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INTRODUCTION

Janet Bennion and Lisa Fishbayn Joffe

PLURAL MARRIAGE AND MARRIAGE PLURALISM

Polygamy is tolerated to some degree by almost half of the world's societies. It is practiced by only 2 percent of North Americans from a range of religious and national backgrounds. Some participants in polygamous marriages have immigrated to North America from countries where such marriage is permitted and recognized under the law. Others are members of local fundamentalist Mormon religious sects, which practice polygamy outside the bounds of secular law. However, questions regarding the legal and ethical permissibility of plural marriage occupy a disproportionately large space in the public and legal imagination. This collection seeks to trace the genealogy of contemporary interest in the institution of polygamous marriage, explore arguments for and against its recognition under North American legal systems, and consider how such recognition might operate in practice.

The term *polygamy* is a gender-neutral one that denotes a state of marriage to many spouses. Polyandry, marriage of one woman to multiple husbands, is uncommon. While it may have been more widespread in hunter-gatherer societies, contemporary polyandry is practiced by a relatively small number of groups living in harsh environments. Brothers may share a wife to prevent a family's land from being subdivided between families into units too small to support them. A man may nominate a brother to be a second husband to protect his wife during a long absence. Polyandry rarely comes about through the choice of the wife (Starkweather and Hames 2012).

Though we use "polygamy" throughout this volume, we are referring to "polygyny," where one man is married to several women. Polygyny dates back to the initial practice of shifting horticulture in sub-Saharan Africa in order to maximize fertility and produce young dependent males (Goody 1976, 27–29). In 1970, Esther Boserup suggested polygyny's true purpose was for men to be able to monopolize women's productive labors and the children they bore (Boserup 1970). The biblical

patriarchs practiced polygamy, and Jewish law permitted it. It was abolished for Ashkenazi Jews in the eleventh century but persisted as a permitted, if frowned upon, alternative for Sephardic Jews into the modern era (Goldfeder 2016). Classical Chinese and ancient Roman societies all once embraced polygamy. It was also encountered sporadically among Native Americans and in the West African continent, Polynesia, India, and ancient Greece. In North America—both Canada and the United States—polygamy emerged in both Native American and Mormon contexts, with recent Muslim immigrant and convert societies adding to these numbers.

The history of Mormon polygamy in the United States is a short but eventful one that offers a unique perspective on its appeal to adherents and the anxieties it raises among outsiders. Mormonism is a young religion, founded in the United States in the 1820s. In 1852, Brigham Young, leader of the Mormon church (Church of Jesus Christ of Latter Day Saints, or LDS church), revealed the practice of plural marriage as a Mormon doctrine. When Mormons received the revelation regarding polygamy, its supporters argued that while monogamy was associated with societal ills such as infidelity and prostitution, polygamy could meet the need for sexual outlets outside marriage for men in a more benign way (Gordon 2001). Politicians in Washington did not welcome this innovation. In 1856, the platform of the newly founded Republican Party committed the party to prohibit the “twin relics of barbarism,” polygamy and slavery. In 1862, the federal government outlawed polygamy in the territories through passage of the Morrill Anti-Bigamy Act. Mormons, who were the majority residents of the Utah territory, ignored the act.

However, prosecutions for polygamy proved difficult because evidence of unregistered plural marriages was scarce. However, in 1887, the Edmunds-Tucker Act made polygamy a felony offense and permitted prosecution based on mere cohabitation. The spouses did not need to go through any ceremony to be accused of polygamy. Scores of polygamists, including Bennion’s ancestors, Angus Cannon and his brother George Q. Cannon, were each sentenced to six months in prison in 1889. The final blow to the viability of nineteenth-century Mormon polygamy came that same year when Congress dissolved the corporation of the Mormon church and confiscated most of its property. Within two years, the government also denied the church’s right to be a protected religious body. This policy of removal of church resources meant that polygamous families with limited funding had to abandon extra wives who had been deemed illegal under the Edmunds Act. This

abandonment created a large group of single and impoverished polygamous women who were no longer tied to their husbands religiously or economically. As a result of the pressures brought on by the Edmunds-Tucker Act, the LDS church renounced the practice of polygamy in 1890 with church president Wilford Woodruff's manifesto. Utah was admitted into the Union in 1896.

