[139] it is suggested that immigration authorities actually take a lenient stance on polygamous marriages.[140] In a policy memorandum approved by an associate deputy minister at Citizenship and Immigration Canada, which was circulated among Canadian immigration officials, it was explained that individuals engaged in plural marriages "are not automatically excluded from residency in Canada" or immigration thereto.[141] The memorandum states, in pertinent part, that:

> A polygamous marriage can be converted into a monogamous marriage provided that the couple live together in a monogamous relationship from the time of arrival in Canada. This conversion is effected by the stated intention of the parties to so convert their marriage, followed by some factual evidence that they have complied. . . . If a husband wishes to sponsor a wife other than his first as a spouse, he must divorce his other wives and remarry the chosen wife in a form of a marriage that is valid in Canada. He and his chosen spouse must sign a declaration to that effect.[142]

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137 *See* Canada Criminal Code, R.S.C. 1985, c. C-34, § 293 ("(1) Everyone who (a) practises [sic] or enters into or in any manner agrees or consent to practise [sic] or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage, or (b) celebrates, or assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.").

138 *Id.* § 293(2).

139 *See id.*

140 *See* Charlie Gillis, *How to Immigrate to Canada If You're a Polygamist*, MACLEAN'S (Oct. 1, 2013), https://www.macleans.ca/politics/how-to-get-into-canada-if-youre-a-polygamist/.

141 *Id.*

142 Memorandum from Chantal Gagnon to Officials of Citizenship & Immigration Can. [hereinafter Memorandum] (Nov. 5, 2012), https://www.macleans.ca/politics/how-to-get-into-canada-if-youre-a-polygamist/.

Arguably, the Canadian immigration stance on polygamous relationships makes it, in practice, "no more complicated than arriving with the first spouse and telling immigration officials you plan to live together in monogamy."[143] This leniency is evident in the 2018 convictions of Winston Blackmore and James Oler,[144] where the defendants were sentenced to six months and three months of house arrest respectively.[145] The gravity of their polygamous activity—Mr. Blackmore's 149 children[146] and twenty-four wives,[147] and Mr. Oler's twenty-three children and five wives[148]—would not seem to warrant only months of house arrest when the Canadian Criminal Code permits a sentence of five years' imprisonment.[149]

Moreover, prior to the 2018 convictions of Winston Blackmore and James Oler,[150] there had only been two other convictions for polygamy in Canadian history, occurring in 1899 and 1906.[151] Canada's infrequent prosecution of polygamy,[152] liberal sentencing for convictions of polygamous activity,[153] and lenient immigration policy for individuals engaged in polygamy,[154] suggests that Canada takes a relatively tolerant stance to plural marriages, in light of the country's stringent anti-polygamy law.[155]

A recent proposal to Canadian policy on the issue of polygamy urged the legislature that "aggressive enforcement of the criminal law would not be appropriate, and would be contrary to the interests of the vulnerable women and children who are at present living in

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143 Gillis, *supra* note 140.

144 *See* R. v. Blackmore, [2018] B.C.J. No. 3039, para. 248 (Can. B.C. Sup. Ct.).

145 *See* Lauren Krugel, *Two Men Guilty in B.C. Polygamy Case Given Conditional Sentences*, VANCOUVER SUN, https://vancouversun.com/news/local-news/two-b-c-men-guilty-of-polygamy-given-conditional-sentences (last updated June 26, 2018).

146 *See Blackmore*, [2018] B.C.J. No. 3039, para. 86.

147 *See id.* at para. 10.

148 *See id.* at para. 76.

149 *See* Canada Criminal Code, R.S.C. 1985, c. C-34 § 293(1).

150 *See* R. v. Blackmore, [2018] B.C.J. No. 3039, para. 131 (Can. B.C. Sup. Ct.).

151 *See id.* ("This case is only one of three prosecutions for polygamy that have occurred in the offence's nearly 130-year history. The others occurred in 1899 and 1906."). *See also* Krugel, *supra* note 145.

152 *See id.* ("This case is only one of three prosecutions for polygamy that have occurred in the offence's nearly 130-year history.").

153 *See id.* at para. 181 ("[T]here has been a degree of denunciation and general deterrence accomplished already in this case through the recording of these first contemporary convictions for polygamy.").

154 *See* Memorandum, *supra* note 142.

155 *See* Canada Criminal Code, R.S.C. 1985, c. C-34, § 293(1).

polygamous families."[156] Instead, it was recommended that "[p]rosecutions for polygamy should take place with sensitivity to the effect of enforcement of the law on children and vulnerable women."[157] Moreover, the proposal advised that it would be constitutionally permissible for the Canadian Government to recognize the polygamous marriages of immigrants as valid, but only if such marriages were valid in the jurisdiction where they were contracted.[158]

As a basis for the recommendation of marital recognition, the proposal looks to a law of Canada's second largest province, Ontario,[159] which arguably has a more lenient stance on polygamy than the country of Canada does as a whole.[160] Ontario's Family Law Act provides that courts may determine the "equitable settlement of affairs of the spouses upon the breakdown of a partnership . . . including the equitable sharing by parents of responsibility for their children."[161] Included in the Act's definition of "spouse" is a "marriage that is *actually or potentially polygamous*, if it was celebrated in a jurisdiction whose system of law recognizes it as valid."[162]

An equal protection argument can be made that recognizing a polygamous marriage as valid for only Canadian immigrants would deny Canadian polygamists—and immigrants whose plural marriages were not legal in their country of origin—from equal treatment relating to property, child custody, and spousal support.[163] However, the proposal asserts that:

> these differences in treatment are constitutionally and politically justified on the ground that this is consistent with principles of private international law about establishing the validity of a marriage, and it is a fair resolution to the problems inherent in international difference in marriage laws. It is also necessary to protect vulnerable women and children who relied on the laws of the jurisdiction where the polygamous marriage was performed . . . .[164]

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156 *See* Campbell, *supra* note 15, at 35.

