WHEN FOR BETTER IS FOR WORSE: IMMIGRATION LAW'S GENDERED IMPACT ON FOREIGN POLYGAMOUS MARRIAGE

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ABSTRACT

The United States has banned polygamous immigrants since the late nineteenth century. Enacted amid isolationist fears that an influx of polygamists would cause moral deterioration, the polygamy bar remains a resolute, if often overlooked, feature of modern immigration law. The current immigration scheme continues this tradition, rendering immigrants who intend to practice polygamy in the United States categorically ineligible for legal-permanent-resident status. As a result, the immigration bar allows polygamous men to immigrate with a wife of their choosing and the children from each of their marriages. Their other wives, however, are deemed inadmissible to the United States.

This Note explores the immigration bar's disproportionate effect on the foreign wives of polygamous immigrants. In addition to precluding the other wives of polygamous immigrants from legal-permanent-resident status, the current immigration bar also renders such women ineligible for humanitarian ingress. After offering a comparative analysis of how Canada and the United Kingdom reconcile their respective policies against polygamy with the burgeoning question of women's rights, this Note proposes that Congress likewise treat foreign women in polygamous unions with a degree of equity.

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INTRODUCTION

On April 3, 2008, authorities raided the Mormon Fundamentalist Yearning for Zion Ranch. International news agencies captured footage of the ranch's women and children who, wearing prairie-style dresses and shell-shocked expressions, appeared hauntingly out of place.[1] Yet when a fire at a Bronx row house in March 2007 exposed Malian-born Moussa Magassa's polygamous family, the story barely registered in the national consciousness.[2] Instead, it was greeted with virtual silence. Perhaps Americans ignored Magassa's story because it lacked the salacious innuendo: the alleged incest,[3] child brides, and sexual abuse.[4] Or perhaps it went unnoticed because polygamous immigrants, unlike their American counterparts, are better left out of sight and out of mind.

Under current immigration law, immigrants who intend to practice polygamy in the United States are categorically inadmissible. Nevertheless, immigrants like Magassa are hardly unique. Indeed, as a 2007 article in *The New York Times* reported, the "clandestine practice . . . probably involves thousands of New Yorkers"[5] because, for the immigrants who have been bequeathed polygamy as a cultural inheritance, plural marriage does not stop at the United States' entry ports. Instead, as one Gambian woman remarked, "[W]hether [immigrant women] like it or not, [their husbands] will marry" additional wives.[6] The wives of polygamous immigrants have no means of escaping their marriages, she observed, because "[i]f you

1. Andrew Gumbel, *Zion Raid: The Ranch Has Not Yet Revealed All Its Secrets . . .*, INDEPENDENT (London), Apr. 13, 2008, at A16.

2. *The New York Times* was the only national newspaper to carry Magassa's story. *See* Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to New York*, N.Y. TIMES, Mar. 23, 2007, at A1.

3. Warren Jeffs, the former leader of the Yearning for Zion Ranch, was charged as an accomplice to "four counts of incest and sexual conduct with a minor stemming from two arranged marriages." *Texan Sect Girls 'In Abuse Cycle*,' BBC NEWS, http://news.bbc.co.uk/2/hi/americas/7339392.stm (last updated Apr. 9, 2008). In August 2011, Jeffs was convicted of child sexual assault. *Polygamist Leader Convicted of Child Sex Abuse*, NPR (Aug. 4, 2011), http://www.npr.org/2011/08/04/139004476/polygamist-leader-convicted-of-child-sex-abuse ("A Texas jury has convicted polygamist leader Warren Jeffs of child sexual assault charges in a case stemming from two young followers he took as brides in what his church calls 'spiritual marriages.'").

4. *See* Sara Corbett, *Children of God*, N.Y. TIMES MAG., July 27, 2008, at 36, 36 (describing one of the minors removed from the Yearning for Zion Ranch as "a member of an out-of-touch religious sect" and "a possible child bride, or a sexual-abuse victim").

5. Bernstein, *supra* note 2.

6. *Id.*

protest, your husband will hit you, and if you call the police . . . the whole community will scorn you."[7] State legal systems favor "[d]on't-ask-don't-know policies" over intervention into immigrants' polygamous marriages, relying on immigration laws to keep practicing polygamists from entering the country in the first place.[8] This approach places immigrant women who circumvent the immigration bar on uncertain ground, where their status is "murky at best"[9] and "invisible" at worst.[10]

This Note explores the polygamy bar's disproportionate effect on foreign-born women in polygamous marriages.[11] Polygamy is a deeply ingrained practice within some of the world's most prominent religions.[12] In the United States, however, polygamy did not become a widespread phenomenon until the nineteenth century, when Mormons adopted plural marriage as a tenet of their faith. Threatened by what they perceived as a deviant religion, critics of the Mormon Church seized on polygamy as a reason for marginalizing the emergent sect. Although the antipolygamy campaign was initially motivated by a desire to emancipate Mormon wives, the critics' dialogue quickly morphed into a condemnation of Mormon women, whose apparent complicity in plural marriage was thought to merit punishment rather than sympathy. In response to the growing public outrage, Congress enacted legislation that curtailed Mormon women's rights and, thus, tacitly endorsed the misogynistic rhetoric. Because modern immigration law preserves the last vestiges of the federal antipolygamy campaign, its gendered understanding of plural

7. *Id.*

8. *Id.*

9. *Id.*

10. Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008), http://www.npr.org/templates/story/story.php?storyId=90857818.

11. Although polygamy technically encompasses both polyandry—one woman marrying several men—and polygyny—one man marrying several women—this Note uses the term "polygamy" to denote only polygyny because polyandry is extremely rare. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 161 (2006).

12. An estimated 5.8 percent of Hindu marriages are polygamous, and an estimated 5.7 percent of Muslim marriages are polygamous. SHAILLY SAHAI, SOCIAL LEGISLATION AND STATUS OF HINDU WOMEN 45 (1996). Polygamy, however, is not limited to the Islamic and Hindu faiths. In Cameroon, for example, where the native people practiced polygamy long before their conversion to Christianity, Cameroonites "develop[ed] a theory in which [polygamy] was part of 'true' Christianity." Sigman, *supra* note 11, at 160 (quoting Catrien Notermans, *True Christianity Without Dialogue: Women and the Polygyny Debate in Cameroon*, 97 ANTHROPOS 341, 346–47 (2002)).

marriage perpetuates the very discrimination that polygamy itself is accused of enabling.[13]

This Note proceeds in five Parts. Part I estimates the incidence of polygamous marriage among recent U.S. immigrants. Part II traces the gender-motivated history of antipolygamy legislation in the United States. Part III examines how U.S. immigration laws disadvantage foreign women in polygamous marriages. Part IV analyzes the more equitable treatment of plural wives under the immigration laws of Canada and the United Kingdom. Finally, Part V argues that the United States should adopt the equitable model of its peer nations by waiving the polygamy bar in humanitarian situations and treating women in polygamous unions as putative spouses. This Note concludes that existing U.S. immigration laws seek to end polygamy among foreign immigrants the same way nineteenth-century lawmakers sought to reform Mormonism: by divesting women in polygamous marriages of their rights. If female emancipation indeed remains the United States' endgame, then Congress should adopt a more nuanced polygamy bar.

I. THE INCIDENCE OF POLYGAMOUS IMMIGRATION

For two decades, Western democracies have grappled with the problem of polygamous immigrants.[14] In the midst of this burgeoning international debate, the United States has remained conspicuously silent because, officially, it does not admit practicing polygamists.[15] The unofficial story, however, is different. According to the Department of Homeland Security *2010 Yearbook of Immigration Statistics*, some of the United States' largest immigrant populations come from countries in which polygamy is "lawful and widespread."[16]

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13. *See* Sigman, *supra* note 11, at 163 (indicating that polygamy is often perceived as a "gender biased monolith").

14. For example, in the early 1990s, France enacted a law that forced polygamous immigrants to "de-cohabitate." Bissuel Bertrand, *Divorce, or Else . . .*, 44 WORLD PRESS REV. 4, 4 (2002). Several years after that development, the United Kingdom quietly extended welfare benefits to the wives of polygamous immigrants. *See* Susan Martinuk, *Polygamous Marriages Drain Taxpayer Dollars*, CALGARY HERALD (Feb. 15, 2008), http://www.canada.com/calgaryherald/news/theeditorialpage/story.html?id=4584f9bc-04ce-4608-b740-72b422deef14 ("[The British government] acted quietly and without public consultation in agreeing to pay polygamists subsidies for additional housing and to grant additional tax benefits.").

15. Immigration and Nationality Act (INA) § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2006) ("Any immigrant who is coming to the United States to practice polygamy is inadmissible.").

16. Bernstein, *supra* note 2.

In 2008, scholars estimated that between 50,000 and 100,000 immigrant families were practicing polygamy in the United States.[17]

In 2010, the United States accepted 101,355 immigrants from Africa alone,[18] where an estimated 20 to 50 percent of marriages are polygamous.[19] The largest percentages of immigrants attaining permanent-resident status in 2010 hailed from Ethiopia, Nigeria, and Egypt.[20] The incidence of polygamy varies among these nations, with approximately 10 percent of Ethiopians[21] engaging in polygamy, compared to the estimated 71 percent of Bajju Nigerians[22] and 25 percent of Egyptian men.[23] A significant number of the legal permanent residents admitted to the United States in 2010 also came from the Middle East, where polygamy—although no longer the dominant form of marriage—retains a significant presence.[24] Approximately 3 percent of the United States' 2010 immigrant population originated in Iraq and Iran,[25] both of which allow men to take multiple wives.[26] Other immigrant populations in the United

17. Hagerty, *supra* note 10.

18. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 12–15 tbl.3 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

19. Nicholas Bala, Katherine Duvall-Antonacopoulos, Leslie MacRae & Joanne J. Paetsch, *An International Review of Polygamy: Legal and Policy Implications for Canada*, *in* POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN report 2, at 16 (2005), *available at* http://www.vancouversun.com/pdf/polygamy_021209.pdf.

20. In 2010, 14,266 legal permanent residents were admitted from Ethiopia, 13,376 legal permanent residents were admitted from Nigeria, and 8,978 legal permanent residents were admitted from Egypt. OFFICE OF IMMIGRATION STATISTICS, *supra* note 18, at 12–15 tbl.3.

21. *See* ETH. CENT. STATISTICAL AGENCY & ORC MACRO, ETHIOPIA DEMOGRAPHIC AND HEALTH SURVEY 2005, at 81 (2006), *available at* http://204.12.126.218/dhs/pubs/pdf/FR179/FR179[23June2011].pdf (estimating that 5.1 percent of Ethiopian marriages include two or more co-wives).

22. Carol V. McKinney, *Wives and Sisters: Bajju Marital Patterns*, 31 ETHNOLOGY 75, 84 (1992).

23. Reem Leila, *Polygamous Duplicity*, AL-AHRAM WEEKLY ON-LINE (Feb. 26, 2004), http://weekly.ahram.org.eg/2004/679/li1.htm.

24. Sigman, *supra* note 11, at 159.

25. In 2010, the United States admitted 14,182 Iranian nationals and 19,855 Iraqi nationals as legal permanent residents. OFFICE OF IMMIGRATION STATISTICS, *supra* note 20, at 12–15 tbl.3.

26. In Iran, a man can have as many wives as "he desires or can afford." Susan Tiefenben, *The Semiotics of Women's Human Rights in Iran*, 23 CONN. J. INT'L L. 1, 63 (2007). Similarly, in Iraq, the law allows a man to take a second wife, provided that he obtains permission from a sharia judge. Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT'L L. & POL'Y 1, 51 (2006).

States hail from Saudi Arabia,[27] where an estimated 19 percent of married women are in plural marriages,[28] and from Jordan,[29] where approximately 28 percent of women in the nation's South Ghor region are in plural marriages.[30] Thus, although polygamy sits in the crosshairs of an international debate, the influx of immigrants from polygamy-friendly countries into the United States suggests that its presence in the United States is largely shrouded in denial.[31]

II. THAT RELIC OF BARBARISM: MORMON POLYGAMY AND THE FEDERAL RESPONSE

America's struggle with polygamy largely began in the mid-nineteenth century, when polygamy was adopted as a feature of the Mormon faith. Antipolygamists, who viewed the practice as a form of sexual slavery, enlisted lawmakers in their fight for female emancipation. Over time, however, public sentiment shifted against Mormon women as it became clear that they were willing participants in plural marriage. In response, legislators sought to deprive Mormon women of their political rights as retribution for their complicity. Thus, by the end of the nineteenth century, polygamy had morphed into both a rationale for alienation and a basis for exclusionary immigration policies.