At the beginning of the twentieth century, the legal status of polygamy in Utah was still not clear. In 1904, the US Senate held a series of hearings after LDS apostle Reed Smoot was elected as a senator from Utah. The controversy centered on whether or not the LDS church secretly supported plural marriage. In 1905, the LDS church issued a second manifesto that confirmed the church's renunciation of the practice, which helped Smoot keep his senate seat. Yet the hearings continued until 1907, the Senate majority still interested in punishing Smoot for his association with the Mormon church. By 1910, Mormon leadership began excommunicating those who formed new polygamous alliances, targeting underground plural movements. From 1929 to 1933, Mormon fundamentalist leadership refused to stop practicing polygamy and was subject to arrest and disenfranchisement. In 1935, the Utah legislature elevated the crime of unlawful cohabitation from a misdemeanor to a felony. That same year, Utah and Arizona law enforcement raided the polygamous settlement at Short Creek after allegations of polygamy and sex trafficking.

In 1944, fifteen Utah fundamentalist men and nine of their wives were arrested on charges of bigamy and jailed in Sugarhouse, Salt Lake City. Then, in 1953, officials again raided Short Creek and removed 263 children from their parents in Arizona and Utah. Two years later the Utah Supreme Court held in *Utah v. Black* that a polygamous family was an immoral environment for rearing children because of the parents' practice and advocacy of plural marriage, upholding the decision of the Juvenile Court to remove children from polygamous families (Smith 2011).

After the 1953 raid on Short Creek and the hostile public reaction to images of children forcibly removed from their parents, most polygamists went underground or fled to Mexico or Canada. However, many stayed in the United States and sought to practice their religious beliefs in the open. For the most part, the police did not enforce the antipolygamy law. Although state courts occasionally convicted individuals of polygamy, in the last fifty years, government officials have more often focused on other crimes committed by polygamists, such as child abuse, statutory rape, welfare fraud, and incest. The official position of the Utah attorney general's

office was not to pursue cases of bigamy between consenting adults. This tolerant approach is exemplified by the 1991 case, *In the Matter of the Adoption of W. A. T., et al.*, in which the Utah Supreme Court ruled that a polygamous family could adopt children, essentially reversing *Utah v. Black*. In spite of this era of relative tolerance, in April 2008 the state of Texas raided the Eldorado FLDS (Fundamentalist LDS) compound, removing 460 children from their families based on accusations of child abuse. A subsequent investigation found that one-quarter of girls between age twelve and fifteen residing in the compound had been entered into spiritual marriages, and some had given birth to children. Twelve men were prosecuted for sexual assault on children as a result. This case also resulted in a public backlash based on the removal of young children from their parents' custody for extended periods during the investigation.

Currently, most American polygamists—numbering approximately 40,000 to 50,000—are associated with fundamentalist Mormonism. These can be sorted into four groups: the Fundamentalist Latter-Day Saints and three groups named for their dominant families—the Allreds, the LeBarons, and the Kingstons. It is difficult to assess how many immigrants from countries that recognize polygamy live in the United States in polygamous families. Estimates for Muslims alone range from 50,000 to 100,000 people (Hagerty 2008). This would bring the total number of possible polygamists in the United States to approximately 50,000 to 150,000.¹

Like mainstream Mormons, fundamentalists believe that God is a mortal man who has become exalted and that if they are worthy, they too will become gods and goddesses of their own worlds. Yet, unlike the mainstream Mormon church, fundamentalists still practice polygamy, which they believe will offset the imbalance in sex ratios related to the abundance of religious women and the dearth of good men, as recorded in Isaiah 4. They see it as not only a direct commandment of God but as a catch-all solution for prostitution, infidelity, homosexuality, spinsterhood, and childlessness.

LEGAL AND SOCIAL HISTORY

The practice of polygamy occupies a unique place in American history, with surprising resonance for other Anglo-American legal systems. Mormon polygamy, the product of a small home-grown religious faith, has disproportionately affected legal and social history. *Reynolds v. US* (1879), a central judgment in American constitutional law, interprets the First Amendment to protect freedom of religious belief but not of

religiously motivated actions. The ruling was prompted by a challenge to a bigamy conviction by Mr. Reynolds, a Mormon who had argued that his faith required him to take multiple wives. Chief Justice M. R. Waite, a founder of the Republican Party, said of polygamy, “To permit this would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself . . . government could exist only in name under such circumstances” (Reynolds v. US).²

The classic definition of marriage in English law as “a voluntary union for life of one man and one woman to the exclusion of all others” in *Hyde v. Hyde* (1886) was prompted by an attempt by a polygamous spouse who had married in Utah to seek a divorce in the United Kingdom.³ The English court refused to accept jurisdiction, holding that a polygamous marriage could not be recognized as a valid marriage. While recent debates in the United Kingdom over the recognition of same-sex marriage have emphasized reading this clause as “one *man* and one *woman*,” the statement was originally drafted to emphasize *only one* man and *only one* woman.