157 *Id*. at 42.

158 *See id.* at 43.

159 *See About Ontario*, ONTARIO.CA, https://www.ontario.ca/page/about-ontario (last updated Mar. 7, 2019).

160 *See* Campbell, *supra* note 15, at 35.

161 Family Law Act, R.S.O. 1990, c. F.3 (Can.) (last amended 2020).

162 *Id*. §1(2) (emphasis added).

163 *See* Campbell, *supra* note 15, at 43.

164 *Id.* at 43.

Moreover, "if a dependent wife in a polygamous relationship were to claim spousal support or property relief, there would be good arguments for granting relief . . . in a Canadian court," potentially increasing protections to women and children exiting polygamous marriages and communities within Canada.[165]

The United States has no such law protecting spouses and children to a polygamous union, be it an immigrant or a United States-born citizen, and a plural wife often feels that it is "extremely difficult to leave her marriage."[166] If a polygamous marriage does end in the United States, "the wives' legal status is murky at best, with little case law to guide decisions on marital property or benefits."[167] As this note recommends for the United States to adopt a similar policy to polygamous unions as that of Canada and Ontario, it is necessary to examine the current divorce system in place in the United States, the legal rights which ensue once a divorce is granted, and the best interest of the child standard utilized to determine custodial arrangements upon the dissolution of a marriage.

IV. RECONCILING POLYGAMY AND THE BEST INTEREST OF THE CHILD STANDARD

A. Monogamous Divorce: Equitable Distribution

When parties to a traditional, monogamous marriage seek to dissolve their legally recognized union through a divorce decree, a court will assert jurisdiction to determine the following three aspects of marriage: (1) the status of the marriage; (2) the financial aspects of the marriage;[168] and (3) the custodial determinations as to the children of such marriage.[169] While these three facets incidental to the legal dissolution of a marriage are able to be determined independent from one

165 *Id.* at 35.

166 Maura Irene Strassberg, *Distinguishing Polygamy and Polyamory Under Criminal Law*, *in* FAMILIES – BEYOND THE NUCLEAR IDEAL 160, 161 (Daniela Cutas & Sarah Chan eds., 2012).

167 Bernstein, *supra* note 50.

168 *See* Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957).

169 *See* 28 U.S.C.S. § 1738A(c) (LEXIS through Pub. L. No. 116-91) ("A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if – (1) such court has jurisdiction under the law of such State; and (2) one of the following conditions is met: (A) such State (i) is the home State of the child on the date of the commencement of the proceeding . . . .").

another by different jurisdictions,[170] a concept known as divisible divorce,[171] such determinations do have an impact on the outcome of the other aspects in practice.

For example, the majority of jurisdictions require a greater child support payment from a non-custodial parent as compared to the custodial parent, who is presumed to already be spending their support obligation by operation of custodial care.[172] Although child support is a basic legal obligation of all parents, "paramount to all other financial obligations," the amount of child support depends on a variety of factors including, but not limited to, financial resources and custodial awards.[173] Thus, the financial and custodial aspects of a divorce are inextricably intertwined when there is a child to the marriage.

Moreover, until the 1960s, divorce in the United States was entirely premised upon the concept of moral wrongdoing, wherein a divorce would only be granted on the limited—fault-based grounds—of adultery, desertion, or cruelty.[174] However, divorce law reform in California during the 1960s,[175] along with the high divorce rate in the country at that time,[176] provided the impetus for the national adoption of no-fault grounds for divorce.[177] As such, a spouse no longer needed to prove fault to obtain a divorce—rather, only that there had been an

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170 *See Vanderbilt*, 354 U.S. at 419 (holding that although Nevada had jurisdiction to determine that the status of the marriage was dissolved, New York, not Nevada, had personal jurisdiction over the wife to determine the financial aspects of the divorce—including spousal support—thus demonstrating the concept of divisible divorce).

171 *See* Pawley v. Pawley, 46 So. 2d 464, 472 (Fla. 1950) ("As we use and understand the term 'divisible divorce' it is a vocable which was invented in recognition of the fact that a divorce, strictly speaking, is a dissolution of the marital status and may or may not extinguish all of the [marital] obligations . . . .").

172 *See* OFFICE OF CHILD SUPPORT ENF'T (OCSE), U.S. DEP'T OF HEALTH & HUMAN SERVS., ESSENTIALS FOR ATTORNEYS IN CHILD ENFORCEMENT 151-52 (3d ed. 2002) [hereinafter OCSE] ("The person with custody of the child is presumed to be contributing his or her proportionate share of the total [child] support obligation . . . .").

173 *See* Little v. Little, 975 P.2d 108, 111 (Ariz. 1999).

174 SANFORD N. KATZ, FAMILY LAW IN AMERICA 78 (2d ed. 2015).

175 *Id.* at 94 (explaining that California implemented no-fault divorce grounds in 1969).