A. Polygamy in Antebellum America: Mormonism and Abolitionist Rhetoric

America's polygamy debate began with the Mormon Church's endorsement of the practice.[32] Although polygamy was not an original tenet of Mormonism, it was enshrined as a central teaching of the faith in 1843, when church leader Joseph Smith urged his followers to

27. *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 20, at 12–15 tbl.3 (noting that 1263 Saudi Arabians were admitted as legal permanent residents in 2010).

28. TAWFIK A. KHOJA & SAMIR A. FARID, SAUDI ARABIA FAMILY HEALTH SURVEY 97 (2000).

29. *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 20, at 12–15 tbl.3 (noting that 3868 Jordanians were admitted as legal permanent residents in 2010).

30. Shuji Sueyosi & Ryutar Ohtsuka, *Effects of Polygyny and Consanguinity on High Fertility in the Rural Arab Population in South Jordan*, 35 J. BIOSOCIAL SCI. 513, 521 (2003).

31. *See, e.g.*, Bernstein, *supra* note 2 ("[T]he picture that emerges . . . is of a clandestine practice that probably involves thousands of New Yorkers.").

32. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 1 (2002).

marry multiple women.[33] Smith's exhortation incited public outrage.[34] Although writers of popular literature were among the first to decry plural marriage,[35] the most resounding condemnation came from politicians, who compared polygamy to the reviled practice of slavery.[36]

The rhetorical comparison of polygamous marriage to slavery was not a novel concept in the Anglo-American legal tradition.[37] Rather, because "structurally, conceptually, and legally the [nineteenth-century] relations of husband to wife, and master to slave, were parallel,"[38] slavery and polygamy were frequently regarded as analogous institutions. Early abolitionists vituperated against American slavery as an affront to the traditional marital institution because it created "a system in which marriage had no sanctity, and fathers sold, prostituted, and committed incest with . . . the daughters of their slave mistresses."[39] Antislavery politicians took the analogy one step further, likening Southerners' "harem-like privileges over their female slaves" to the Mormon practice of polygamy.[40] Abolitionist Ebenezer Rockwood Hoar, however, was the first critic to analogize polygamy and slavery directly, excoriating the practices as the "twin relics of barbarism."[41] Driven by fears that the "unrestrained sexuality" common to both practices would beget "anti-Republican tendencies,"[42] the 1856

33. *Id.* at 22.

34. *Id.* at 23.

35. *Id.* at 29. Popular literature focused on the plight of the Mormon women, who "met with one of two fates: the virtuous suffered, even died, the weak descended into viciousness and vulgarity." *Id.* at 42.

36. Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 390 (2009).

37. NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 62 (2000).

38. *Id.* In Daniel Defoe's 1740 novel *Roxana*, the heroine opines: "[T]he very Nature of the Marriage Contract was . . . nothing but giving up Liberty, Estate, Authority, and every-thing to the Man, and the Woman was indeed a meer Woman ever after, that is to say, a Slave." DANIEL DEFOE, ROXANA 169 (Melissa Mowry ed., Broadview Press 2009) (1740).

39. COTT, *supra* note 40, at 58–59.

40. *Id.* at 73.

41. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 130 (1995) (quoting Hoar) (internal quotation marks omitted).

42. Kelly Elizabeth Phipps, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862–1887*, 95 VA. L. REV. 435, 445 (2009).

Republican platform resolved "to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery."[43]

The antipolygamy campaign continued with the Morrill Anti-Bigamy Act of 1862,[44] which criminalized polygamy.[45] Upon its introduction to the Senate, the act sparked a heated debate; in a speech entitled "The Barbarism of Slavery," Senator Charles Sumner drew a comparison between polygamy, by which "one man may have many wives, all bound to him by the marriage tie," and slavery, by which "a whole race is delivered over to prostitution and concubinage."[46] It was time, Senator Sumner concluded, to halt the "abrogation of marriage."[47] Despite subsequent challenges to the act's validity, the Supreme Court upheld the Morill Anti-Bigamy Act in *Reynolds v. United States*,[48] stating that it is well "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."[49] Despite its harsh rhetoric, however, the Morill Anti-Bigamy Act failed to end the practice of polygamy.[50] With the polygamous "twin" still conspicuously at large, Congress redoubled its efforts to emancipate Mormon women through a series of legislative measures.

B. Antipolygamy Legislation During Reconstruction

In the wake of the Morrill Anti-Bigamy Act's failure to curtail polygamy, a group of radical politicians resurrected the polygamy debate in the hopes of expunging the "stain of human slavery."[51] The campaign, which began in 1867, rekindled the feminist rhetoric

43. REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1856 (1856), available at http://www.presidency.ucsb.edu/ws/index.php?pid=29619. *But see* Phipps, *supra* note 42, at 447 ("[T]he 1856 Republican national platform did not reflect a defined anti-polygamy agenda.").

44. Morill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501 (1862) (repealed 1910).

45. *Id.* § 1, 12 stat. at 501.

46. CONG. GLOBE, 36th Cong., 1st Sess. 2591–92 (1860) (statement of Sen. Sumner).

47. *Id.* at 2591 (emphasis omitted). Representative John Alexander McClernand expounded similar sentiments, calling polygamy "a scarlet whore" that "is often an adjunct to political despotism." *Id.* at 1514 (statement of Rep. McClernand).

48. Reynolds v. United States, 98 U.S. 145 (1879).

49. *Id.* at 166.

50. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3574 (1870) (statement of Sen. Aaron Cragin) ("In 1862 Congress passed a law prohibiting polygamy in the Territories, and making it a crime; but the law is a dead letter, because the courts of Utah have no power to enforce it.").

51. *Id.* at 2144 (statement of Rep. Elijah Ward).

espoused by polygamy's early opponents. Congressman Elijah Ward denounced polygamy as a practice that undermined a woman's "great ambition" by rendering her "a debauched and dishonored thing."[52] Senator Aaron Cragin concurred, condemning the "devilish art of cunning men" who forced "ignorant and deluded women" into polygamy.[53] These positions culminated in the proposal of the Cullom Bill[54] of 1870 (Cullom Bill), which perpetuated the comparison of polygamy and slavery. The Cullom Bill sought to marginalize practicing polygamists by barring "any person living in or practicing bigamy, polygamy, or concubinage" from holding "any office of trust or profit" in territorial Utah, and further, by preventing such individuals from "vot[ing] at any election."[55] In addition, the bill required all elected government officials in the Utah Territory to take the following oath: "I am not living in or practicing bigamy, polygamy, or concubinage, and I will not hereafter live in or practice the same."[56] This oath, which the Cullom Bill's proponents "unabashedly linked" to the Civil War's ironclad oath of union loyalty, "was a powerful signifier of the political and social exclusion of Confederate sympathizers from the national community."[57] For the bill's advocates, the oath requirement "directed similar symbolic exclusion at polygamous husbands."[58]

The Cullom Bill also used criminal law to attack practicing polygamists. The bill continued to prohibit polygamy and indeed reduced the evidentiary proof necessary to sustain a conviction. The proposed legislation decreed that "it shall not be necessary to prove either the first or subsequent marriages, by the registration or certificate thereof, . . . but the same may be proved by . . . proof of cohabitation [or the husband's] acts recognizing, acknowledging, introducing, treating, or deporting himself toward them as [wives]."[59] For relationships that could not be successfully prosecuted under this evidentiary rubric, the bill created a new crime of "concubinage,"

52. *Id.* at 2143 (statement of Rep. Ward).
53. *Id.* at 3574 (statement of Sen. Cragin).
54. Cullom Bill, H.R. 1089, 41st Cong. (1870).
55. *Id.* § 19.
56. *Id.*
57. Phipps, *supra* note 42, at 457–58.
58. *Id.* at 459.
59. Cullom Bill § 12.

which criminalized "cohabit[ation] with one woman or more, other than [a man's] lawful wife."[60]

Despite its harsh stance against polygamous husbands, the bill took a more conciliatory approach toward plural wives. Motivated by fears that "suddenly break[ing] down the system of polygamy" would "leave the women and children of the [Utah] Territory helpless and dependent, and, perhaps, in a starving condition,"[61] the drafters of the bill created a provision that obligated men who were convicted of "bigamy, polygamy, or of any adulterous or incestuous marriage" to provide financial support for their dependent wives, concubines, and children.[62] To facilitate this support, the bill enabled courts to "order the sale of so much of the [man]'s personal property . . . as shall be needed for the support and maintenance of the wife, concubines, and children . . . until such time when such persons can procure labor or means to support themselves."[63] If a property sale was inadequate, the bill authorized government officials to furnish "temporary relief" to women "reduced to destitution by the enforcement of the laws against polygamy."[64] The bill, however, ultimately failed to clear the Senate.[65]

Like the Cullom Bill, an early version of the Poland Act[66] of 1874 (Poland Act) sought to eliminate polygamy without undermining women's rights. In an effort to facilitate federal polygamy prosecutions, the Poland Act stripped Utah county courts of all criminal and civil jurisdiction other than limited divorce, estate, guardianship, and related matters.[67] This provision was designed to circumvent the Utah county probate courts, which were staffed with Mormon ecclesiastical leaders sympathetic to plural marriage.[68] In the aftermath of the Act's passage, "federal prosecutors began arresting Mormon leaders en masse,"[69] in an effort to curtail polygamy. To

60. *Id.* § 13.

61. CONG. GLOBE, 41st Cong., 2d Sess. 1372 (1870) (statement of Rep. Shelby M. Cullom).

62. Cullom Bill § 30.

63. *Id.*

64. *Id.* § 31.

65. The bill failed in part because moderate Republicans refuted the analogy of polygamy to slavery. *See* CONG. GLOBE, 41st Cong., 2d Sess. 2149 (1870) (statement of Rep. Austin Blair) ("[W]e cannot forget the fact that [plural wives] went there voluntarily.").

66. Poland Act, ch. 469, 18 Stat. 253 (1874).

67. *Id.* § 3, 18 Stat. at 253–54.

68. Sigman, *supra* note 11, at 121.

69. *Id.* at 122.

mitigate the harsh consequences faced by women whose husbands would be arrested under the Act, an early incarnation of the Poland Act contained a provision—similar to one found in the Cullom Bill—that would have enabled courts to give plural wives "such [a] reasonable sum for alimony . . . as the circumstances of the case will justify."[70] Advocating in favor of this provision, Senator George Edmunds argued that the law should afford the benefit of divorce to the victim of any relationship that was neither "sporadic" nor "criminal in the Mormon sense."[71] Senator Edmunds's approach, however, was met with outrage from opponents who saw Mormon wives as exemplars of a morally bankrupt system. Senator Oliver Morton, for example, found it unthinkable that a man's several wives should "acquire rights to [their husbands'] property as against his children and as against his relatives, where they are both in fault and both in crime."[72] Senator Eugene Casserly concurred, arguing that because polygamous marriages were illegal, a man's subsequent wives should not be placed "on precisely the same footing with the lawful wife."[73] Ultimately, Congress voted against the Poland Act's female-protective provisions, relying instead on jurisdiction stripping to allow federal authorities to nullify plural marriages.[74]

Unlike the Cullom Bill and the Poland Act, both of which considered giving subsequent wives putative rights to their voided marriages, the Edmunds Act[75] of 1882 (Edmunds Act) refused to grant women any rights to their illicit unions. In addition to banning cohabitation, the Act disenfranchised both practicing polygamists and their wives.[76] The Supreme Court upheld the Edmunds Act in *Murphy v. Ramsay*,[77] praising the legislature's choice of monogamy as the "best guaranty" of morality.[78] After the Edmunds Act's passage, an estimated 1300 Mormon men were prosecuted for polygamy.[79] Yet

70. Poland Act, H.R. 3089, 43d Cong. § 3 (1874).

71. CONG. GLOBE, 42d Cong., 3d Sess. 1789 (1873) (statement of Sen. Edmunds).

72. *Id.* (statement of Sen. Morton).

73. *Id.* at 1800 (statement of Sen. Casserly); *see also id.* at 1795 (providing that polygamous marriages are "unlawful, simply null and void").

74. *See* Sigman, *supra* note 11, at 121 n.134 (noting that "stripping courts of jurisdiction has been recognized as a tactic to achieve desired political results," which, in this case, was the end of polygamous unions).

75. Edmunds Act, ch. 47, 22 Stat. 30 (1882) (repealed 1983).

76. *Id.* § 8, 22 Stat. at 31–32.

77. Murphy v. Ramsay, 114 U.S. 15 (1885).

78. *Id.* at 45.