The nineteenth-century precursors to the provisions of the Criminal Code of Canada which prohibit polygamy, recently at issue in the British Columbia Polygamy Reference (Reference re: Section 293 of the Criminal Code of Canada), were passed to ward off the possibility that Mormon polygamists, subject to persecution for their practices in the United States, might seek refuge to practice them in Canada.⁴ Canada’s Parliament returned to the issue of polygamous immigrants in 2015 with passage of the Zero Tolerance for Barbaric Practices Act, which bans them from entry into Canada and allows for their deportation if they engage in polygamy while residing there. When the US government began its assault on polygamy in 1887, a small community of members of the Mormon church fled to Canada. They sought permission from Parliament in 1888 to bring their plural wives with them. The Canadian government refused and in 1890 passed its first legislation against plural marriage. The law sought to convict Mormons “on the basis of cohabitation, attacking the Mormons’ private ceremonies” (Macintosh, Herbst, and Dickson 2009).⁵

The regulation of Mormon polygamy and its implications for the definition of marriage in Utah continue to roil political and legal waters today. In December 2013, the United States District Court in Utah struck down a provision of Utah’s bigamy law that made it an offense for a legally married person not only to purport to marry a second spouse but also to cohabit with someone in a marriage-like relationship (*Brown v. Buhman*).⁶ A week later, a different judge of the same court struck down

an amendment to the Utah state constitution that prohibited the recognition of same-sex marriage as a violation of the Fourteenth Amendment due process rights of same-sex couples (*Kitchen v. Herbert*).⁷ Both judgments emphasized that the state required compelling reasons to refuse recognition to the marriage choices of its citizens.

For centuries, polygamy has played a role in the public imagination as metaphor and catalyst for discussing other challenging marital practices. Indeed, the history of regulation of polygamy evokes legacies of religious and cultural intolerance. The court in *Brown v. Buhman*, for example, found that Utah's prohibition was rooted in orientalist racism. The social harm it protected against was introducing a practice perceived to be characteristic of non-European people—or non-White races—into white society because it is “almost exclusively a feature of the life of Asiatic and of African people” that had been adopted by Mormons.⁸

Justice Antonin Scalia of the United States Supreme Court warned in his dissent in *Lawrence v. Texas* that decriminalization of homosexual practices and the recognition of same-sex marriage have now put America on a slippery slope toward affirming polygamy (*Lawrence v. Texas*).⁹ It would appear, based on the recent decision in *Brown v. Buhman*, that he might be right. The time has therefore come to determine what sort of impact such recognition might have. To what extent would the decriminalization of plural marriage endanger the values that underlie traditional American heteronormative marriage? Which of these values deserve to be perpetuated? Further, if plural marriage is decriminalized, what would be the relative costs to women and children, and society as a whole?

Scholars have come at the question of the relative benefits and harms of polygamy in different ways. Some look at the reasons women give for entering into polygamy. Anthropologists Robin Fox (1993) and Phil Kilbride (1994) were both interested in showing the benefits polygamy offers in solving the crises of American modernity; they emphasized how women might choose alternative family forms as a way to cope with the socioeconomic obstacles they confront. Kilbride applauded the adaptive measures of polygamists that help them share resources and provide protection from the harsh realities of urban life. For Mormon women not born into polygamy, it is considered a last resort for those facing poverty or limited marital prospects after having been abandoned by their husbands or if they are unable to find a mate. Female converts in the Montana Allredite order are attracted to the commune because of the socioeconomic support it offers, replacing a rather difficult life in the

mainstream where their status as divorcees, single mothers, widows, and “unmarriageables” limits their access to good men and the economic and spiritual affirmation that comes from a community of worship (Bennion 1998). Women may choose polygamy when resource inequalities among men are more pronounced, when they perceive being the subsequent wife of a wealthy/good man to be better than being the only wife of a “rogue” male (Kanazawa and Still 1999). Women in some polygamous communities hold positions of independent religious or political power in the community. They can raise their children with minimal oversight by their husband, manage their household, and work in the all-important female support networks. Finally, Mormon fundamentalism balances the deprivations and difficulties of the lives of polygamous wives with a promise of an afterlife as “queens and priestesses.” Polygamous women enjoy autonomy and freedoms associated with the multifaceted ties established between married women of the same patriarchal kingdoms. For example, women may unite in opposition to a husband who “gets out of line.” Women have a greater chance of halting or changing the behavior of males by expressing their dissatisfaction collectively (Forbes 2003). When women are isolated, the need for a strong female support network becomes increasingly significant. Furthermore, as Bennion’s research indicates, when this network is present, it may be more difficult for abuse to go unnoticed as community members are more likely to be engaged in and aware of daily events in the lives of their peers (Bennion 1998). These networks also provide women with a protective emotional and financial safety net that reduces the need for women to rely exclusively on their husbands for these resources.