176 *See* W. Bradford Wilcox, *The Evolution of Divorce*, NAT'L AFFAIRS, https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce (last visited Jan. 7, 2020) (explaining that in the 1950s, less than twenty percent of marriages ended in divorce, raising to fifty percent by the 1970s).

177 *See* KATZ, *supra* note 174, at 94 ("Although only a few states have entirely abolished fault as a basis for divorce, by 2001 all fifty states had included some type of no-fault provision in their divorce laws.").

irreconcilable breakdown of the marriage.[178] Accordingly, the focus of courts moved from fault to finances.[179] "With the inclusion of no-fault divorce in American law, the emphasis in a divorce case has shifted from determining and proving fault grounds for divorce to tabulating and dividing marital assets."[180]

The majority of jurisdictions in the United States divide marital assets—including money, property, stocks, pensions, and debts—in accordance with a system of equitable distribution.[181] Equitable distribution does not look to which party to the marriage held title to the asset in their name, but rather looks—through a lens of equity—to the contributions each spouse made to acquiring that asset, be it professional or even marital labor.[182]

The advent of equitable distribution has led to a decrease in alimony awards which operate as a form of spousal support and maintenance.[183] Historically, women have adopted the role of the homemaker and relied on their husbands for financial security.[184] As such, alimony was urged as a way to avoid a divorced woman from relying on public welfare funds and "becoming a public charge."[185] However, alimony still remains a benefit available to divorcing, monogamous spouses, calculated "based on a balance between the husband's ability to pay and the wife's needs."[186]

Accordingly, the marital union provides a sense of financial security upon divorce. Even if one spouse does not have an income, household caretaking functions are considered to enhance the earning capacity of the other, and therefore are deemed a marital contribution

178 *See* CAL. FAM. CODE § 2310 (Deering 2019) ("Dissolution of the marriage or legal separation of the parties may be based on . . . (a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.").

179 *See* Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-national Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 57 (2011) ("Since the advent of no-fault divorce in the 1960s and 1970s, both divorce litigation and negotiation have focused predominantly on the distribution of property and debt.").

180 KATZ, *supra* note 174, at 98.

181 *See* KATZ, *supra* note 174, at 99.

182 *See* Innerbichler v. Innerbichler, 132 Md. App. 207, 225 (Md. Ct. Spec. App. 2000) (holding that where separate property, such as a company, appreciates in value during marriage due to the titled spouse's active management, the asset's appreciation is divisible upon divorce). *See also* KATZ, *supra* note 174, at 99-100.

183 *See* KATZ, *supra* note 174, at 106 (noting that lifetime alimony is less commonly award today than in the past).

184 *See id.*

185 *See, e.g.,* Rule v. Rule, 402 P.3d 153, 157 (Utah Ct. App. 2017) (citing Jensen v. Jensen, 197 P.3d 117, 120 (Utah Ct. App. 2008)).

186 KATZ, *supra* note 174, at 105.

warranting equitable distribution or alimony.[187] Absent a marital union, neither equitable distribution of assets nor alimony is available upon separation without a contractual agreement to such effect.[188]

B. Monogamous Divorce: Custody and Best Interest of the Child

With respect to child custody arrangements, the concept of divisible divorce appears to suggest that custody determinations are made independent of financial decisions. However, as aforementioned, not only will child support obligations be influenced by an award of child custody,[189] but the determination of which parent is best suited to be the custodial parent also has the potential of being impacted by financial considerations.[190]

Prior to the 1970s, child custody determinations were made in accordance with the subjective, "best interests of the child" standard, a standard which has been criticized for its ambiguity, lending itself to judicial discretion.[191] In an attempt to curb unfettered judicial discretion with respect to the best interest of the child standard, the Uniform Marriage and Divorce Act (UMDA) directs a court to consider certain enumerated factors, including the wishes of the child and his or her parents, the child's relationship with his or her parents and siblings, and the stability of the possible custodial homes.[192] The UMDA additionally states that courts "shall not consider the conduct of a proposed custodian that does not affect his [or her] relationship to the child."[193]

However, the UMDA is only a model statute and, as seen in *Hollon v. Hollon*, the UMDA's enumerated factors are not regarded as dispositive.[194] Rather, courts often look to the additional factors of: (1) a parent's capacity to provide primary caretaking functions; (2) a

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187 *See Innerbichler*, 132 Md. App. at 223-24 (placing emphasis on the fact that the wife had served as the primary caretaker to ultimately conclude that the appreciation in the husband's company was subject to equitable division).

188 *See, e.g.*, O'Reilly-Morshead v. O'Reilly-Morshead, 50 Misc. 3d 402, 416 (Sup. Ct. Monroe Cty. 2015) ("Equitable distribution of property . . . is only permitted in New York if the parties are married . . . .").

189 OCSE, *supra* note 172, at 151-52.

190 *See* Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L. Q. 75, 84 (1989) (finding that of criteria used to determine if joint or sole custody is appropriate, judges rated parental economic stability as a 4.57 on a 9.0 scale, 9.0 being an "extremely important" consideration in a custody determination).

191 *See* KATZ, *supra* note 174, at 114-15 ("The standard has no uniform definition, and its application was both contextual and case specific.").

192 *See* Unif. Marriage & Divorce Act § 402 (1973).