79. Sigman, *supra* note 11, at 128.

as the alleged wives of indicted polygamists regularly perjured themselves to exonerate their husbands, Americans began to question whether Mormon women were the pawns or the perpetrators of plural marriage.[80] Although some activists continued to argue that Mormon women were a marginalized class, others found it increasingly difficult to classify Mormon women as hapless victims.[81] Former advocates of emancipation instead began to recast Mormon women as the "lynchpin[s]" of their own enslavement.[82]

In an attempt to inure a harsher stance against polygamists, Congress passed the Edmunds-Tucker Act[83] of 1887 (Edmunds-Tucker Act), which criminalized male adultery[84] and repealed the incorporation of the Mormon Church.[85] The law's primary aim, however, was to bolster the foundering marital institution in the Utah territory by taking aim at Mormon women.[86] In addition to criminalizing "fornication" by unmarried women,[87] the act annulled illegitimate children's succession rights[88] and disenfranchised female voters.[89] Many antipolygamists had come to regard the enfranchisement of Mormon women fifteen years earlier as a catalyst of female subversion, because the right to vote had done little to emancipate Mormon women.[90] This perception was validated by a Mormon bishop's remark that "[t]he women of Utah vote, and they never desert the colors of the church."[91] This perception of their loyalty earned Mormon women the unhappy reputation as the "catspaw of the [Mormon] priesthood."[92] Thus, the purpose of the

80. GORDON, *supra* note 32, at 162–63.

81. *Id.* at 164. In her lecture entitled "The Mormon Monster," contemporary commentator Kate Field echoed the shock among antipolygamists at the fact that "a female Mormon lobby ask[ed] Congress to give to Utah the liberty of self-degradation!" *Id.* (internal quotation mark omitted).

82. *Id.*

83. Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (repealed 1978).

84. *Id.* § 3, 24 Stat. at 635–36.

85. *Id.* § 17, 24 Stat. at 638.

86. GORDON, *supra* note 32, at 167.

87. Edmunds-Tucker Act § 5, 24 Stat. at 636.

88. *Id.* § 11, 24 Stat. at 637.

89. *Id.* § 20, 24 Stat. at 639.

90. GORDON, *supra* note 32, at 168.

91. *Id.* Rather than using the newly enacted female vote to eliminate polygamy, Mormon women "overwhelmingly supported the election of Mormon candidates to public offices." Omri Elisha, *Sustaining Charisma: Mormon Sectarian Culture and the Struggle for Plural Marriage, 1852–1890*, 6 NOVA RELIGIO 45, 54 (2002).

92. GORDON, *supra* note 32, at 168–70.

Edmunds-Tucker Act's disenfranchisement provision was to "relieve the Mormon women of Utah from the slavehood" that the right to vote had failed to dispel.[93] In recognizing that Mormon women were not passive victims of plural marriage, the Edmunds-Tucker Act signaled a turning point in the antipolygamy campaign. Mormon women, once the subjects of pity, had morphed into objects of public derision, their presence a chimera amid the nascent politics of emancipation.

Polygamy's legacy persisted long after Utah officially banned the practice as a condition of its admission to the United States in 1896.[94] During the course of the federal debate, polygamy had become synonymous with two of America's most reviled practices: slavery and deviant sexuality. Yet the pall of moral opprobrium fell primarily on the women who capitulated to plural marriage, rather than on the men who indulged in the practice. As a result, polygamy assumed an unmistakably gendered connotation.

C. Polygamy as a Mechanism for Exclusionist Policies

Polygamy did not become a prominent facet of American immigration policy until the late nineteenth century, when an influx of Chinese laborers and their concubine wives prompted a public backlash. The wave of ensuing legislation barring Chinese immigrants borrowed the gendered concept of enslavement from the debate over Mormon polygamy. This exclusionary legislation branded polygamy as a new type of barbarism.

Chinese immigration to the United States began in earnest in the 1840s in response to an increased demand for cheap labor.[95] Although anti-Chinese sentiment was not new, it reached a fever pitch in the 1870s, when an economic downturn quickly gave rise to rhetoric decrying the Chinese "coolie" laborers who "worked too hard . . . saved too much, and spent too little."[96] Critics rallied against the influx of "Asiatic coolies" who forced American laborers "into

93. *Id.* at 171. Antipolygamists believed that "[w]omen who consented to a legitimate marriage . . . had made their choice and should thereafter defer to the political voice of their husbands, who would 'represent' the interest of the household at the polls." *Id.*

94. *See* UTAH CONST. art. III, § 1 ("[P]olygamous or plural marriages are forever prohibited.").

95. Kerry Abrams, *Polygamy, Prostitution and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 649 (2005).

96. CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 10 (1995).

unjust and ruinous competition, by placing the white workingman entirely at the mercy of the coolie employer, and building up a system of slavery."[97] A substantial portion of the anti-Chinese sentiment was channeled into criticism of the Chinese marital structure, which condoned a hierarchy of primary wives, secondary wives, concubines, and prostitutes. Because most Chinese immigrants' primary wives remained in China, the vast majority of Chinese women who entered the United States were situated further down in the marital hierarchy.[98] Consequently, Chinese marital customs became more than a mere "signifier of [Chinese immigrants'] essential foreignness."[99] Rather, as Americans observed the fluid delineation between Chinese wives and prostitutes,[100] Chinese marital customs became the focal point of anti-Chinese sentiment.

Accordingly, it did not take long for legislators to seize on polygamy as a ground for Chinese exclusion. Arguing that intermarriage between native-born Americans and Chinese women "of a lower moral tone" would "cause a general moral deterioration,"[101] federal legislators responded to Chinese polygamy in much the same way as they had to Mormon polygamy: by construing Chinese marriage as a form of institutionalized slavery.[102] Whereas American monogamy was premised on mutual consent, the Chinese marital system was characterized by a "sordid monetary exchange and . . . coercion on the part of the woman involved."[103] According to legislators, Chinese marital traditions embodied a

97. Abrams, *supra* note 95, at 652 (quoting *Anti-Chinese Convention*, S.F. CHRON., Aug. 19, 1870, at 3).

98. 3 CONG. REC. app. at 41 (1875) (statement of Rep. Horace F. Page).

99. Phipps, *supra* note 42, at 47; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1879) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

100. *See* Abrams, *supra* note 95, at 656 ("[T]he distinction between 'wife' and 'prostitute' was not static: Many women brought to the United States as prostitutes later escaped prostitution by becoming the wives of Chinese laborers.").

101. COTT, *supra* note 37, at 135.

102. *See* Abrams, *supra* note 95, at 653 ("Americans responded to [Chinese marital customs with] a conviction that the Chinese treated all women . . . as slaves.").

103. COTT, *supra* note 37, at 136; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. William Higby) (warning that because Chinese men "buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution[,] . . . [y]ou cannot make citizens of them"); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 219 (1998) ("Prostitution appeared to embody all the forces threatening the legitimacy of contract as a model of freedom.").

"benumbing despotism"[104] at odds with the country's newly minted politics of freedom.[105] If left unchecked, critics contended, polygamy would "destroy [the white man's] very being."[106] Such rhetoric created an "ominous variation" on the abolitionist theme.[107] And, thus, the United States, by characterizing Chinese marital traditions as slavery and Chinese women as the instruments of enslavement, "justified denying [Chinese immigrants] the right to enter or remain in the United States."[108]

The Page Law[109] of 1875 (Page Law), which took aim at the prostitutes who critics blamed for turning America into a "cess-pool" of depravity,[110] was the first legislative measure targeting Chinese immigrant women.[111] The Page Law barred any "subject of China, Japan or any Oriental country" who had "entered into a contract or agreement for a term of service . . . for lewd and immoral purposes" from immigrating to the United States.[112] Legislators openly praised the measure for "send[ing] the brazen harlot . . . back to her native country,"[113] and proponents hailed the law as the only way to prevent the "deadly blight" of Chinese immigration from corrupting American values.[114] In practice, however, because immigration officials often failed to differentiate between prostitutes and wives within the Chinese marital hierarchy, the Page Law resulted in the exclusion of many legitimate Chinese wives from the United States.[115]

Despite the Page Law's passage and subsequent enforcement, legislators continued to lament the lack of "respectable" Chinese

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104. S. REP. NO. 44-689, at vi (1876).

105. *See* 3 CONG. REC. app. at 44 (1875) (statement of Rep. Horace F. Page) ("[A] more insidious danger must eventuate by the great increase of this servile [Chinese laborer] population"); COTT, *supra* note 37, at 137 ("Prostitutes echoed the evil pinned on Chinese contract ['coolie'] laborers: their presence in the United States signified coercion, more akin to the slavery tabooed a decade earlier than to the voluntary choice of welcomed migrants.").

106. *See* Francis Lieber, *The Mormons: Shall Utah Be Admitted into the Union?*, 5 PUTNAM'S MONTHLY 225, 234 (1855) ("Strike [monogamy] out, and you destroy [the civilized white man's] very being . . . .").

107. Phipps, *supra* note 42, at 473.

108. *Id.*

109. Page Law, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

110. 3 CONG. REC. app. at 44 (1875) (statement of Rep. Horace F. Page).

111. *See* Abrams, *supra* note 95, at 696–97 ("Section 3 made it a crime to import a woman into the United States for purposes of Prostitution.").

112. Page Law § 1.

113. 3 CONG. REC. app. at 44 (1875) (statement of Rep. Horace F. Page).

114. *Id.*

115. Smearman, *supra* note 36, at 393–94.

immigrant women in America.[116] Accordingly, legislators passed the Chinese Exclusion Act of 1882 (Exclusion Act),[117] which effectively enabled immigration officials to regulate undesirable marriages. The law, which precluded all Chinese laborers from entering the United States and reduced the categories of permissible Chinese immigrants to merchants, ministers, sojourners, and students, made a wife's immigration status contingent on her husband's occupation.[118] As a corollary, immigration officials were authorized to assess the validity of a Chinese marriage so as to determine whether a Chinese woman was truly the wife of a permissible immigrant.[119] Six years later, the Scott Act[120] of 1888 (Scott Act) took the Exclusion Act's implicit regulation of marriage further by effectuating an expansive ban on the practice of foreign polygamy. The Scott Act barred Chinese laborers from reentering the United States after visiting China,[121] a prohibition that prevented Chinese men from making their customary trips back to China to support the primary wives they had left behind.[122] The Scott Act thus prohibited Chinese immigrants from maintaining "cross-continental" polygamous families.[123]

Anti-Chinese legislation was, in many respects, an outgrowth of the Mormon debate. Linked by the common rhetoric of slavery, the discourse surrounding both Mormon and Chinese polygamy cast these practices as aberrational forces in an otherwise-free society. And in both instances, women were construed as the perpetuators of social deviance. To insulate America from polygamy, legislators made polygamous immigrants categorically inadmissible. Although immigration law has long since lost its xenophobic overtones, gender nonetheless remains a powerful subtext of the United States' modern polygamy bar.

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116. Abrams, *supra* note 95, at 708.

117. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

118. Abrams, *supra* note 95, at 711; *see also In re* Ah Moy, 21 F. 785, 785 (C.C.D. Cal. 1884) (holding that a Chinese immigrant's wife was ineligible for entry because her status was contingent on her husband's occupation as a laborer).

119. Abrams, *supra* note 95, at 712; *see also In re* Lum Lin Ying, 59 F. 682, 682–84 (D. Or. 1894) (holding that an arranged marriage between a Chinese couple was valid in part because the woman was not a prostitute).

120. Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943).

121. *Id.* § 1, 25 Stat. at 504.

122. Abrams, *supra* note 95, at 710.

123. *Id.*

D. Polygamy and Twentieth-Century Immigration Laws

U.S. immigration law has excluded practicing polygamists since 1891.[124] Although scholars debate whether this ban was a result of anti-Mormon or anti-Chinese sentiment,[125] it does allow the federal government to reshape marriages it finds inimical to American values.

The Immigration Act of 1891[126] was the first federal immigration law to categorically bar polygamy. The act grouped polygamists with the other specimens of Victorian depravity: "idiots, insane persons . . . [and] persons suffering from a loathsome or a dangerous contagious disease."[127] The Immigration Act of 1907 (the 1907 Act)[128] followed shortly thereafter, and was passed amid fears that America's "temperate blood . . . [was] yearly experiencing a partial corruption of foreign blood."[129] Although the 1907 Act left most excludable categories the same, it broadened the polygamy bar to encompass "persons who admit their belief in the practice of polygamy."[130] A decade later, the Immigration Act of 1917[131] retained this broad exclusionary language, forbidding the entry of "polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy."[132] The subsequent Immigration and Nationality Act (INA),[133] as enacted in 1952, removed "belief" as a basis for exclusion but continued to preclude "polygamists . . . who practice polygamy or advocate the practice of polygamy."[134] The 1952 law's polygamy bar remained unchanged until the Immigration Act of 1990[135] further

124. Immigration Act of 1891, ch. 551, 26 Stat. 1084.

125. *See, e.g.*, Abrams, *supra* note 95, at 711 (arguing that American immigration policy was formulated as a continuation of anti-Chinese sentiment). *But see, e.g.*, COTT, *supra* note 37, at 139 (arguing that excluding polygamists was "a legacy of the campaign against Mormon polygamy").

126. Immigration Act of 1891, 26 Stat. 1084.

127. *Id.* § 1, 26 Stat. at 1084.