Women may also find emotional and economic sustenance in their relationships with their sister wives. Patricia Dixon-Spear challenges us to rethink plural marriage as a vehicle for coping with the shortage of good men and fostering a “womanist ethic of care for sisters” (Dixon-Spear 2009). This ethic of care is especially vital during the prolonged absences of husbands when women must work together to create a large co-op of domestic and mechanical skills as well as childcare for the children of women who work. It reduces the number of hours per day that women labor, contributing to increased leisure and contentment; it alleviates anxieties, providing a mechanism for support in times of illness or hardship; and it mediates disputes. Women develop a strong interdependence with each other and, in doing so, create a large repertoire of domestic and mechanical skills. By contrast, monogamous women may not experience this type of shared skill set, especially if they are isolated from their friends, sisters, or community networks. Polygamous women

also say that they value being surrounded by women in an environment where emotions are not suppressed, as they perceive them to be among men, and that they can escape from the demands of their husband in ways a monogamous woman cannot.

Assuming the marriage is otherwise tolerable, polygamy has also been offered as an alternative to divorce and may—in some instances—lead to greater stability in the marital relationship. Anastasia Gage-Brandon, who did research on polygamous marriages in Nigeria in the late 1980s and early 1990s, found that marriages involving two wives were the most stable unions and were much less likely to end in divorce than both marriages involving more than two wives and monogamous unions (Gage-Brandon 1992). In addition to these potential benefits, polygamy may enhance family life by providing a greater number of loving parents for children and a wider range of supportive siblings (Jankowiak and Diderich 2000).

Harmful behaviors are present within some polygamous groups, but the causation is unclear. Many scholars highlight a correlation between polygamy and attitudes of male supremacy in Mormon and Muslim fundamentalist households (Jankowiak and Allen 1995). Among some fundamentalist Mormons, a duty of adoration of the father is supported by a strict code that requires obedience from all children and wives. The punishment for breaking this code is known as the *blood atonement*, corporal punishment through whipping or cutting of the skin to atone for the sins against the father. Male supremacy or dominance stifles female decision making and autonomy and creates an environment of alienation, ridicule, and, possibly, battery. The husbands in such households insist on restricting the ability of females to travel, pursue an education, or even go to a hospital for medical care. This mistreatment of women is not necessarily a factor of polygamy itself but rather a manifestation of the husbands' extreme fundamentalist beliefs. These men abuse their priesthood powers and present themselves as the sole guardians of the family's spiritual welfare. Studies of polygamous Muslim households have also linked abuse and unequal treatment to extreme patriarchal beliefs. In Dena Hassouneh-Phillips's examination of US Muslim women who were victims of abuse, the majority of participants reported that their husbands' "misuse" of polygamy rather than polygamy itself constituted the abuse and that this abuse occurred when their husbands "strayed from Islamic dictates in their pursuit of other wives" (Hassouneh-Phillips 2001). Similarly, the majority of participants expressed a belief that the unjust treatment of wives, not polygamy itself, was abusive and emotionally destructive to women.

The criminalization of polygamy does not resolve this abuse; rather, it leads to families “often practicing polygamy clandestinely and inconspicuously,” creating the potential for loss of perspective and abuse within the group (Campbell et al. 2005). The conditions under which polygamy is practiced in North America may, in fact, allow domestic violence to thrive. Abusers may deliberately choose to settle in remote places in order to maintain control over their victims without being observed, and women in such isolated locations are unable to leave the community easily. It is also important to note that the correlation between isolation and abuse is not limited to polygamous family relationships. Examples of abuse within monogamous relationships related to isolation have been found in northern Maine, the state with the highest rate of sexual abuse in the United States, and remote areas of midwestern states (Keller 2006).

Underage girls may be subjected to coercion to enter into polygamy in FLDS communities. Should a girl refuse, she is told she could jeopardize her salvation and let the whole community down as well as lose financial and social security. She is encouraged to have as many children as possible and to get pregnant very soon after marriage. Forcing a fifteen-year-old into a “spiritual union” with an older male is statutory rape of a minor incapable of giving valid consent to sexual activity. In some groups, a plural wife is apt to lack a high-school diploma because of her early motherhood. She is also likely to have little or no financial support from a husband who has other families as well and to be surviving economically only through the formal assistance of the church and informal support networks of sister wives and other plural wives in similar situations. She may well lose these critical sources of support if she seriously reconsiders plural marriage and has no connections outside the isolated community that makes plural marriage “its defining ideology and practice” (Strassberg 2010). Having many children of her own may make her feel that she cannot escape the group, especially without independent socioeconomic resources to help her obtain a divorce, custody of her children, and child-support payments from the biological father. In extreme cases, if a woman does have the courage to try to leave an abusive situation, she knows she may have to leave her children behind under fundamentalist religious doctrine.