193 *See id.*

194 *See* Hollon v. Hollon, 784 So. 2d 943, 946 (Miss. 2001).

parent's employment responsibilities which may limit their availability to provide child care; and (3) the stability of a parent's home and employment.[195] While empirical research has found that parental finances are taken into account in the best interest of the child determination, the nature of the parent-child relationship and previous caretaking functions are deemed significantly more important to a judicial determination of custody.[196] It has even been suggested that wealth should not be given significant weight in such a determination.[197] Nevertheless, evidence-based research demonstrates that income and financial assets are taken into consideration.[198]

However, in an effort to avoid unfettered judicial discretion, some jurisdictions have turned to "presumptions" to guide child custody determinations.[199] In such jurisdictions, commonly utilized is the "primary caretaker" presumption,[200] whereby primary physical custody is awarded to the parent who, prior to separation, had taken responsibility for nurturing duties, such as feeding, bathing, disciplining, and educating the child.[201] While the primary caretaker presumption eliminates arbitrary application of the numerous factors considered in a strict "best interests of the child" analysis—placing the greatest weight instead on which parent had performed primary caretaking

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195 *See id.* at 947.

196 *See* Reidy et al., *supra* note 190, at 84 (finding that judges consider the quality of the parent-child relationship and each parent's previous caretaking responsibilities to be significantly more important than parental economic stability but, that judges nevertheless do consider wealth in the ultimate determination of a custody arrangement).

197 *See* Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 230 (2000) ("Courts . . . tend to give too much weight to the wealth comparison [of parents], ... [and] rely too heavily on financial factors in relation to more important intangible factors.").

198 *See* Reidy et al., *supra* note 190, at 84.

199 *See, e.g.*, Garska v. McCoy, 167 W. Va. 59, 69-70 (W. Va. 1981) (utilizing the most common of the presumptions—the "primary caretaker" presumption—to grant custody to the parent who was acting as the child's primary caretaker prior to separation); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (AM. LAW. INST. 2002) (advocating for the use of the approximation rule wherein the court is directed to presume that the child's best interest is served if custodial responsibility is allocated in accordance with the amount of time each parent had previously spent performing caretaking functions).

200 *See* Paul L. Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L.J. 731, 734 (2000) ("[T]he primary caretaker presumption continues to be one factor that many states use when making a best interest of the child custody determination . . . .").

201 *See Garska*, 167 W. Va. at 69-70.

functions—the outcome of the presumption, in practice, tends to favor mothers.[202]

Although not gender-biased on its face, the primary caretaker presumption has been argued by many legal commentators to favor "mothers [who] are much more likely than fathers to be deemed the primary caretakers of their children during marriage."[203] Thus, just as equitable distribution recognizes the value in caretaking responsibilities and allocates assets accordingly,[204] the primary caretaker presumption similarly awards custody on such a basis; typically, the award goes to the mother.[205]

While proscribing rights to untitled spouses for purposes of asset distribution, or requiring consideration of a myriad of factors or presumptions for purposes of custody determinations, may benefit one spouse to the detriment of the other, the ultimate judicial goal is to mitigate harm to spouses and their children upon the dissolution of a marriage.[206] As such, divorce laws in the United States offer "protection [to] an economically vulnerable spouse from great financial hardship at the end of marriage" in accordance with principles of equity.[207] However, the legal mechanisms allowing for such equity upon divorce only operate with respect to two-person marital unions, and do not extend to polygamous marriages.

C. Departure from Polygamy: A Wife's Precarious Financial Position

As aforementioned, *Obergefell v. Hodges* has created the possibility that plural marriages can be legally recognized, considering that the traditional marital framework—as between one man and one woman—has been abandoned.[208] However, *Obergefell* has been cited

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202 Smith, *supra* note 200, at 740.

203 *Id.*

204 Johnathan L. Kranz, Note, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity,* 13 CARDOZO ARTS & ENT. L.J. 917, 930-32 (1995).

205 *See* Smith, *supra* note 200, at 740 ("Women have always had to sacrifice career goals to raise their children, and the primary caretaker presumption recognizes this, and rewards women for this sacrifice.").

206 *See* Unif. Marriage & Divorce Act § 102(3) (1973) ("This Act shall be liberally construed and applied to promote its underlying purposes, which [include] . . . mitigat[ing] the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.").

207 Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 233 (1994).

208 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015) (holding that the fundamental right to marry extends to same-sex couples).

as a case to support the proposition that those who decline to be lawfully wed, when having the ability to do so, cannot enjoy the rights and benefits concomitant to the marital institution which they chose not to partake in.[209] By deeming marriage a fundamental right, the marital institution has strengthened, thereby increasing the disparity with respect to the rights available upon divorce for a lawfully married couple, as compared to those whose marriages are illicit.[210]

For example, as held in *Whitney v. Whitney*, "plural marriages . . . are void and wholly ineffectual to create a marital status or any of the legal incidents that usually flow therefrom as between the parties."[211] *Whitney* illustrates the principle that due to an illicit, plural union, neither alimony nor equitable distribution rights to property will be awarded by a court upon dissolution of the polygamous marriage, absent a contractual agreement to such effect.[212]

In dissent to the majority opinion in *Whitney v. Whitney*, Justice Thomas L. Gibson reasoned that it was an injustice to deny the mother—and the "innocent children"—the benefit of the state's divorce statute, wherein "provision [could otherwise have been] made for the care and maintenance of the minor children, and [for] the division of property."[213] Whereas the court could have utilized traditional divorce remedies to allocate marital assets in accordance with principles of equity, Justice Gibson asserted that the *Whitney* majority instead chose to inequitably allow the polygamous husband to "escape the legal responsibility that would attach to him if his marriage had been contracted . . . legally and in good faith."[214]

However, nearly eighty years after Justice Gibson's equity-based, dissenting argument in 1942, equitable distribution upon divorce still remains unavailable for individuals leaving a polygamous marriage. In the United States, "a second or third wife [has] no legal protection for her financial contributions,"[215] and is unable to rely on the concept

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209 *See* Blumenthal v. Brewer, 69 N.E.3d 834, 858 (Ill. 2016) (explaining that *Obergefell v. Hodges* strengthened the institution of marriage and, as such, the institution's benefits are only available to those who are lawfully wed).