128. Immigration Act of 1907, ch. 1134, 34 Stat. 898.

129. COTT, *supra* note 37, at 140 (quoting then-scholar Woodrow Wilson).

130. Immigration Act of 1907 § 2, 34 Stat. at 898–99.

131. Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952).

132. *Id.* § 3, 39 Stat. at 875–78.

133. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

134. *Id.* § 212(a)(11), 66 Stat. at 182.

135. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

confined inadmissibility to immigrants "coming to the United States to practice polygamy."[136]

The Defense of Marriage Act (DOMA)[137] of 1996 crystallized America's intolerance for polygamy by defining marriage as "*only* a legal union between *one* man and *one* woman."[138] Unsurprisingly, the current polygamy bar bears DOMA's imprimatur. Under § 212(a)(10)(A) of the INA, "[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible."[139] Section 212(a)(10)(A) precludes practicing polygamists from attaining any category of legal-resident status, including a status obtained through participation in the diversity lottery,[140] selection as a special immigrant,[141] or admission through employment programs.[142] Section 212(a)(10)(A) further prohibits practicing polygamists from gaining legal residency through adjustment-of-status proceedings.[143] Polygamous families that elude the polygamy bar risk immediate deportation[144] without the possibility of cancellation of removal.[145]

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136. *Id.* sec. 601(a), § 212(a)(9)(A), 104 Stat. at 5075.

137. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C).

138. *Id.* sec. 3(a), § 7, 110 Stat. at 2419 (emphasis added). Although DOMA is primarily aimed at preventing homosexual marriage, scholars argue that it also precludes polygamy. *See* Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 345 (2006) (noting that "Congress intended the terms 'spouse' and 'marriage' to include only the partners to a legal, monogamous marriage" (quoting Memorandum from William R. Yates, Acting Assoc. Dir. of Operations, Bureau of Citizenship & Immigration Servs., U.S. Dep't of Justice, to Reg'l & Serv. Ctr. Dirs. (Mar. 20, 2003))). A number of courts have declared Section 3 of DOMA unconstitutional. *See, e.g.*, *In re* Balas, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) ("[T]here is no valid governmental basis for DOMA. . . . [T]he court finds that DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment."); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (holding that DOMA "violates core constitutional principles of equal protection"). Further, President Obama announced that his administration would no longer defend DOMA. Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1.

139. Immigration and Nationality Act (INA) § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2006).

140. INA § 203(c), 8 U.S.C. § 1153(c).

141. *Id.* § 101(a)(27), 8 U.S.C. § 1101(a)(27).

142. *Id.* § 203(b)(1), 8 U.S.C. § 1153(b)(1).

143. *Id.* § 245, 8 U.S.C. § 1225. An adjustment of status allows admissible individuals to apply for resident status from within the United States. *Id.*

144. *Id.* § 237(a)(1)(A), 8 U.S.C. § 1227.

145. *See id.* § 240A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B) (providing that the cancellation of removal for inadmissible nonpermanent residents requires a finding of good moral character, for which practicing polygamists are statutorily ineligible under INA § 101(f), 8 U.S.C. § 1101(f)).

In addition to rendering marriage the "central organizing principle" of American immigration policy,[146] the foregoing laws sanction intolerance of marriages that fall outside a narrow conception of acceptability. In essence, the polygamy bar enables officials to force polygamous marriages into the ill-fitting dimensions of the traditional nuclear family. Although the polygamy bar has progressed from its openly xenophobic predecessors, gender remains an inexorable subtext of the current regulations. As Part III discusses, the bar's differential impact on the wives of polygamous immigrants resonates with the gendered underpinnings of the nineteenth-century polygamy debate.

III. POLYGAMY UNDER U.S. IMMIGRATION LAW

America's polygamy bar has profound consequences for immigrant women. Because inadmissibility is limited to immigrants who intend to practice polygamy in the United States, a polygamous husband is free to immigrate, but he may sponsor only one wife. As a result, American immigration laws sanction and exacerbate a power differential that allows a man to emigrate unilaterally with the wife and children of his choosing.[147]

A. Family-Based Immigration

Modern immigration law is premised on a policy of family unification.[148] Under the INA, foreigners who wish to immigrate are accorded a preference status based on their familial relationship with either U.S. citizens or legal permanent residents. Family-sponsored visas are divided into two categories: the first, immediate-relative preference visas, allows an unlimited number of visas for the spouses, parents, and children of U.S. citizens;[149] the second, family preference visas, allows a limited number of visas for the children and spouses of

146. Kerry Abrams, *Regulation of Marriage*, 91 MINN. L. REV. 1625, 1633 (2007).

147. *See infra* notes 158–61 and accompanying text; text accompanying note 192.

148. *See* Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of Family*, 11 LEWIS & CLARK L. REV. 809, 815 (2007) ("The INA is full of expressions of legislative concern for the protection and reunification of families."). One historical underpinning of immigration legislation has been "the problem of keeping families of United States Citizens and immigrants united." Fiallo v. Bell, 436 U.S. 757, 795 n.6 (1977) (quoting H.R. REP. NO. 85-1119, at 6 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020); *accord* Lau v. Kiley, 563 F.2d 542, 547 (2d Cir. 1977) (noting that family reunification is "the foremost policy underlying the granting of preference visas under our immigration laws").

149. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

legal permanent residents.[150] The alien beneficiary of any family-based visa may petition for a spouse and any unmarried children to be classified as derivative beneficiaries. This derivative status affords petitioners the same preference status and priority filing date accorded to principal aliens.[151] Non-family-sponsored immigrants must rely on either humanitarian visas—which include refugee, asylum, and Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA)[152] visas—or employment visas for admission. As a consequence, members of a polygamous household seeking to immigrate must either fit within the narrow definition of spouse or qualify for humanitarian- or employment-based ingress.

B. Inadmissibility's Gendered Impact on Plural Wives

Existing immigration laws make every effort to recognize foreign marriages.[153] To ascertain the validity of a foreign marriage, immigration officials determine first whether the marriage is valid in its place of celebration and second whether the union is consistent with U.S. public policy.[154] Because polygamous marriages violate DOMA,[155] they "cannot be recognized for immigration purposes even if the marriage is legal in the place of marriage celebration."[156]

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150. The preference categories are as follows: first preference, comprising unmarried children of U.S. citizens over the age of twenty-one under INA § 203(a)(1), 8 U.S.C. § 1153(a)(1); second preference, comprising unmarried children of legal permanent residents under INA § 203(a)(2), 8 U.S.C. § 1153(a)(2); third preference, comprising married children of U.S. citizens under INA § 203(a)(3), 8 U.S.C. § 1153(a)(3); and fourth preference, comprising siblings aged twenty-one or older of U.S. citizens under INA § 203(a)(4), 8 U.S.C. § 1153(a)(4).

151. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 9 FAM 42.31(d) (2009).

152. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 6, 8, 18, 21, 22, 25, 28, 31, 42, 47, and 49 U.S.C.).

153. *See* United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (noting that immigration law should recognize foreign marriages that were valid in the place where they were celebrated).

154. Smearman, *supra* note 36, at 404–05.

155. *See supra* note 138.

156. U.S. DEP'T OF STATE, *supra* note 151, § 9 FAM 40.1 note 1.1(d); *see also, e.g.*, Adomako, A99 365 109, 2006 WL 3712508, at *1 (B.I.A. Nov. 20, 2006) ("[P]olygamous marriage, which may or may not be valid in Ghana where performed . . . cannot be recognized . . . for immigration purposes . . . because the marriage is repugnant to United States public policy."); Mujahid, 15 I. & N. Dec. 546, 547 (B.I.A. 1976) (denying an Egyptian citizen's petition on behalf of his wife because the marriage had taken place when he was still married to his first wife).

These existing immigration laws, however, do not exclude individuals merely because they have been in plural marriages. Instead, the INA articulates a more nuanced bar: it only prohibits immigrants who plan to continue practicing polygamy *in the United States*.[157] As a consequence, a polygamous husband can immigrate, but he can sponsor only one of his wives.[158] Because a husband's first marriage is presumptively valid, a petition on behalf of his first wife will be approved regardless of whether he divorces his subsequent wives.[159] If, however, the husband wishes to sponsor one of his subsequent wives, he must terminate all of his prior marriages[160] before entering the United States.[161] Although subsequent wives in a polygamous marriage may temporarily visit the United States,[162] they are statutorily ineligible to immigrate with their families. As the following Sections discuss, this reality has the most profound effects on women who seek to immigrate under special immigrant visas as refugees, as asylees, or as battered women.

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157. U.S. DEP'T OF STATE, *supra* note 151, § 9 FAM 40.101 note 2.

158. Smearman, *supra* note 36, at 407; *see also* Nora Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers*, 32 HOFSTRA L. REV. 273, 279 ("Western countries generally deny recognition to polygamous marriages, which means only the first wife can benefit from spousal unification.").

159. *See* SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY § 4:18 (2008) ("[Officials] will recognize the polygamist's first marriage without question; he need not end his subsequent marriages for his first spouse to obtain immigration benefits."); *see also* Nwangwu, 16 I. & N. Dec. 61, 62 (B.I.A. 1976) ("Any pre-existing valid marriage is a bar to our recognition of the [subsequent] marriage on which the visa petition is based.").

160. ANNA MARIE GALLAGHER & SHANE DIZON, IMMIGRATION LAW SERVICE § 7:8 (2d ed. 2008) ("[B]efore [the husband's] third-in-time wife may immigrate based on their marriage, the man must divorce the two wives that he married before her but need not divorce the fourth wife."). Whether a divorce is validly obtained hinges on the laws of the parties' domicile. *See, e.g.*, Weaver, 16 I. & N. Dec. 730, 730 (B.I.A. 1979) (holding that a divorce is valid in the United States if it was valid in the place where the parties were domiciled at the time of the divorce).

161. GALLAGHER & DIZON, *supra* note 160, § 7:9.

162. Nonimmigrant visas are temporary visas for foreign nationals who do not intend to relocate permanently to the United States, Immigration and Nationality Act (INA) § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2006); *id.* § 101(a)(26), 8 U.S.C. § 1101(a)(26), and they are issued regardless of the applicant's intent to practice polygamy, *id.* § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A); U.S. DEP'T OF STATE, *supra* note 151, § 9 FAM 40.101 note 4 (2009). The *Foreign Affairs Manual*, *supra* note 151, however, cautions against the use of the nonimmigrant visa as an illicit backdoor. *See id.* § 9 FAM 40.101 note 2 (2009) ("For example, an alien who believes in the practice of polygamy and who has divorced all but one of his wives just prior to visa application would arouse suspicion if it were known that the divorced spouse had recently obtained a nonimmigrant visa.").

1. *The Effect of the Polygamy Bar on Asylum Seekers and Refugees.* The ban on polygamous marriage "presents particular problems for refugees and asylum seekers."[163] To qualify for asylum, foreign nationals must demonstrate that they face a "well-founded fear of persecution."[164] Asylum is awarded on a discretionary basis after qualifying nationals have arrived in the United States.[165] Because immigration officials have statutory discretion to waive certain admissibility requirements, including the ban on polygamy,[166] practicing polygamists are eligible for asylum.[167] Polygamy will, however, affect the principal aslyee's ability to petition for asylum on behalf of multiple spouses as derivative beneficiaries. A spouse can obtain derivative asylum status only if he or she is validly married to the principal petitioner at the time of application.[168] Because polygamous marriages are categorically invalid for immigration purposes, subsequent wives are ineligible for derivative-beneficiary status[169] and must therefore petition independently for asylum.[170] Practicing polygamists may also encounter problems under the polygamy bar if they attempt to adjust their status from asylees to permanent residents,[171] as adjustments of status take inadmissibility into account.[172] Nonetheless, immigration officials do have discretion to waive most grounds of inadmissibility—including polygamy—when humanitarian considerations demand a more equitable approach.[173]

The polygamy bar poses a greater problem for refugees. Refugees are individuals facing persecution in their countries of origin who, unlike asylees, petition for visas from outside the United States.[174] To obtain refugee status, immigrants must establish that they

163. Demleitner, *supra* note 158, at 279.

164. To qualify for asylum, immigrants must demonstrate that they fit within the INA's definition of "refugee." INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). As defined under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), a refugee is "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution," *id.*

165. *Id.* § 208, 8 U.S.C. § 1158; 8 C.F.R. § 208 (2011).

166. 8 C.F.R. § 209.2(a)(v).

167. Smearman, *supra* note 36, at 436.

168. 8 C.F.R. § 208.21(b).

169. Smearman, *supra* note 36, at 437–38.

170. Hagerty, *supra* note 10.

171. Asylees have the option to adjust their status under 8 C.F.R. § 209.2(a)(1).

172. Immigration and Nationality Act (INA) § 212(a), 8 U.S.C. § 1182(a) (2006).

173. *Id.* § 209(c), 8 U.S.C. § 1159(c); 8 C.F.R. § 209.2(b).

174. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

are otherwise eligible to immigrate under INA § 212(a).[175] As is the case with asylees, however, immigration officials have discretion to waive the polygamy bar both initially—when refugees seek to immigrate[176]—and subsequently—when refugees file for adjustment of status.[177] Nonetheless, as is the case in the asylum process, subsequent wives, who are statutorily ineligible to qualify as spouses,[178] cannot be accorded derivative-beneficiary status and must apply as refugees independently from their husbands.[179] Therefore, subsequent wives in polygamous marriages will not receive refugee visas concurrently with their families. Because refugees petition from outside the United States, this delay may force a husband's multiple wives to be subjected to the atrocities their families are attempting to flee. The United States' approach has been met with chagrin from the United Nations High Commissioner for Refugees, an agency that "recognizes polygamous marriages in its criteria of eligible unions . . . and prefers to refer such cases to resettlement countries . . . that would allow the resettlement of the whole family."[180]

Realizing that a rigid antipolygamy policy is inimical to both family reunification and humanitarianism, the United States has occasionally waived the polygamy bar. During the first Gulf War, for example, the United States tacitly overlooked its antipolygamy laws when it admitted polygamous Iraqi families who had aided in the United States' war efforts.[181] This kind of exception, however, is a rarity, and "[f]amily unification outside the refugee context always excludes polygamous spouses."[182]

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175. 8 C.F.R. § 207.3.

176. INA § 207(c)(3), 8 U.S.C. § 1157(c)(3).

177. *Id.* § 209(c)(3), 8 U.S.C. § 1159(c)(3). Unlike asylees, refugees must apply for an adjustment of status within one year of immigrating to the United States. *Id.* § 209(a)(1), 8 U.S.C. § 1159(a)(1).

178. *See supra* Part IV.B.

179. *See* INA § 207(c)(2)(A), 8 U.S.C. § 1157(c)(2)(A) ("A spouse . . . of any refugee who qualifies for admission . . . shall . . . be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse . . . is admissible (except as otherwise provided under paragraph (3)).").

180. U.N. Annual Tripartite Consultations on Resettlement, Geneva, Switz., June 20–21, 2001, *Background Note: Protecting the Family: Challenges in Implementing Policy in the Resettlement Context* 6, http://www.unhcr.org/3b30baa04.html.

181. Demleitner, *supra* note 158, at 279.

182. *Id.*

2. *The Polygamy Bar's Effect on Women Self-Petitioning for a VAWA Visa.* Foreign plural wives also face difficulties if they attempt to immigrate through a VAWA visa. VAWA permits immigrant women who have been abused by their U.S.-citizen or legal-permanent-resident husbands to self-petition for permanent-resident status.[183] To qualify, an immigrant woman must prove that she entered into a bona fide marriage with her spouse,[184] that she or her child was "battered" or subjected to "extreme cruelty,"[185] and that she was a person of "good moral character" in the three years preceding her petition.[186] VAWA, however, is inapplicable to women in polygamous marriages on three independent grounds. First, although VAWA exonerates women who believed that their bigamous marriages were in fact monogamous at the time they entered into their unions, it makes no exception for women who knowingly entered into polygamous marriages.[187] Second, according to both DOMA and the INA, subsequent wives have not entered into "bona fide marriage[s]" within the meaning of VAWA.[188] Third, and finally, women in polygamous marriages are "statutorily ineligible"[189] for the requisite finding of "good moral character."[190] VAWA thus

183. Violence Against Women and Department of Justice Reauthorization Act of 2005 § 811, 119 Stat. at 3057.

184. Immigration and Nationality Act (INA) § 204(a)(1)(A)(iii)(II)(aa)(CC), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC) (2006 & Supp. IV 2011).

185. *Id.* § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii).

186. *Id.* § 204(a)(1)(A)(iii)(II)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb).

187. *See id.* § 204(a)(1)(A)(iii)(II)(aa)(BB), 8 U.S.C. § 1154 (a)(1)(A)(iii)(II)(aa)(BB) (exempting petitioners whose marriages are invalid "solely because of the bigamy of the [abusive spouse]"). The *Foreign Affairs Manual* distinguishes bigamy, "a criminal act resulting from having more than one spouse at a time without benefit of a prior divorce[,]" from polygamy, "the historical custom or religious practice of having more than one wife or husband at the same time." U.S. DEP'T OF STATE, *supra* note 151, § 9 FAM 40.101 note 1. Whereas parties to a polygamous marriage intentionally enter into a plural union, bigamy often occurs when one spouse fails to obtain a valid divorce from a prior marriage. *See id.* ("Bigamy *may imply* wrongdoing on the part of one of the spouses in failing to inform the other spouse . . . of an existing marriage. . . . [Bigamy] *may render* an alien ineligible for an immigrant visa . . . if the alien purposely married more than one wife or husband at the same time based on historical custom or religious practice." (emphasis added and omitted)).

188. INA § 204(a)(1)(A)–(B), 8 U.S.C. § 1154(a)(1)(A)–(B).

189. Smearman, *supra* note 36, at 423.

190. *See* INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) ("No person shall be regarded as . . . a person of good moral character who, during the period for which good moral character is required to be established is, or was[,] . . . a member of one or more classes of persons . . . described in paragraphs (2)(D), (6)(E), and (10)(A) . . . ."). According to Professor Claire Smearman, although INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C), "provides that a self-

creates insurmountable hurdles for battered wives in polygamous marriages who self-petition for resident status.[191]

C. Immigration and Children of Polygamous Households

Whereas additional wives in polygamous marriages are statutorily ineligible for both legal-permanent-resident status and special-visa status, the child of a polygamous marriage can immigrate to the United States on four independent grounds: as a child born in wedlock, as a stepchild, as a legitimate child, or as a child born out of wedlock. This framework effectively bifurcates foreign polygamous families by enabling a husband, a wife of his choosing, and all of his children to immigrate to the United States, leaving the additional wives behind.[192]

Children of polygamous unions are eligible for entry as "children born in wedlock"[193] if they are the products of a valid marriage.[194] Because immigration law recognizes only a polygamous husband's marriage with his first-in-time wife, children will only qualify for this category if they are products of that marriage.[195] Children of additional wives must therefore obtain entry under one of the three remaining visa categories.

Unlike the "children born in wedlock" designation, the "stepchild" visa[196] "benefits members of a polygamous family in unexpected ways."[197] Under INA § 101(b)(1)(B), the children of a polygamous union may qualify as stepchildren of their father's

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petitioner who would be barred from a finding of good moral character as a result of an act or conviction encompassed in the . . . statutory bars will not be precluded from a finding of good moral character if she establishes that the act or conviction was connected to the abuse she suffered," this exception is inapplicable to foreign plural wives. Smearman, *supra* note 36, at 423–24.

191. Battered and abused women in polygamous marriages may, however, self-petition for legal-permanent-resident status under a U visa, which allows noncitizens who have suffered "substantial physical or mental abuse" as a result of criminal activity to self-petition for nonimmigrant status if they have aided or are likely to aid in a governmental investigation of the perpetrator. INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i). Unlike a VAWA visa, a U visa does not require a finding of good moral character, *id.* § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i), and gives the secretary of homeland security substantial discretion to waive inadmissibility, *see id.* § 212(d)(14), 8 U.S.C. § 1182(d)(14).

192. *See supra* Part III.A–B.

193. INA § 101(b)(1)(A), 8 U.S.C. § 1101(b)(1)(A).

194. *See id.*

195. Smearman, *supra* note 36, at 410.

196. INA § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B).

197. Smearman, *supra* note 36, at 413.

immigrated wife as long as the marriage between the stepparent and the natural parent—in this instance, the marriage between the children's natural father and his immigrated wife—is valid for immigration purposes and as long as the marriage occurred while the children were minors.[198] The stepchild designation thus allows the immigrated wife in a polygamous marriage to petition on behalf of all of her husband's children, including those from his additional wives.[199]

If the immigrated wife does not wish to sponsor the children from her husband's other marriages, her husband may nonetheless sponsor all of his children as "legitimated children" or as "children born out of wedlock." A child qualifies as a legitimated child if he or she resides in the custody of the legitimating parent and the legitimation occurred in accordance with the laws of the child's domicile[200] before he or she reached the age of majority.[201] As the Board of Immigration Appeals held in *Kubicka*,[202] formal legitimation can overcome a child's polygamous parentage.[203] Moreover, formal legitimation is unnecessary if a child comes from a jurisdiction that recognizes polygamy because children born to solemnized polygamous unions are treated as legitimated from birth.[204] Alternatively, a polygamous father can petition for his children as

198. U.S. DEP'T OF STATE, *supra* note 151, § 9 FAM 40.1 note 2.2; *see also* Awwal, 19 I. & N. Dec. 617, 621 (B.I.A. 1988) (holding that relationships between a stepchild and a stepparent must be premised on a valid marriage between the child's natural parent and the stepparent). As long as the qualifying marriage is intact at the time of entry, the stepparent need not show a demonstrable emotional connection with the child. Vizcaino, 19 I. & N. Dec. 644, 648 (B.I.A. 1988).

199. *See* Fong, 17 I. & N. Dec. 212, 212–13 (B.I.A. 1980) (allowing a naturalized citizen born to his father's second wife to petition on behalf of his father's first wife because the petitioner claimed "a relationship to his father's [valid] 'first' wife"). The relationship between the stepchild and the stepparent, however, cannot be used to confer immigration privileges upon illicit polygamous marriages. *See* Man, 16 I. & N. Dec. 543, 544 (B.I.A. 1978) ("It has never been held . . . that the secondary wife can derive or bestow immigration benefits through children born to the husband and his principal wife.").

200. The requirements of legitimation are jurisdiction-specific and can occur in a variety of ways, including through operation of law, judicial decree, marriage, and acknowledgment. IGNATIUS & STICKNEY, *supra* note 159, §§ 6:22–:25.

201. INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C); 8 C.F.R. § 204.2(d)(2)(ii) (2011).

202. Kubicka, 14 I. & N. Dec. 303 (B.I.A. 1972).

203. *See id.* at 304 ("It has never been held . . . that the secondary wife can derive or bestow immigration benefits through children born to the husband and his principal wife.").

204. *See* Smearman, *supra* note 36, at 413 ("In a jurisdiction where polygamy is legal and the child is recognized as legitimate, the father of a child born to a second or subsequent wife who has acknowledged and supported the child as his own will easily establish that the child is 'legitimated' under [the INA].").

"children born out of wedlock" as long as the children have "bona fide parent-child relationship[s]" with their natural fathers.[205] Because evidence of a father's bona fide relationship has been interpreted to include "an active concern for the child's support, instruction, and general welfare,"[206] in a jurisdiction where polygamy is legal and in a case in which a father has publicly acknowledged the children of his plural wives, the children should qualify as "children out of wedlock" from birth.[207]

As the foregoing discussion illustrates, whereas a polygamous man's additional wives face tremendous barriers to entry, the children of polygamous unions can immigrate without their biological mothers under a variety of legal theories. The United States' immigration bar thus treats the offspring of polygamous relationships as innocent bystanders to illicit unions, singling out polygamous consorts for their participation in plural marriage.

D. Inadmissibility's Gendered Impact

Since the nineteenth century, polygamists have been cast in an immoral light. As evidenced by the statutory definition of "good moral character," which groups practicing polygamists with prostitutes and Nazis, this negative perception endures.[208] This legacy is most keenly expressed in the United States' polygamy bar, which creates disproportionate hardships for women in polygamous marriages. Whereas a polygamous husband can freely immigrate with the wife of his choosing, women in polygamous marriages can only immigrate at their husbands' whims. As a result, polygamous husbands have the power to decide where each of their wives resides.[209] In the case of refugees, those decisions may condemn the wives left behind to suffer the very atrocities that their families have fled.[210] Polygamy also precludes battered women from self-petitioning for status as legal permanent residents under VAWA.[211] Further, because children can immigrate regardless of their parents' marital

205. INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D).

206. 8 C.F.R. § 204.2(d)(2)(iii).

207. *See* Smearman, *supra* note 36, at 413 (noting that a father can "easily establish" a bona fide parent-child relationship if he raises and supports a child born to a second wife, the child was born in a jurisdiction where polygamy is legal, and the child is recognized as legitimate).

208. INA § 101(f), 8 U.S.C. § 1101(f).

209. Smearman, *supra* note 36, at 442.

210. *See supra* Part III.B.

211. *See supra* Part III.B.

status, a husband can unilaterally divest his wives of child custody.[212] Although children can petition on behalf of the mothers they leave behind, they cannot do so until they are naturalized citizens and are at least twenty-one years of age.