Even women who claim to support polygamy may be harmed by it. Alean Al-Krenawi’s study of Bedouin women (Slonim-Nevo and Al-Krenawi 2006) raises additional questions about wife order, differential treatment, and mental stability. He sought to compare how satisfied “senior wives” (the first wives in polygamous marriages) and women in

monogamous marriages were in the West Bank, Palestine. Al-Krenawi found significant differences with regard to family functioning, marital satisfaction, self-esteem, and life satisfaction. Though the senior wives approved of polygamy over monogamy, they expressed more psychological problems than their monogamous counterparts.

The contributions to this volume come from multiple disciplines, including anthropology, sociology, women's studies, history, and law, and they focus on two related issues. The first defines both the harms and benefits of polygamy. The second key issue flows from the first. If the alleged harms of polygamy stem from the institution itself in all its instantiations, how could it be regulated by the state? If there are forms of polygamy that respect or even enhance the possibilities for a satisfying life for its participants, could the practices of these groups be separated from abusive forms of polygamy through regulating subsets of abusive behavior rather than the practice of polygamy itself? Should this regulation take place through refusal to recognize polygamous marriages as having any legal effect, through regulating the processes for entry into and dissolution of polygamous marriages, or through criminalization of such unions? The authors seek to disaggregate the diverse forms of polygamy practiced in North America and to chart the variable impacts these models of polygamy have on men, women, and children—whether they are independent individuals or members of relatively coherent fundamentalist communities.

The first section begins with two related pieces by Sarah Song and Lori Beaman. They both trace how the characterization of North American polygamy has, and has not, changed over the last century. In "Polygamy in Nineteenth Century America," Song explains how the nineteenth-century anti-Mormon critique of polygamy protected patriarchy while shielding monogamy from similar criticisms. She posits that opposition to polygamy was a sort of smokescreen for opposition to the political power of the church in Utah. She concludes that the movement against Mormon polygamy was not only concerned with its overt objective to protect women's rights but also with upholding Christian-model monogamy and its associated patriarchal public morals. The threat that Mormon polygamy was seen to pose to monogamous marriage and to Christian civilization itself was heightened by Mormon reforms allowing for easy divorce and for women's suffrage in Utah. In actuality, polygamy served as a handy foil, deflecting attention from the bigger concern of political elites in the nation's capital: the growing political and economic power of the Mormon church. While antipolygamists stressed the importance of saving vulnerable women from the insults of barbaric oriental practices,

they also succeeded in holding off a state in which the granting of suffrage to polygamous women would mean polygamy's perpetuation.

In "Opposing Polygamy: A Matter of Equality or Patriarchy?," Lori Beaman analyzes another more recent antipolygamy narrative involving the 2010 British Columbia Polygamy Reference. The Canadian province of British Columbia was grappling with the question of whether to prosecute members of the Bountiful FLDS polygamist community for the crime of polygamy. While there was a criminal law on the books, the province had been reluctant to bring prosecutions for fear that the law would be struck down as unconstitutional. The government sent a reference to the British Columbia Supreme Court, asking them for an opinion on how the law should be interpreted and whether it was permissible to enforce it under the Canadian Constitution. While some women currently residing in Bountiful, and various other groups, filed affidavits testifying to their agency in choosing polygamy, their voices were balanced by those of women who had left the community and rejected polygamy. The court heard extensive testimony from scholars and activists on the nature and extent of harms that might correlate with polygamy. In an exhaustive review of the literature across a range of disciplines, the court concluded that polygamy correlated with harms to women's equality, to the well-being of children in polygamous families and communities, and to the nation as a whole. Polygamy was linked with rises in crime and antisocial behavior by men excluded from marriage, pressure on women to enter into underage marriage, an emphasis on patriarchal control over women and children, which manifested in increased rates of domestic violence and poor maternal and child health, and reduced paternal investment in the well-being of their children as they diverted their resources to acquiring new brides.¹⁰ On this basis, the court decided that the provisions of the Criminal Code of Canada that render polygamy illegal do not violate the Canadian Charter of Rights and Freedoms. While the religious freedom of polygamists was indeed violated by the criminal prohibition, this limitation was justified in order to achieve the public-policy objectives of avoiding the harms associated with it.