210 *See id.*

211 Whitney v. Whitney, 134 P.2d 357, 360 (Okla. 1942).

212 *See id.* at 360-61 (holding that a dissolved polygamous marriage does not permit the court to grant alimony or interests in property as it would in a monogamous divorce proceeding but, if the parties have contracted to settle their property rights, the contract can be enforced by the courts).

213 *Id.* at 365 (Gibson, J., dissenting).

214 *Id.*

215 Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL'Y 1, 26 (2014).

of equitable distribution, "left without any legal rights to marital property."[216]

The economic position of women in polygamous communities, especially upon their departure from the plural union, is often deleterious.[217] "A substantial amount of research suggests that polygamy deprives women of economic resources, and of the ability to earn income independently of their husbands" while in the plural marriage.[218] A study of a polygamist community in the Gaza Strip found that more senior wives strictly performed caretaking functions within the home, rather than obtaining outside employment, and that only forty percent of more junior wives were gainfully employed.[219] In Canada, researchers have found that polygamous women are unlikely to be economically independent and "bear a limited ability to acquire economic resources" due to a lack of education and employment background.[220]

In FLDS communities within the United States, polygamist wives similarly tend to forgo formal education and are instead urged to focus on learning the skills necessary to become "dutiful wives and nurturing mothers."[221] In fact, an FLDS school, the Alta Academy, only provides up to an eighth-grade education as that was all the FLDS leader and "prophet"—Warren Jeffs—believed was necessary.[222] In a speech to the FLDS Church, Warren Jeffs preached that "[s]chool is not your top priority. It is your preparation to be filled with the hold of God. That is the most important labor you have individually and in your family."[223]

However, a polygamist husband's salary alone is often insufficient to support his multiple wives and children,[224] as FLDS members'

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216 *Id.*

217 *See* Campbell, *supra* note 15, at 17 ("[W]hile some literature suggests that polygamy can be economically beneficial for women, it more often leads to deleterious economic effects for them.").

218 *Id.* at 15.

219 *See id.*

220 *Id.* at 16 ("[S]enior wives experienced significantly greater economic problems than did junior wives . . . [and] generally had less formal education, and a greater number of children.").

221 Eve D'Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 INT'L J.L. POL'Y & FAM. 373, 377 (2005).

222 *See* PROPHET'S PREY, *supra* note 39 (explaining that even if a child was given an eighth-grade education, they were taught a skewed and censored curriculum; children were taught, for example, only about former LDS and FLDS leaders in a course called "priesthood history" and were not taught about United States' history).

223 *Id.*

224 *See* D'Onofrio, *supra* note 221, at 380.

salaries are turned over, in large part, to the Church.[225] As such, "plural wives may file welfare claims *as single mothers* in need of child support" in order to provide sufficient income for her polygamist family.[226] Not only may a plural wife face the perils of poverty but, out of fear of legal prosecution, a polygamous wife may decline to record her husband as her child's father, thus relieving him of the child support or custody obligation that attaches to the parental status if she decides to leave.[227]

Moreover, within the Mormon Fundamentalist community, the salary of a plural wife who does work is turned over to her husband, who then redistributes the funds among all of his wives, based on their number of children or general needs.[228] As such, even if a polygamist wife does have outside employment, the earnings she has accumulated will not likely be available to her if she decides to depart from the plural marriage. While a new wife may benefit from the emotional and financial stability ensuing from the marital arrangement, "another wife is worse off for having to share the resources available to her."[229] Thus, with access to financial assets being diminished with each additional child and wife brought into the union, in conjunction with the fact that polygamous women often do not accrue their own wealth through employment, a polygamous wife's ability to support herself upon divorce is dubious at best.[230]

Not only is a polygamous wife denied financial compensation for her marital, caretaking contribution—although highly considered by courts with respect to two-person unions for purposes of equitable distribution[231]—but spousal support is a benefit similarly unavailable.[232] Thus, the fact that monogamous divorce laws deny access to the

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225 *See* PROPHET'S PREY, *supra* note 39.

226 Campbell, *supra* note 15, at 16 (emphasis added).

227 *See* Michael Scott Moore, *Big Love Soaking the State*, PACIFIC STANDARD, https://psmag.com/news/big-love-soaking-the-state-16044 (last updated May 3, 2017) (explaining how Mormon Fundamentalists are able to obtain child support through the United States' welfare system, as their children are often deemed fatherless by law).

228 *See* D'Onofrio, *supra* note 221, at 380.

229 Shayna M. Sigman, *Everything Lawyers Know about Polygamy is Wrong*, 16 CORNELL J. OF L. & PUB. POL'Y 101, 165 (2006).

230 *See* Campbell, *supra* note 15, at 18 ("[W]omen who live as plural wives . . . have few or no economic resources. If they leave, they might not have the skills necessary to earn an income outside their community.").

231 *See* Innerbichler v. Innerbichler, 132 Md. App. 207, 225 (Md. Ct. Spec. App. 2000).