Moreover, plural wives who enter the United States by circumventing the immigration bar remain "invisible"[213] under the American legal system.[214] Because their marriages are not recognized under any state law,[215] these wives are not entitled to the benefits of either divorce[216] or spousal support.[217] It is also unlikely that the wives of polygamous immigrants will be entitled to any succession rights if their husbands die intestate.[218] Finally, if a polygamous husband chooses to abandon his multiple wives after immigrating, the women have no legal recourse against their polygamous spouses[219] and will often face grave financial insecurity as a result.[220] In essence, immigrant women in polygamous unions are specters of a legal system that once fought for their emancipation. Instead of deterring

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212. *See supra* Part III.C.

213. Hagerty, *supra* note 10 (quoting Julie Dinnerstein, senior attorney with Sanctuary for Families) (internal quotation mark omitted).

214. *See supra* Part III.

215. Polygamous marriages are illegal in all fifty states. *See, e.g.*, IDAHO CONST. art. I, § 4 ("Bigamy and polygamy are forever prohibited in the state . . . ."); N.M. CONST. art. XXI, § 1 ("Polygamous or plural marriages and polygamous cohabitation are forever prohibited."); COLO. REV. STAT. § 18-6-201(1) (2011) ("Any married person who, while still married, marries or cohabits in this state with another commits bigamy . . . ."); UTAH CODE ANN. § 76-7-101(1) (LexisNexis 2008) ("A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.").

216. *See* MARGARET C. JASPER, MARRIAGE AND DIVORCE 22–23 (3d ed. 2008) (explaining that intentionally bigamous marriages cannot be "ratified, or validated" and that therefore the parties to these marriages are also not entitled to divorce).

217. *See* Bernstein, *supra* note 2 (noting that there is "little case law to guide decisions on marital property or benefits" in polygamous families).

218. Although no domestic court has squarely addressed the issue of succession rights for immigrant plural wives residing in the United States, at least two cases have implied that these women would not be entitled to succession rights. *See, e.g.*, *In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (stating that although the decedent's two wives domiciled in India were entitled to an equal division of their husband's estate, they would not have obtained relief "if [the] decedent had attempted to cohabit with his two wives in California"); *In re* Estate of Diba, No. 642-A/97, 2010 WL 2696611, at *1–2 (N.Y. Sur. Ct. July 8, 2010) (holding that the proceeds of the decedent husband's wrongful-death suit, which had been commenced against a New York domiciliary, could lawfully be distributed to the decedent's two spouses in Senegal who "always were, and remain, citizens and domiciliaries of Senegal").

219. Bernstein, *supra* note 2.

220. *See id.* (describing an immigrant from the Ivory Coast who left her polygamous husband and who, "[w]ithout [immigration] papers, . . . ended up in a homeless shelter").

plural marriages, this approach forces practicing polygamists underground, perpetuating the cycle of "abuse and exploitation" that is sometimes synonymous with modern-day polygamy[221] and depriving women of the benefits that marriage confers.[222]

IV. THE WESTERN WORLD'S CONFLICTED SOLUTIONS

The United States' categorical polygamy bar differs from the immigration laws of its peer nations, which have taken more tempered approaches toward women in foreign polygamous unions. Although Canada and the United Kingdom share the United States' strong public policy against polygamy,[223] both nations have opted for a greater degree of equity than has the United States. Because Canada and the United Kingdom have facilitated humanitarian-based ingress for immigrant women in polygamous unions without endorsing plural marriage, their respective approaches provide a compelling case for change.

A. The United Kingdom's Approach

The United Kingdom clarified its stance on polygamous immigration when it passed the Immigration Act of 1988,[224] which articulated a firm policy of "prevent[ing] the formation of polygamous households"[225] by allowing a polygamous husband to immigrate with only one of his wives.[226] Yet despite adopting a seemingly rigid stance against polygamy, the United Kingdom has

221. *See* DOROTHY ALLRED SOLOMON, PREDATOR, PREY AND OTHER KINFOLK: GROWING UP IN POLYGAMY 13 (2003) ("The secrecy imposed by an illegal lifestyle further undermines individual development, increasing the likelihood of abuse and exploitation.").

222. Martha Bailey, Beverley Baines, Bita Amani & Amy Kaufman, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, *in* POLYGAMY IN CANADA, *supra* note 19, report 3, at 1, 33.

223. *See, e.g.*, Lim v. Lim, [1948] 2 D.L.R. 353, 355 (Can. B.C. S.C.) ("[Polygamous] unions are not considered as marriages, though they be called by that name, since such marriages are not in conformity with our Christian concept of marriage."); U.K. BORDER AGENCY, IMMIGRATION DIRECTORATES' INSTRUCTIONS ch. 8, § 1, annex C, § 1 (2009), *available at* http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter8/section1/annexc.pdf?view=Binary ("It is Government policy to prevent the formation of polygamous households in this country.").

224. Immigration Act, 1988, c. 14 (U.K.).

225. U.K. BORDER AGENCY, *supra* note 223, ch. 8, § 1, annex C, § 1.

226. Immigration Act, 1988, § 2. Unlike the law of the United States, which predicates entry on the order of marriage, British law is indifferent to chronology, relying instead on "the order in which polygamous wives come to the United Kingdom for settlement." U.K. BORDER AGENCY, *supra* note 223, ch. 8, § 1, annex C, § 1.

administered its immigration bar with an eye toward equality. First, if a polygamous wife is denied entry, her children will also be denied admittance, absent extenuating circumstances.[227] This measure prevents husbands from unilaterally bifurcating their families and instead encourages polygamous men to keep their families intact by remaining in their foreign domiciles. Second, Britain's immigration laws feature one loophole that the United States' laws do not: they allow a man who divorces his first wife under English law to sponsor his subsequent wives "while continuing to live with [the first wife] as his spouse under Islamic law."[228] Third and finally, the law in the United Kingdom that prohibits women from immigrating as multiple spouses to a single husband "do[es] not apply to wives who have a right of entry to the United Kingdom" under employment visas, regardless of whether they intend to practice polygamy.[229] For women who immigrate separately from their polygamous husbands, "English law has long regarded parties who were validly, albeit polygamously, married elsewhere as being legal spouses in England for the purposes of remarriage."[230] Thus, U.K. law entitles immigrant women to spousal support, succession rights,[231] and state benefits.[232] Although "[t]he law is drafted thus because the Government have no desire forcibly to sever relationships that have been lawfully contracted in other jurisdictions," the English government has reiterated that this approach "should not . . . be construed as government approval of polygamous marriages."[233]

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227. *See* U.K. BORDER AGENCY, *supra* note 223, § 6.2 ("It will rarely be appropriate to grant [children of a polygamous marriage] entry clearance where their natural mother is still alive and still in a position to take care of them. . . . [This] would not apply to a child who has the right of abode . . . .").

228. Jonathan Wynne-Jones, *Multiple Wives Will Mean Multiple Benefits*, SUNDAY TELEGRAPH (London), Feb. 3, 2008, at 2.

229. U.K. BORDER AGENCY, *supra* note 223, § 7.

230. Joost Blom, *Public Policy in Private International Law and Its Evolution in Time*, 50 NETH. INT'L L. REV. 373, 382–83 (2003) ("Protecting the interests of family members is a value shared by English and by the foreign law and outweighs whatever anomaly is produced in the domestic legal system by recognizing a polygamous union as a marriage.").

231. *Id.*

232. *See* Sue Reid, *Polygamy UK: This Special Mail Investigation Reveals how Thousands of Men Are Milking the Benefits System To Support Several Wives*, DAILY MAIL (Feb. 25, 2009, 10:03 PM), http://www.dailymail.co.uk/news/article-1154789/Polygamy-UK-This-special-Mail-investigation-reveals-thousands-men-milking-benefits-support-wives.html ("[A] man can receive &£92.80 [*sic*] a week in income support for wife number one, and a further £33.65p [*sic*] for each of his subsequent spouses.").

233. CATHERINE FAIRBAIRN, HOUSE OF COMMONS LIBRARY, SN/HA/5051, POLYGAMY 5 (2011), *available at* http://www.parliament.uk/business/publications/research/briefing-papers/SN

B. Canada's Approach

Like the United Kingdom's antipolygamy regulations, Canada's immigration laws provide an illuminating counterpoint to the United States' policies.[234] Canadian immigration officials use a two-pronged test to determine whether a foreign marriage is valid: first, the marriage must be formally valid—meaning that it was originally valid in the place of celebration—and second, it must be essentially valid—meaning that each party had the capacity to marry.[235] Because polygamous marriages celebrated in countries that condone the practice would qualify under this test, Canada might theoretically recognize such marriages.[236] In practice, however, polygamous families are presumptively inadmissible[237] because they would violate Canada's criminal bigamy laws.[238]

Nevertheless, Canada's polygamy bar is not inflexible. Under the Immigration and Refugee Protection Act,[239] which was passed in 2001, the minister of immigration can waive an immigrant's inadmissibility to accommodate "humanitarian and compassionate" considerations,

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05051.pdf (quoting Lord Hunt of Kings Heath, Parliamentary Under-Secretary of State at the Ministry of Justice). Indeed, the United Kingdom continues to prohibit British residents from entering into polygamous marriages either at home or abroad. *Id.* at 4.

234. Canada provides persuasive authority because it employs a system of cooperative federalism that mirrors the United States' own federal design. *See* Constitution Act, 1867, 30 & 31 Vict., c. 3, § 94 (U.K.) ("[T]he Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick . . . but any Act of the Parliament of Canada making provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.").

235. Amy J. Kaufman, *Polygamous Marriages in Canada*, 21 CAN. J. FAM. L. 315, 320 (2005).

236. *See* Tse v. Canada, [1983] 2 F.C. 308, 311 (Can. Fed. Ct.) (holding that, on the issue of whether a polygamous marriage celebrated abroad was valid for immigration purposes, "the answer . . . appears to be yes").

237. *See* Immigration and Refugee Protection Regulations, SOR/2002-227, § 125(1)(c)(i) (Can.) (explaining that an immigrant is not considered a spouse for immigration purposes if "the sponsor or the spouse was, at the time of their marriage, the spouse of another person").

238. *See* Criminal Code, R.S.C. 1985, c. C-46, § 293 (Can.) ("(1) Every one who (*a*) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy . . . is guilty of an indictable offence . . . ."). Accordingly, in *Ali v. Canada (Minister of Citizenship & Immigration)*, (1998), 154 F.T.R. 285 (Can. Fed. Ct.), the court denied a Kuwaiti man's application on behalf of his two wives despite their protestations that they did not plan to cohabitate in Canada, *id.* at 288. In November 2011, British Columbia's intermediate court affirmed the constitutionality of Canada's polygamy ban. Ian Austen, *Canadian Court Rules that Polygamy Ban Is Constitutional*, N.Y. TIMES, Nov. 23, 2011), http://www.nytimes.com/2011/11/24/world/americas/british-columbia-court-upholds-canadas-polygamy-ban.html.

239. Immigration and Refugee Protection Act, 2001, c. 27 (Can.).

including "the best interests of a child directly affected" by a parent's inadmissibility.[240] Relying on the humanitarian waiver, Ottawa officials granted permanent-resident status to polygamist Winston Blackmore's three wives in 1994 so that they could rejoin their children in Canada.[241] Officials took pains to mitigate any unseemly precedent created by their decision, classifying the women as "independent applicants under the humanitarian and compassionate program," rather than as members of an illicit "conjugal relationship."[242] In addition to adjusting immigration policy with an eye toward equity, the Immigration and Refugee Protection Act also permits polygamous families to enter simultaneously as refugees.[243] Finally, the act enables the minister of immigration to waive the polygamy bar so that "some or all of the parties to a polygamous marriage might enter Canada as independent immigrants under the Investor or Skilled Worker classes."[244] Thus, rather than arming its immigration officials with rigid exclusionary formulas, Canada allows its officers to advance the equitable principles underlying family unification.

The rights of polygamous couples are administered both by Canada's federal government, which controls marriage and divorce,[245] and by the individual provinces, which oversee marriage solemnization.[246] Under Canada's Divorce Act,[247] which defines "spouse" as "either of *two persons* who are married to each other,"[248] polygamous spouses are categorically ineligible to divorce. This decree codifies the precedent set by *Hyde v. Hyde*,[249] an English case in which the court reasoned that "if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law."[250] Consequently, the parties to the

240. *Id.* § 25(1).

241. Robert Matas, *Immigration Bureaucrats Let Man's Three Wives Stay*, TORONTO GLOBE & MAIL, Oct. 7, 2002, at A1.

242. *Id.* (quoting Angela Battiston, Immigration Department spokeswoman).

243. *Id.*

244. Bala et al., *supra* note 19, at 34–35.

245. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91(26) (U.K.).

246. *Id.* § 92(12).

247. Divorce Act, R.S.C. 1985, c.3 (2d Supp.) (Can.).

248. *Id.* § 2(1) (emphasis added).