Beaman reads the decision through a skeptical lens. She argues that certain ways of imagining polygamy allow policymakers, lawmakers, and others to displace the inequality of women onto the institution of polygamy and behave as though women's equality has been reached in monogamous society. Beaman cautions that contemporary campaigns against polygamy may also be motivated by a desire to demonize the patriarchal practices of the illiberal other while failing to interrogate those of the dominant culture. While not arguing in favor of polygamy

per se, she urges a more nuanced and self-conscious examination of the contrasts between polygamy and monogamy that does not take for granted that monogamous family forms are always better for women. A commitment to multicultural toleration entails taking seriously the claims of women within illiberal minority groups, acknowledging that they are capable of meaningfully choosing to commit themselves to a way of life beyond the mainstream.

In Janet Bennion's essay, "The Variable Impact of Mormon Polygamy on Women and Children," she examines factors contributing to well- and poor-functioning polygyny among four Mormon fundamentalist groups in the Intermountain West. Using an ethnographic approach, Bennion asserts that it is the combination of several key variables that contributes to poor-functioning polygamy: (1) illegality, (2) geographic isolation, (3) socio-economic inequality, (4) male supremacy, (5) economic deprivation, (6) absence of female networking, and (7) the presence of sexual, physical, and emotional abuse.

In Debra Majeed's essay, "Ethics of Sisterhood: African American Muslim Women and Polygyny," she too explores why some women might choose polygamy. She demonstrates how African American Muslim women in the Chicago area are drawn to polygamist marriages to cope with a perceived severe shortage of eligible, marriageable men within black America. Further, the higher status routinely afforded married women has led some African American Muslim women to accept plural marriage to obtain resources and prestige. This essay traces how women's agency, exegesis of the Qur'an, and demographic conditions affect how African American Muslims practice polygyny.

Polygamy has been practiced across a range of cultural and religious traditions from time immemorial. Contemporary polygamy in North America involves both immigrants from countries where polygamy is legally recognized and Americans who convert or are born into such societies. In addition to moral objections rooted in religious doctrine and tradition, some theorists develop ethical objections to polygamy based on its failure to generate conditions for autonomy for all its members. If the toleration of minority cultural practices is justified based on their capacity to contribute to the exercise of autonomy by their members, then the practices of groups designed to extinguish the capacity for autonomy in girls and women are problematic.

In "An Economist's Perspective on Polygyny," Shoshana Grossbard writes about the negative economic impact of polygyny. She relies on two assumptions: (1) marriage is an institution that organizes household production, such production including giving birth, raising children,

homemaking, and many more activities, and (2) marriage markets exist. Because of the high value of women in marriage markets in polygamous societies, men's incentives to control women by way of political and religious institutions, such as early arranged marriages, will increase. Her primary argument is that polygamy is bad for women because marriage markets are not, in fact, free because the men who institute and control polygyny institute corresponding limitations on women's freedom to exploit the increased value of women under polygyny. Moreover, Grossbard argues, polygynous societies, sometimes implicitly, recognize that polygamy harms women because they institute ways to limit those harms. Grossbard concludes by outlining the parameters for experiments in polygamous marriage that might comport with a commitment to women's freedom to negotiate entry, exit, and the terms of such marriages. Nineteenth-century Mormon women did not have equal input into legal processes, but they did publicly defend and advocate polygamy in a number of different and compelling ways. They participated at least as much as men, if not more, in the public defense of polygamy, and it seems at least possible that they had equal influence in legal processes and may have approved of plural marriage for religious reasons. It is unclear whether modern polygynous women have the same level of participation and advocacy.

Rose McDermott, a political scientist and expert witness in the Polygamy Reference, presents another opposing view of polygamy with her colleague, Jonathan Cowden. She testified about the negative effects of polygamy on the well-being of women and children, and the court mentioned her work as central to its decision. In their piece for this volume, "The Effect of Polygyny on Women, Children, and the State," the authors argue that such violence and suppression of basic rights can be "potentiated by a number of factors, including patriarchy, pastoralism, patri-locality and polygyny" (118). These features of the social structure enhance male control over women and children in ways that allow and encourage "violence and suppression of political rights and liberties" (118). As polygamy increases, the lives of women and children and the associated features of family life will all worsen. In particular, the marriage age of women will decline, the rate of maternal mortality will increase, life expectancy will decrease, and the birthrate will increase. They note that polygamy's effect on children will be devastating, especially at the secondary level.

Given the factors that lead women to choose polygamy and the dangers it poses, do the harms warrant continued *criminalization*? If there are forms of polygamy that are perceived to respect or even enhance

the possibilities for a satisfying life for its participants, is it possible to isolate and regulate abusive behavior rather than the practice of polygamy itself? Should this regulation take place through *decriminalization*, in which the state merely tolerates polygamy but refuses to recognize polygamous marriages as having any legal effect, or through *legal recognition* of polygamy as a form of legal marriage in which the state takes responsibility for regulating the processes for entry into and dissolution of polygamous marriages?