232 *See* D'Onofrio, *supra* note 221, at 377, 381.

benefits of spousal support and equitable distribution only serves to worsen a polygamous wife's financial position upon separation, as compared to women leaving a legally recognized, two-person marital union.[233]

D. Polygamy, Custody, and the Best Interest of the Child

Whether a jurisdiction looks to certain enumerated factors similar to those proposed by the UMDA,[234] or opts to apply a presumption, such as the primary caretaker presumption,[235] judges ultimately consider the relationships between parents and children in making custody determinations.[236] Unlike a traditional, two-person marital union, children raised in a polygamous family "receive a divided share of their father's attention" as they must compete with not only multiple children, but also multiple wives.[237]

Studies have found that within polygamous families in the FLDS community, fathers tend to have less affectionate and more distant relationships with their children as compared to fathers in a traditional monogamous relationship.[238] Moreover, the United Nations' Committee on the Rights of the Child reported that a polygamous father typically leaves the responsibility of childcare with the child's mother.[239] Based on the foregoing, both a strict best interests of child analysis, and a presumption that it is in the best interests of the child to remain with their primary caretaker, would likely bestow custody upon the child's mother.[240]

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233 *See* Campbell, *supra* note 15, at 15 (explaining that researchers have found that women in polygamous marriages "were more economically marginalized than their monogamous counterparts.").

234 *See* Unif. Marriage & Divorce Act § 402 (1973).

235 *See* Smith, *supra* note 200, at 740.

236 *See* Reidy et al., *supra* note 190, at 83-85.

237 Neel Burton, *The Pros and Cons of Polygamy*, PSYCHOLOGY TODAY, https://www.psychologytoday.com/us/blog/hide-and-seek/201801/the-pros-and-cons-polygamy (last updated Apr. 25, 2020).

238 ALTMAN & GINAT, *supra* note 32, at 432 ("In several families, children showed a blend of awe, respect, and deference toward their father, but we observed little warmth and informality or over displays of affection between children and their fathers.").

239 *See* Rep. of the Comm. on the Rights of the Child, ¶ 173, U.N. Doc. CRC/C/8/Add.43 (June 26, 2001) ("Polygamy also limits parental responsibility for child. The polygamous father mostly leaves the responsibility with the respective mothers.").

240 *See, e.g.*, PROPHET'S PREY, *supra* note 39 (explaining that Charlene Jeffs, the first and only legal wife of the current FLDS leader Lyle Jeffs, filed for divorce,

Moreover, an additional aspect of the best interests of the child analysis in the United States concerns the child's connection to the environment and the community in which they were raised.[241] A similar consideration is given to child custody determinations in Canada. However, in the case of *Blackmore v. Blackmore*, the British Columbia Supreme Court held that it was in a child's best interest to leave the FLDS polygamous community—granting custody to the departing mother—despite the children having been raised within the FLDS community since their birth.[242] Of the factual evidence taken into account for purposes of the best interest of the child custody determination was that children were denied a proper education within the FLDS community, where it was rare for a child to obtain more than an eighth-grade education.[243]

The fact that the children, over whom the *Blackmore v. Blackmore* custody dispute concerned, would likely "face ostracism by the FLDS Church community, which may well have a negative impact on the children" did not alter the ultimate judicial decision that the children's best interests would be served by granting their mother custody.[244]

Although two cases decided in 2006 in the United States held that parental custodial rights could not be denied solely due to the practice of polygamy,[245] or solely because a parent has indoctrinated their child with religious belief in a polygamous lifestyle,[246] where the court finds that a child suffers harm as a result of such a practice, the parent will be denied custodial rights.[247]

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citing the molestation of young girls as a reason for her departure. Charlene Jeffs was granted custody of two of her ten children, as the eight she was not granted custody to were over the age of eighteen and had authority to determine whether they would remain within the FLDS Church).

241 *See* KATZ, *supra* note 174, at 121.

242 *See* Blackmore v. Blackmore, 2007 CarswellBC 2893, para. 19 (Can. B.C.) (WL).

243 *See id.* at para. 15-21.

244 *Id.*

245 *See* State v. Holm, 2006 UT 31, 137 P.3d 726, 776 (2006).

246 *See* Shepp v. Shepp, 906 Pa. 691, 1165, 1174 (Pa. 2006) (holding that a parent cannot be denied custody of a child due to their belief in, and teaching of, polygamy alone absent evidence that, as a result, the child faces grave harm).

247 *See* Ben Winslow, *FLDS Custody Case Official Ends in Texas, Alleged "Bride" Dropped From Court Oversight*, KSL.COM (July 23, 2009, 4:28 PM), https://www.ksl.com/article/7270444/flds-custody-case-officially-ends-in-texas-alleged-bride-dropped-from-court-oversight ("The order, signed Thursday by 51st District Judge Barbara Walther, places the girl in the custody of her aunt.").

For example, after leaving a FLDS community along the border of Utah and Arizona, two mothers were granted custody of their children against opposition from the father, community leader, and "prophet," Warren Jeffs.[248] Despite the children's initial struggles of assimilating into non-polygamist society, and despite the ostracism from the FLDS community which the women and children faced upon their separation from the plural marriage, the courts held that it was in the best interests of the children to grant custody to the departing mothers.[249] The numerous accounts of child molestation and child labor within the FLDS Church provide strong evidence that harm to a child as a result of a polygamous lifestyle can—and should—be found.[250] As such, the "best interest of the child analysis" is more likely to weigh in favor of a parent who decides to depart from polygamy.