249. Hyde v. Hyde, (1866) 1 L.R.P. & D. 130 (Eng.).

250. *Id.* at 137.

polygamous marriage were in that case "not entitled to the remedies, the adjudication, or the relief of . . . matrimonial law."[251]

Over time, *Hyde*'s seemingly inflexible precedent has given way to a more equitable approach aimed at reducing the tensions between public policy and women's rights. Under Canadian law, polygamous immigrants may be entitled to spousal support. In *Lim v. Lim*[252]—a seminal case for the wives of polygamous immigrants—the second wife of a Chinese national, who was domiciled with her husband in Canada, petitioned for alimony. Although pursuant to *Hyde*, the court declined to award spousal support, the judge nonetheless opined in oft-quoted dicta,

> It does not seem . . . consistent with common sense that this plaintiff who was admitted into this country under our immigration laws as the wife of the defendant and who, in China prior to her coming to this country, enjoyed the full civil status of wife, should be denied that status under our law, when, after a residence here of almost 30 years with the defendant as her husband . . . she seeks against her husband the remedy which our law provides to a wife to claim alimony. . . . The implications arising from [the] refusal to recognize the plaintiff's status for the purpose in question are . . . repellant to one's sense of justice.[253]

In the decades following *Lim*, Canadian courts have shown a willingness to afford polygamously married immigrant women the benefits of divorce. In *In re Hassan*,[254] a subsequent Ontario case concerning a woman in a potentially polygamous marriage,[255] the court held that the woman was a wife under the relevant Ontario statute and was therefore entitled to spousal support.[256]

Canadian federal law also recognizes succession rights of polygamous spouses domiciled in Canada. In the seriatim opinions

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251. *Id.* at 138; *see also* Lim v. Lim, [1948] 2 D.L.R. 353, 355 (Can. B.C. S.C.) (explaining that a polygamous marriage "will not be recognized as a valid marriage for the purpose of enabling either party to take proceedings against the other to enforce . . . obligations incident to a valid marriage contract").

252. Lim v. Lim, [1948] 2 D.L.R. 353 (Can. B.C. S.C.).

253. *Id.* at 357–58.

254. *In re* Hassan, (1976), 69 D.L.R. 3d 224 (Can. Ont. H.C.J.).

255. "Potentially polygamous marriages" are marriages that "are actually (de facto) monogamous but are celebrated under a law which permits polygamy." U.K. BORDER AGENCY, *supra* note 223, ch. 8, § 1, annex C, § 5.

256. *In re Hassan*, 69 D.L.R. 3d at 231.

announced in *Yew v. British Columbia*,[257] Justice Archer Martin supported the majority's decision to confer succession rights on a man's multiple spouses, remarking on the "unsound" consequences of allowing just one wife to recover from her husband's estate.[258] Warning that such a policy "would lead to unthinkable confusion of principles and imperilment of the status and rights" of the women involved,[259] Justice Martin concluded that the law should recognize a polygamous husband's several marriages for the purposes of determining succession.[260]

In addition to the protections available to the foreign wives of polygamous immigrants under Canadian federal law, several Canadian provinces have enacted definitions of marriage that recognize the rights of plural wives. In Ontario, for example, a man or woman is still considered a spouse even though the marriage is "actually . . . polygamous, if [the marriage] was celebrated in a jurisdiction whose system of law recognizes [the marriage] as valid."[261] Spouses of foreign polygamous unions are entitled to a bevy of legal rights under Ontario law, including spousal and child support, separation agreements, and standing in wrongful-death suits.[262] Polygamous spouses can also "pursue claims for an equalization of net family property between the spouses on separation or death."[263] Indeed, "under the law of Ontario, a spouse who contracted a valid polygamous marriage abroad has the same legal rights and obligations as a spouse who is party to a traditional monogamous marriage."[264]

Canada's case law and provincial regulations demonstrate a commitment to fairness rather than strict exclusion. Recognizing the profound injustice that results when women are forcibly estranged from their families, Canada has established a system of discretionary workarounds and rhetorical distinctions to mitigate the kinds of

257. Yew v. B.C. (Att'y Gen.), [1924] 1 D.L.R. 1166 (Can. B.C. C.A.).

258. *Id.* at 1180.

259. *Id.*

260. *Id.* at 1185 (holding that "the two domiciled Chinese wives of the deceased should be regarded . . . as his lawful wives for the purposes of the statute under consideration"); *accord* Lim v. Lim, [1948] 2 D.L.R. 353, 357 (Can. B.C. S.C.) (limiting the applicability of *Yew*'s holding to succession rights).

261. Family Law Act, R.S.O. 1990, c. F.3, § 1(2) (Can.).

262. JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 28 (3d ed. 2008).

263. *Id.*

264. *Id.*

harms that the United States' policies impose on polygamously married immigrant women. Furthermore, Canada has endowed the wives in such unions with legal rights akin to those of monogamous women to prevent legal invisibility. Thus, Canada maintains the de jure endorsement of monogamy while establishing a de facto system of equity.

V. A SOLUTION: EXPANDING THE HUMANITARIAN VISA AND APPLYING THE DOCTRINE OF PUTATIVE MARRIAGE

To rectify the harms inflicted upon polygamously married immigrant women, the United States should adopt a more equitable stance, similar to the approaches taken in Canada and the United Kingdom. This stance can be achieved through a two-pronged approach. First, immigration officials should be given enhanced discretion to waive the polygamy bar in a range of humanitarian circumstances. Second, states should use the putative-spouse doctrine to accord polygamously married émigrés the anticipated incidents of their marriages. Rather than undermine the United States' longstanding antipolygamy policy, this proposed approach would strengthen the United States' commitment to family reunification and gender equality without endorsing plural marriage.

A. Expanding the Humanitarian Visa

1. *Congress, Not the Judiciary, Must Intervene.* Any change to the United States' polygamy bar must begin with Congress. Under the plenary-power doctrine, "[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[265] The Supreme Court has long held that Congress has unfettered authority to regulate "the admission of aliens"[266] and, further, that any congressional articulation of immigration policy is "conclusive upon the judiciary."[267] Considering its unilateral and largely unchecked power to formulate immigration policy, Congress should revise the existing polygamy bar because, in addition to disadvantaging foreign women,[268] the bar also

265. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).
266. Fiallo v. Bell, 430 U.S. 787, 792 (1977).
267. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).
268. *See supra* Part III.

contravenes Congress's abiding interest in family reunification.[269] To accomplish this change, Congress should consider broadening immigration law's definition of family by replacing the traditional nuclear ideal with a more flexible understanding. This would enable officials to recognize polygamous unions for the limited purpose of conferring residency, without undermining the strong public policy against plural marriage.

The United States' immigration laws reflect a preference for the traditional nuclear family.[270] This ideal, however, is no longer the dominant reality, as "many households do not fit [the nuclear family] mold."[271] Today, an estimated "[t]wenty-eight million children in the United States grow up in families in which care is not provided exclusively by two heterosexual parents."[272] In light of this trend, the Supreme Court has eschewed a rigid definition of family, opining that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear [household]."[273]

The Court has long conferred constitutional protections on "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," including decisions regarding marriage and procreation.[274] Courts have faced the question of how far individuals' intimate liberties should extend and, furthermore, how the bounds of autonomy might alter the traditional concept of family. In response to these burgeoning questions of personhood, the Court, in *Lawrence v. Texas*,[275] pushed the bounds of intimate autonomy past established cultural norms. Reasoning that "the right of homosexual adults to engage in intimate, consensual conduct" is a right "that has been accepted as an integral part of human freedom in many other countries," the Court concluded that homosexual intercourse is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[276] In a vehement dissent, Justice Scalia warned that the majority's reasoning

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269. *See supra* Part III.

270. *See* Reynolds v. United States, 98 U.S. 145, 166 (1879) (upholding the Morrill Anti-Bigamy Act's prohibition of polygamy); *supra* Part III.A.

271. Demleitner, *supra* note 158, at 290.

272. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 91 (2004).

273. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

274. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

275. Lawrence v. Texas, 539 U.S. 558 (2003).

276. *Id.* at 577.

eliminated any principled argument that a similar tolerance for polygamous marriage is not constitutionally required.[277]

Despite some scholars' beliefs to the contrary,[278] it is unlikely that Congress will reverse its stance on the validity of polygamous marriages under immigration law. Rather, for polygamous families to obtain federal recognition, they will have to be recognized through functional means. A limited number of state courts have chosen to honor relationships that, although not familial in a legal sense, are nonetheless characterized by the "emotional and financial commitment and interdependence" underpinning the concept of family.[279] Indeed, in countries that condone its practice, polygamy provides the complex emotional and fiscal attachments that are central to this functional definition of family.[280] As the following Subsections discuss in greater detail, if Congress were to adopt a functional understanding of family for the purposes of polygamous immigration, it could adhere to its family-centric ethos without legalizing polygamy.

2. *Proposed Changes to the Humanitarian Visas.* To mitigate the immigration bar's harmful effects on the wives of polygamous immigrants, the United States should allow immigration officials to exercise greater discretion when granting humanitarian visas to

277. *Id.* at 599 (Scalia, J., dissenting).

278. Since *Lawrence*, commentators have debated whether polygamy will be legalized. *See generally* Joseph J. Bozzuti, Note, *The Constitutionality of Polygamy Prohibitions After* Lawrence v. Texas*: Is Scalia a Punchline or a Prophet?*, 43 CATH. LAW. 409, 413 (2004) (concluding that although "polygamy statutes need not be overturned[,] . . . . *Lawrence* . . . may very well have left all morals-based legislation vulnerable to constitutional attack"); Samantha Slark, Note, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J.L. & FAM. STUD. 451, 458 (2004) ("In light of the U.S. Supreme Court's decision in *Lawrence*, it is no longer legitimate to prohibit the practice of polygamy merely because there is a long history of criminalization of the practice or because a majority of society still deems it immoral.").

279. *See* Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 54 (N.Y. 1989) (eschewing a strict legal definition of family because "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence"). *But see* Preferred Mut. Ins. Co. v. Pine, 848 N.Y.S.2d 190, 194 (N.Y. App. Div. 2007) (declining to extend the "expansive" definition of family in *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989)).

280. *See* Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis*, *in* POLYGAMY IN CANADA, *supra* note 19, report 1, at 10 ("Many women living in polygamy have supported plural marriage and appear to find happiness and satisfaction within their family structures. Certain anecdotes reveal genuine love and companionship among polygamous spouses and within their entire family unit.").

polygamous families. The proposed initiative should begin with a revision of VAWA, which, as previously discussed, excludes women in polygamous marriages from the category of battered spouses who can obtain relief from their abusive marriages.[281] Congress should first remove polygamy from VAWA's calculus of "good moral character" when a foreign petitioner can prove that her polygamous marriage was valid under the laws of the country where the marriage was solemnized.[282] Because, in their countries of origin, validly married women have entered into legally and socially cognizable unions with their polygamous husbands, categorically precluding them from establishing good moral character is arbitrary and inhumane. Furthermore, this de facto condemnation vitiates VAWA's primary purpose: empowering women to leave their toxic marriages. Revising the requirements for good moral character would thus restore VAWA's humanitarian purpose without compromising public policy.

In addition to removing polygamy from VAWA's calculus of good moral character, lawmakers should enable polygamously married women to reunite with their immigrant children.[283] The United States could mitigate the harmful effects of its policy on the family by adopting the United Kingdom's approach of refusing admission to a woman's children if she is denied entry.[284] Such a solution, however, would run afoul of the United States' family-centric immigration system because it would bifurcate child custody.[285] A better tactic would thus be to adopt Canada's solution of allowing subsequent wives to rejoin their children as independent petitioners.[286] Although this approach could be pursued by crafting a new humanitarian visa, it could also be accomplished by allowing officials to waive the polygamy bar for women petitioning under employment-based visas.[287]

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281. *See supra* Part III.B.2.

282. Smearman, *supra* note 36, at 446.

283. *See supra* Part III.C.

284. Bala et al., *supra* note 19, at 24.

285. *See supra* Part III.A.

286. *See* Matas, *supra* note 241 (noting that William Blackmore's polygamous wives obtained entry "as independent applicants under the humanitarian and compassionate program").

287. *See supra* note 244 and accompanying text. The benefit of this approach is that qualifying applicants would theoretically be fiscally self-sufficient and therefore less likely to claim public assistance.

An interest in family reunification would also justify expanding the definition of derivative beneficiaries to include refugees and asylum seekers. Under existing laws, which preclude foreign women from petitioning as spouses in connection with their polygamous husbands' refugee or asylum visas, inadmissible wives face potentially fatal consequences.[288] To remedy this harm, the United States should follow Canada's example by enabling polygamously married women to petition as derivative beneficiaries of their children's visas.[289] This approach would recognize the humanitarian tenor of women's resettlement without endorsing plural marriage. Alternatively, if there are no children within the polygamous marriage, Congress could craft a new subset of immediate-relative derivative visas premised on a functional definition of family.[290] Indeed, the current policies, which allow immigration officials to disregard polygamy in adjustment-of-status proceedings, support the notion that Congress did not intend for polygamy to impede humanitarian resettlement.[291]

Together, these changes to humanitarian visas would mitigate the polygamy bar's harmful effects on foreign women and would bolster the United States' commitment to family reunification.