Criminal prosecutions of polygamy itself are difficult for both ideological and practical reasons. The obstacles to effective prosecution are well known: (1) family members may be reluctant to testify against each other; (2) children raised in fundamentalist communities are taught to fear and distrust the law; (3) there is no paper trail for underage births or unlawful marriages; (4) it is nearly impossible to obtain accurate evidence about abuse or about which jurisdiction perpetrators should even be prosecuted in; (5) local police and doctors in fundamentalist communities often aid and abet residents engaged in criminal activity; (6) law enforcement and political officials are concerned about acting too aggressively against a practice some see as a protected religious activity, and many Mormon law-enforcement officials are simply unwilling to charge consenting adults for religious beliefs their Mormon ancestors shared; and (7) busy prosecutors place greater focus on more serious offenses, ignoring polygamy (Duncan 2008).

Several of the essays in this volume are devoted to parsing the evidence weighed by the BC Supreme Court and evaluating the decision and its implications. In her chapter, "Testing the Limits of Religious Freedom: The Case of Polygamy's Criminalization in Canada," Melanie Heath analyzes the discourse used by the judge in the case. She writes that the opinion places disproportionate emphasis on the nature of harms associated with polygamy and insufficient emphasis on claims, lodged by men and women, that polygamy allowed them to pursue their own religiously based conception of a good life. Heath's main argument here is that the court's discussion of the harm of polygyny obscures its ability to consider religious freedom and the right to familial and sexual intimacy.

In "Distinguishing Polygyny and Polyfidelity under Criminal Law," Maura Strassberg argues in favor of continuing criminal prohibition, although in a more tailored way. She writes that Mormon fundamentalist polygamy operates in a tyrannical, patriarchal fashion that seeks to eliminate a capacity for independent thought and actions in girls and boys in the community. Plural marriage thus renders community

members unfit for participation in civic discourse. Polygyny not only fails to produce critical building blocks of liberal democracy, such as autonomous individuality, robust public and private spheres, and affirmative reconciliation of individuality and social existence, but promotes a despotic state populated by subjects rather than citizens. Strassberg argues that polygamy should be criminalized in order to protect both the individuals involved and the broader society.

In Song's second essay in this collection, "Polygamy Today: A Case for Qualified Recognition," she expresses concern that the mere regulation of polygamy may serve to undermine the equality struggles of women. She also justifies state involvement in order to ensure women autonomy in entry into and exit from the marital bond. Women (and men) are free to exit monogamous relationships, but they are less free to exit polygamous ones, perhaps because of social censure in their communities.

In "Should Polygamy Be a Crime?" Martha Bailey argues against criminalization because the liberal state ought not to intrude into the bedrooms of the nation by imposing criminal sanctions for private, non-commercial sexual activity among consenting adults. She argues also for consistency, as the state does not regulate a range of other distasteful intimacies, such as incest between adults. She also contends that most misconduct will be caught by other criminal laws, not by the ban on polygamy. When polygamy is criminalized, female victims of abuse may be less likely to report their status because they are afraid of being charged or that they will jeopardize the welfare of their entire family with the threat of criminal charges. In this way, a prohibition, which is designed to protect women from abuse may, in fact, put them at greater risk. Criminalizing polygamy is not an effective way to address the harms of certain forms of polygamy to women and children.

Finally, in "(Mis)Recognizing Polygamy," Kerri Abrams asks us to step away from the moral questions involved in regulating polygamy to consider the practical ones. What would such recognition entail in terms of distributing the sorts of social welfare benefits we currently distribute through the family? Would we really be comfortable with the intensity of regulation necessary to ensure fair treatment within polygamous families? The modern state now regulates domestic violence within ongoing families, but traditional forms of marriage regulation have allowed the state to intervene to divide assets and enforce support only after marriages have broken down. Given that polygamous families may have a more fluid and continuing mobility among spouses, this might make government oversight a regular part of polygamous life. For example, South African laws recognizing polygamy require that first wives give their written consent

to the husband's marriage to a subsequent wife (Stacey and Meadow 2009). A recent Constitutional Court case held that failure to secure the informed consent of the first wife renders second marriages invalid (*Mayelane v. Ngwenyama*).¹¹ Abrams contrasts the merits of an approach that seeks to base welfare entitlements on family relationships with one that simply allows a polygamous spouse to select one family member to receive these benefits. In sum, Abrams's chapter urges readers to consider the ways that legal recognition of polygamy may not be the best solution for those seeking an alternative to the criminalization of plural marriage.