V. WHAT CAN BE DONE TO ENSURE THAT THE BEST INTEREST OF THE CHILD IS PROMOTED IN POLYGAMOUS SITUATIONS?

The United States has created a complex web of laws intended to protect divorcing spouses from economic harm as a result of the breakdown of their marriage.[251] The country also has a judicial policy of protecting against inequality which could result from undue influence and inequality of bargaining power.[252] However, when it comes to polygamy, the same judicial and legislative mechanisms are not in place

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248 *See* Harris et al., *supra* note 18. *See also* PROPHET'S PREY, *supra* note 39 (explaining that Warren Jeffs considered himself to be the "prophet" of the FLDS Church, as did the congregants, his wives, and his many children).

249 *See id.* ("A judge awarded her legal custody of all four children [and] . . . [she] is determined to savor every little sign of a brighter future with them.").

250 *See* PROPHET'S PREY, *supra* note 39 (recounting Warren Jeffs' molestation of numerous children, including his nephew, Thomas Jeffs, and his twelve-year-old wife, Merrianne Jessop. In addition to the countless accusations of Warren Jeffs' and other male figureheads' sexual relations with minors, the FLDS Church has been accused of violating child labor laws. For example, Warren Jeffs had ordered schools to close for a week period in 2012 so that children could harvest pecans; a subsidiary company of the FLDS Church, Paragon, was fined approximately two million dollars for violating child labor laws as a result of this incident).

251 *See* Higdon, *supra* note 17, at 81 (explaining that judicial regulation of divorce is "designed and structured primarily to permit the state to oversee the process" of divorce in order to protect spouses from financial harm).

252 *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(1)-(2) (AM. LAW. INST. 2019).

to ameliorate the financial harm that a woman may face as against her leader-like spouse upon her departure from the plural marriage.[253]

As expressed in a general recommendation issued by the U.N. Committee on the Elimination of Discrimination against Women in 2013, "polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants [sic] that such marriages ought to be discouraged and prohibited."[254] Worse yet, is that the United States does not provide a judicial mechanism to lessen the potential deleterious financial consequences for a former polygamous wife and her children upon her departure from the plural marriage.[255]

As seen in the case of *R. v. Blackmore*, the husband often takes on the role of leader, holding "a great deal of authority and control . . . rendering others, particularly women, powerless."[256] Moreover, "[o]nly familiar with communal living, obstacles to leaving the community [which former wives faced] included having no credit, no place to go, limited supports, limited education, and no money."[257] It takes a brave woman to leave a marriage but, it takes an even braver woman to leave a marriage where there is no legal protection—financial or otherwise—assisting her in the support of not only herself, but also her children.

If the United States has declared polygamy to be an "offence against society,"[258] why do the country's laws have the effect of punishing a woman who has decided to respect the institution of marriage and decrease the prevalence of the illicit marriage? Moreover, if the "best interest of the child" standard, utilized in cases of marital

253 *See* ALTMAN & GINAT, *supra* note 32, at 3 (explaining that women were encouraged to marry religious leaders).

254 Committee on the Elimination of Discrimination Against Women, General Recommendation on Article 16: Economic Consequences of Marriage, Family Relations, and their Dissolution, para. 27, U.N. Doc. CEDAW/C/GC/29/2013, https://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf. *See also* United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (explaining that of the treaty's 189 parties, the United States, while a signatory, has not ratified it).

255 *See, e.g.,* Whitney v. Whitney, 134 P.2d 357, 360 (Okla. 1942).

256 *See* R. v. Blackmore, [2018] B.C.J. No. 3039, para. 54 (Can. B.C. Sup. Ct.).

257 *Id*. at para. 56.

258 Reynolds v. United States, 98 U.S. 145, 165 (1878).

dissolution throughout the United States,[259] is likely to award custody to a mother escaping a plural marriage, rather than a father who remains in a polygamist community,[260] how can the best interest of the child truly be accounted for if equitable distribution, spousal support, and child support are not available? Equitable distribution and alimony awards have historically been viewed as a judicial tool to avoid divorcing spouses from becoming a "public charge."[261] Denying such judicial remedies to polygamous spouses not only can result in poverty but, can similarly deny a child any semblance of a custodial situation which facilitates their best interest.

"You can't undo what you have done with these young girls, but are you willing to do something to help the people [of the FLDS Church] further?"[262] To this question at his trial, Warren Jeffs invoked his Fifth Amendment Right.[263] When asked in court if he "felt any remorse" for the "heinous crimes against children," Warren Jeffs again invoked his Fifth Amendment Right.[264] "Today there are an estimated 10,000 FLDS members under the control of Warren Jeffs" despite the fact that he is serving a lifetime jail sentence in a Texas prison.[265] "Lyle Jeffs continues to rule the FLDS followers on behalf of his brother, Warren. [Warren's] power and control over the people is stronger than ever."[266] Accordingly, more must be done to protect those escaping plurality in the United States, and it will take legislative and judicial action to do so.

If the best interest of a child is truly desired to be protected, and the incidence of plural marriages throughout the country is to be lessened, the United States should enact a law similar to Ontario's Family Law Act which permits a court to determine the "equitable settlement of affairs of the spouses upon the breakdown of a partnership . . . including the equitable sharing by parents of responsibility for their children."[267] As aforementioned, the Act's definition of "spouse"

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259 *See* Child Welfare Information Gateway, *Determining the Best Interests of the Child*, CHILDWELFARE.GOV 1, 2 (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=1&view=Introduction.