B. Applying the Doctrine of Putative Spouses to Foreign Plural Wives

Once immigrants are inside the United States, their status is no longer governed by the plenary-power doctrine. Immigrants' rights at that stage are instead administered by the tradition of *Yick Wo v. Hopkins*,[292] under which "aliens are 'persons' for purposes of [constitutional] protection."[293] Although the United States has thus far eschewed a constitutional right to polygamous marriage,[294] the Supreme Court has nonetheless recognized a liberty interest in the "emotional attachments that derive from the intimacy of daily

288. *See supra* Part III.

289. *See supra* Part IV.

290. *See supra* Part V.A.1.

291. *See supra* Part III.

292. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

293. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1060 (1994) (quoting *Yick Wo*, 118 U.S. at 369). The *Yick Wo* tradition has resulted in a variety of constitutional protections for aliens, including protections under the Ninth, Fourth, Sixth, and Eighth Amendments in criminal proceedings, as well as certain First Amendment rights. *Id.* at 1060–61.

294. Reynolds v. United States, 98 U.S. 145, 165–66 (1879) (holding that the Morrill Anti-Bigamy Act's prohibition on polygamy does not violate the Free Exercise Clause of the First Amendment).

association."[295] This interest in protecting familial bonds has led many states "to provide the rights of relationship to non-traditional family members, even while [they continue to resist] the expansion of traditional notions of family status."[296] Many state courts, finding an affirmative duty to invest nontraditional families with legal rights, have encouraged legislatures to adopt laws that protect, for example, same-sex relationships.[297] The American Law Institute likewise advocates giving parties whose relationships are not legally cognizable the opportunity to receive the incidents of marriage, including property division and compensatory payments upon dissolution.[298] Thus, given that legal immigrants are entitled to the benefits and protections of U.S. law, and given that state legislatures have trended toward recognizing nontraditional relationships, states should use the putative-spouse doctrine to provide foreign plural wives the incidents of marriage.

The putative-spouse doctrine is the best avenue for providing immigrant women in polygamous marriages with the incidents of their unions. The Uniform Marriage and Divorce Act (UMDA)[299] defines a putative spouse as "[a]ny person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person."[300] Although the doctrine of putative spouses is typically used to compensate the innocent spouse in a bigamous union, it could also apply to foreign women who possessed the good-faith belief that their state-sanctioned polygamous marriages were legal at the time they were contracted.[301] Expanding the doctrine to foreign polygamous marriage would entitle

295. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977).

296. Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend To Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 177 (2010).

297. *See, e.g.*, Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (extending the benefits of marriage to same-sex couples).

298. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 6.01–.06 (2000).

299. UNIF. MARRIAGE & DIVORCE ACT (1974).

300. *Id.* § 209. The UMDA has not been accepted by all fifty states, but a number of states recognize putative spouses. *See, e.g.*, CAL. FAM. CODE § 2251 (West 2004) (recognizing a putative marriage in which "either party or both parties believed in good faith that the marriage was valid"); MINN. STAT. ANN. § 518.055 (West 2006) ("Any person who has cohabited with another to whom the person is not legally married in the good faith belief that the person was married to the other is a putative spouse until knowledge of the fact that the person is not legally married terminates the status . . . .").

301. *See supra* Part I.

subsequent wives to a range of possible benefits, including alimony,[302] property division,[303] succession rights,[304] the ability to sue for a decedent spouse's wrongful death,[305] and the right to receive public retirement benefits through a surviving spouse.[306] This approach would have two advantages. First, it would give foreign women the benefits of monogamy while nullifying an otherwise-repugnant union. Second, because it would apply only to "good faith" marriages, adapting the doctrine to foreign polygamous unions would not exonerate U.S. domiciliaries from purposeful bigamy.

C. Welfare Challenges to this Proposed Solution

Although this two-pronged solution would vindicate the rights of foreign women in polygamous marriages, the correlative increase in eligible immigrants could burden the welfare system. Under INA § 212(a)(4), an immigrant who "is likely at any time to become a public charge" is ineligible for either admission or adjustment of status.[307] The public-charge bar, however, is inapplicable to refugees and asylees seeking either admission[308] or adjustment of status.[309] As a consequence, admitting polygamously married women as derivative beneficiaries to a principal's refugee or asylum petition would create the greatest probability of fiscal strain. Refugees and asylum seekers are entitled to a bevy of government welfare benefits,[310] including Temporary Assistance for Needy Families (TANF), Social Security,

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302. *See* Kindle v. Kindle, 629 So. 2d 176, 177 (Fla. Dist. Ct. App. 1993) (awarding permanent alimony to the putative spouse).

303. *See, e.g.*, Hager v. Hager, 553 P.2d 919, 924 (Alaska 1976) (awarding a putative wife approximately 8 percent of her husband's property); Williams v. Williams, 97 P.3d 1124, 1129–30 (Nev. 2004) (upholding a property division between putative spouses).

304. *See, e.g.*, Estate of Leslie, 689 P.2d 133, 140 (Cal. 1984) ("[A] surviving putative spouse is entitled to succeed to a share of his or her decedent's separate property.").

305. *See, e.g.*, CAL. CIV. PRO. CODE § 377.60(b) (West Supp. 2011) (establishing that a putative spouse has standing to sue for a decedent spouse's wrongful death).

306. Frank S. Berall, *The Non-Traditional Family in the United States and Canada—Estate and Tax Planning Responses*, *in* FAMILIES AND ESTATES: A COMPARATIVE STUDY 9, 13 (Rosalind F. Croucher ed., 2005).

307. Immigration and Nationality Act (INA) § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (2006).

308. INA § 207(c)(3), 8 U.S.C.§ 1157(c)(3).

309. *Id.* § 209(c), 8 U.S.C. § 1159(c).

310. Refugees have a "relatively high participation rate" in federal welfare programs because they "are eligible for assistance upon arriving . . . and are encouraged by refugee-integrating programs to seek it." Paul Meehan, *Combatting Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389, 394 n.22 (1997).

and Supplemental Social Security (SSI).[311] Because Social Security benefits accrue upon retirement[312] and because SSI benefits are specific to elderly and disabled workers,[313] this Section focuses on alleviating potential burdens on the TANF program.

As a general matter, because refugees "flee their homes with little more than the clothes on their backs," they are more likely than any other class of immigrants to receive federal TANF assistance.[314] The TANF program is designed to "provide assistance to needy families" while "promoting job preparation, work and marriage."[315] Under the TANF program, states receive a block federal grant to distribute to qualified families in the form of "cash, payments, vouchers and other . . . benefits designed to meet a family's ongoing basic needs."[316] Although states can articulate their own guidelines for TANF eligibility, the federal government restricts TANF assistance to households in which adult family members "participate in . . . allowable work activities for specified hours each week."[317] In addition to the strict work requirement, families are limited to sixty months of TANF assistance.[318]

The TANF program has the potential to be abused if the wives of polygamous immigrants living in polygamous households claim TANF benefits as single parents. Such welfare fraud is rampant among Mormon fundamentalist communities in which fundamentalist men "spiritually marry" multiples wives so that "in the eyes of the

311. 8 U.S.C. § 1612(a)(2)(A) (2006); Marcia Henry, *Immigrants' Eligibility for Federal Benefits*, 38 CLEARINGHOUSE REV. 393, 395–97 (2004).

312. 20 C.F.R. § 404.110 (2011). Numerous solutions have been proposed to prevent excessive social-security payouts to polygamous wives. One approach would be to preclude subsequent wives from receiving payments altogether. The 1968 U.K. Law Commission, however, suggested that social-security benefits could be payable to each of a man's polygamous wives in full, provided that the husband made an increased tax contribution. Bailey et al., *supra* note 222, at 13. Alternatively, it suggested that "social security benefits that would have been payable to one wife should be equally divided between all of the wives of a polygamous marriage." *Id.* (quoting U.K. LAW COMM'N, PUBLISHED WORKING PAPER NO. 21, POLYGAMOUS MARRIAGES 50 (1968)).

313. 20 C.F.R. § 416.202.

314. Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 174 (1998).

315. 45 C.F.R. § 260.20(a)–(b) (2011).

316. 45 C.F.R. § 260.31(a)(1).

317. *TANF Fact Sheet*, ADMIN. FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/opa/fact_sheets/tanf_factsheet.pdf (last updated Apr. 2009).

318. *See* 45 C.F.R. § 260.59 (imposing penalties for states that exceed the federal five-year limit).

state, the subsequent wives all remain single mothers eligible for welfare and other forms of public assistance."[319] To curtail this type of abuse, the United Kingdom has implemented a system whereby spouses in a polygamous union receive a prorated share of family benefits. Under this revised program, "a man can receive £92.80 a week in income support for wife number one, and a further £33.65p [*sic*] for each of his subsequent spouses."[320] Because the United Kingdom's "benefit is payable at the difference between the couple rate and the higher rate for a single person . . . there is no financial advantage to claiming for those in a polygamous marriage."[321]

Although a prorated-benefits system would likely ease the fiscal strain on welfare programs such as TANF, it is not without its problems. Because such a payment structure implicitly recognizes and endorses polygamous unions, the United Kingdom's approach would need to be tweaked slightly. As a practical matter, it is unlikely that polygamous refugees or asylum seekers would immediately abandon their polygamous lifestyles. Instead, there would probably be a period in which polygamous families still resided together. TANF assistance should account for this reality by providing foreign polygamous families with prorated benefits for a limited period of time. In keeping with TANF's rigid accountability measures, a husband's multiple wives would have to demonstrate that they are both physically independent and engaged in an eligible work program to receive single-person TANF benefits at the end of the appointed time frame. In addition to limiting the strain on federal welfare, this approach would integrate polygamous immigrants into the national economy.

Even if polygamous refugees and asylum seekers pose an initial threat of fiscal strain,[322] scholarship suggests that "[o]verall, immigrants represent a net fiscal plus."[323] In a 1994 study, researchers estimated that "immigrants arriving after 1970 pay taxes of seventy

319. Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 717 (2004). In Colorado City, Utah, which boasts a significant Mormon fundamentalist population, "[33] percent of the town's residents receive food stamps, which is shockingly high compared to the state average of 4.7 percent." *Id.*

320. Reid, *supra* note 232.

321. FAIRBAIRN, *supra* note 233, at 8.

322. Indeed, the federal government assumes that immigrants will create a fiscal deficit. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 402, 8 U.S.C. § 1612 (2006) (restricting immigrants' access to public assistance).

323. Jeffrey S. Passel & Michael Fix, *United States Immigration in a Global Context: Past, Present, and Future*, 2 IND. J. GLOBAL LEGAL STUD. 5, 14 (1994).

billion dollars to all levels of government—a net surplus of twenty five to thirty billion dollars more than they use in public services."[324] Although evidence indicates that refugees are the largest immigrant consumers of public assistance,[325] "statistics for the second generation of refugees specifically demonstrate that refugee welfare use is transitional rather than permanent."[326] Because refugee assistance has not been shown to create a "cycle of dependency,"[327] polygamous immigrants may ultimately produce net fiscal gains in the United States.

CONCLUSION

The antipolygamy movement, which began as the clarion call of women's suffrage, has led, paradoxically, to the development of an immigration system that curtails women's rights. By mapping American values onto marriages that were consented to without DOMA in mind, the United States is endorsing a form of invidious gender discrimination. To rectify this harm, the United States should look to the examples of its peer nations, which, in recent years, have embraced the principle of equality in dealing with polygamous immigrants. To keep pace with its peer nations, the United States should adopt the two-pronged approach of, first, expanding the categories of permissible humanitarian immigrants and, second, using the putative-spouse doctrine to vindicate plural wives' expectations. Together, these measures would reconcile the tensions inherent in the United States' protracted battled against polygamy by both emancipating women from an "odious"[328] marital institution and ameliorating the law's discriminatory effects.

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324. *Id. See generally* JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION (1989) (arguing that immigrants create a net financial benefit). *But see generally* DONALD HUDDLE, CARRYING CAPACITY NETWORK, THE NET COSTS OF IMMIGRATION: THE FACTS, THE TRENDS, AND THE CRITICS, at i (1996) (concluding that, during the 1990s, immigrants yielded a $65.01 billion net deficit).

325. *See* Hing, *supra* note 314, at 173 (arguing that, outside of the refugee context, "use of all public programs . . . by immigrants does not impose any unusual fiscal burden").

326. *Id.* at 174.

327. *Id.*

328. Reynolds v. United States, 98 U.S. 145, 164 (1879).