Contemporary modes for regulating polygamy need to be rethought in light of changing demographics, changing mores, and changing legal norms. Laws against polygamy have been called into question on constitutional grounds in both Canada and the United States. The challenge to the Utah criminal law against polygamy in *Brown v. Buhman* was brought by Kody Brown and his four wives, featured performers in the reality television program *Sister Wives*, who felt they had been threatened with prosecution because they had openly extolled the virtues of their polygamous lifestyle. Only Kody and his first wife, Meri, are legally married. The "marriages" between Kody and Janelle, Christine, and Robyn were created through religious rituals only. The court found that this law had initially been drafted to prevent Mormons' polygamous common-law marriages from gaining recognition as legal marriages, a possibility that ceased to exist when Utah abolished common-law marriage in 1898. To continue to use the law to prosecute Mormon fundamentalist polygamists like the Browns who entered into purely religious marriages without any pretense that they were valid legal marriages violated these polygamists' rights to due process under the Fourteenth Amendment and religious freedom under the First. Moreover, the state could not point to a good reason to punish religiously motivated intimacy with multiple partners while making no attempt to regulate adultery motivated by more banal desires.

In the twenty-first century, more progressive forms of plural marriage are emerging, causing many to reexamine the merits of a ban on polygamy. As the *Brown* case shows, openly polygamous families may be encouraging a social shift in society in favor of toleration and decriminalization of polygamy. Primetime television has played no small part in this normative transformation. The drama *Big Love*, which ran on HBO from 2006 to 2011, presented the fictional relationships of the Henrickson family, consisting of one husband, three wives, and their children, with sensitivity and humor. Reality television shows like *Sister Wives* and *Polygamy, USA* may seek to titillate with the details of polygamous family formation and family management among Mormon

fundamentalists, but these programs also operate to normalize the polygamous unit, showing seemingly happy, thriving, and relatively self-aware families with little apparent abuse or underage marriage. Viewers are presented with images of a variety of forms of polygamy, including those depicting women as the decision makers who operate in the public sphere with careers and political ambitions and seek to redefine their roles within their religion and within the family. This volume provides multinational, multidisciplinary scholarship on the pros and cons of legalization and the complexities of evaluating polygamy as a workable form of marriage in this new and changing landscape.

Notes

1. Reporting actual number of individuals and families that live a polygamous lifestyle is variable and unclear because standards differ in making this calculation. Do we count children and their parents? Are polyamorists included? Jonathan Turley's estimation mirrors my own estimation of 50,000. See Jonathan Turley, "Polygamy Laws Expose Our Own Hypocrisy," *USA TODAY*, Oct. 4, 2004, available at usatoday30.usatoday.com/news/opinion/columnist/2004-10-3-turley_x.htm. Samuel D. Brunson ("Taxing Polygamy," 91 WASH. U.L.REV. 113, 146 [2013]) estimates the number of polygamists as high as 150,000, though he does not specify the source of his data.
2. *Hyde v. Hyde*, Courts of Probate and Divorce. L.R. 1 P&D 130 (1886).
3. *Reynolds v. US*, US Supreme Court, 98 U.S. 145, 133 U.S. 333 (1879).
4. Reference re: Section 293 of the Criminal Code of Canada, BCSC 1588 (2011) (hereafter, Polygamy Reference).
5. Incidentally, only two polygamy convictions have taken place in Canada since 1890; *R. v. Bear's Shin Bone* (1899) 4 Terr. L.R. 173, a case involving First Nations customary law marriages, demonstrates how the law's selective use has tracked understandings of the "barbarous" nature of non-European marital forms (Drummond 2009).
6. *Brown v. Buhman*, US District Court, District of Utah, Central Division. (December 13, 2013).
7. *Kitchen v. Herbert*, United States District Court of the District of Utah, December 20, 2013, 961 F. Supp. 2d 1181 (D. Utah). For a little over two weeks, same-sex couples rushed to marry in the state. On January 6, the state attorney general won an injunction from the United States Supreme Court to prohibit same-sex marriages in the state until the case had been appealed to the Tenth Circuit Court of Appeals. Arguments in that case were set to be heard in April 2014. Utah Governor Herbert's decision to instruct the state not to recognize the 1,300 same-sex marriages performed during this period is being challenged in a lawsuit brought by the ACLU. However, the point has been rendered moot by the decision of the United States Supreme Court in *Obergefell v. Hodges*, June 26, 2015, which found that same sex couples are entitled to legal recognition of their marital unions.
8. *Brown*, at 20.
9. *Lawrence v. Texas*, 539 U.S. 558 (2003).
10. Polygamy Reference, paras. 770–93.
11. *Mayelane v. Ngwenyama and Another*, Case CCT 57/12, May 30, 2013, ZACC 14, paras. 770–793.

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