260 *See* Harris et al., *supra* note 18.

261 *See, e.g.,* Rule v. Rule, 402 P.3d 153, 157 (Utah Ct. App. 2017).

262 PROPHET'S PREY*, supra* note 39.

263 *See id.*

264 *Id.*

265 *See id.*

266 *Id.*

267 Family Law Act, R.S.O. 1990, c. F.3 (Can.) (last amended 2020).

"includes a marriage that is *actually or potentially polygamous*."[268] Although the Act limits such relief to polygamous marriages that were "celebrated in a jurisdiction whose system of law recognizes it as valid,"[269] Canada's lenient stance on polygamy has led to the possibility that such relief could extend to situations where the polygamous union was contracted illegally.[270]

Aside from religious and moral arguments that can be made to assert that recognition of a polygamous marriage is harmful to society, in our current cultural and legal system, "[p]olygamy is harmful precisely because it cannot survive within the United States without deliberate efforts to make it viable in a system geared from a demographic, economic, and sociological standpoint toward monogamy."[271] Ontario's Family Law Act,[272] accommodating polygamous spouses in the realm of those able to receive equitable distribution upon divorce, has done just that.

The United States would not need to declare polygamy lawful in order to protect departing spouses and their children.[273] Rather, by extending the equitable mechanisms available to divorcing monogamous spouses to divorcing polygamous spouses, financial harm can be alleviated, the best interest of the child can be promoted, and individuals in plural marriages may be more inclined to dissolve their illicit union.

It is true that division of assets upon the dissolution of a polygamous marriage would be complex, considering that there are multiple spouses who have contributed to the acquisition of marital assets in some way and for some period of time. However, legal scholars have proposed "conceptual innovations to the law [so that] plural marriage can be accommodated without doing violence to any of the basic principles of the marital property system."[274]

Moreover, the United States has already demonstrated an ability to accommodate polygamous spouses in the realm of asset division. In the case of *Estate of Bir*, the District Court of Appeal of California

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268 *Id*. § 1(2) (emphasis added).

269 *Id*.

270 Campbell, *supra* note 15, at 35 ("[I]f a dependent wife in a polygamous relationship were to claim spousal support or property relief, there would be good arguments for granting relief . . . in a Canadian court.").

271 Sigman, *supra* note 229, at 167.

272 Family Law Act, R.S.O. 1990, c. F.3 (Can.) (last amended 2020).

273 *See* Canada Criminal Code, R.S.C. 1985, c. C-34, § 293 (declaring polygamy a crime in Canada).

274 Klein, *supra* note 16, at 38 (suggesting, for example, that the income and assets of all spouses could be pooled and divided equally among all spouses—including the husband—as an extension of community property law).

held that California's laws against polygamous marriage did not prohibit two wives from inheriting equal shares of their *deceased* husband's estate.[275] The court stated that "[w]here only the question of *decedent property* is involved, 'public policy' is not affected."[276] Although *Estate of Bir* concerned a situation where the polygamous marriage was lawfully contracted in India prior to immigration to California,[277] it sheds light on the fact that equitable division upon divorce, unlike intestate succession, is curtailed merely because of its challenge to the institution of marriage and the divorce rights which flow therefrom.

Further, recent case law has suggested that the United States is becoming more tolerant to unconventional family structures, especially where the best interest of the child is concerned. In the 2017 case of *Dawn M. v. Michael M.*, a New York court granted tri-custodial rights to two mothers and one father upon the dissolution of their family unit.[278] The court held that to deny custodial rights to any of the parties, all three of whom parented and raised the child together, "would have a devastating consequence to the child" and his best interests.[279]

Despite the "unconventional family dynamic . . . [of] raising [the child] with two mothers," the court found that the child's "best interests cry out of an assurance that he will be allowed to continue a relationship" with all three of his parents.[280] Although they parties did not hold themselves out as married in a polygamous union, *Dawn M. v. Michael M.* exemplifies that accommodations to divorce laws in the United States can be made to facilitate the best interests of the child, even if the norm of the nuclear family is challenged in the process.[281]

If polygamous women can succeed equally to their deceased husband's estate,[282] and tri-custody can be granted upon dissolution of an

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275 *See* Estate of Bir, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

276 *Id.* (emphasis added) (explaining that, unlike cases where a wife decides to leave a polygamous union, distribution rights to decedent property does not challenge the institution of marriage and does not raise public policy issues).

277 *See id.* at 499.

278 *See* Dawn M. v. Michael M., 55 Misc. 3d 865, 871 (Suffolk Cnty. Sup. Ct. 2017).

279 *Id.*

280 *Id.* at 870-71.

281 *See id.* at 871 ("No one told these three people to create this unique relationship. Nor did anyone tell defendant to conceive a child with his wife's best friend or to raise the child knowing two women as his mother.").

282 *See* Estate of Bir, 188 P.2d 499, 502 (Cal. Dist. Ct. App. 1948).

unconventional family unit to facilitate the best interest of a child,[283] equitable distribution of assets upon a polygamist divorce should be available in the United States. The best interests of the child and principles of equity beg for such a result. Continuing to hold otherwise is "antagonistic to the clear legislative intent that permeates this field of law—to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to [all] children" of the United States.[284]

283 *See Dawn M.*, 55 Misc. 3d at 871.

284 In re Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) (holding that a former partner who was neither a biological nor adoptive parent of the child had standing to petition for custody).