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**BETWEEN TRADITION AND PROGRESS: A
COMPARATIVE PERSPECTIVE ON
POLYGAMY IN THE UNITED STATES AND
INDIA**

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Both the United States and India have had longstanding experiences with polygamy and its regulation. In the United States, the dominant Protestant majority has sought to abolish Mormon practices of polygamy through criminalization. Moreover, a public policy exception has been used to deny recognition of plural marriages conducted legally elsewhere. India's approach to polygamy regulation and criminalization has been both similar to and different from that of the United States. With a sizable Muslim minority and a legal framework that recognizes religious law as family law, India recognizes polygamy in the Muslim minority community. However, it has criminalized it in the Hindu majority community. Despite the existence of criminal sanctions for Hindus, the incidence of polygamy among the majority community is roughly equivalent to that of Muslims for whom it is permitted. In the United States, despite harsh measures to abolish the practice, it continues and might even be growing in urban communities. This Article takes seriously the feminist critique of traditional polygamy as distributionally unfair to women. However, it also acknowledges that polygamy may be an attractive alternative and an acceptable family form. This is

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particularly true if it is reformed and made to progress as was monogamous marriage in the mid-twentieth century. This Article argues that rather than focusing on the criminalization of a family form that has been in existence for millennia, a more fruitful approach to regulating polygamy is to focus on the distribution of rights and obligations within the family. This approach accepts that abolition is a goal that is unlikely to be met and that women and men may choose polygamy for rational reasons. As such, feminists are more likely to see gains for women by directing their efforts toward reform and recognition rather than criminalization and abolition.

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INTRODUCTION

To the ordinary person on the street of Kolkata or Kalamazoo, a question about the similarities between India and the United States might elicit a blank stare. Indeed, the two countries are geographically separated by half the globe and have distinct histories and cultures. India—with a

population of a billion people, multiple languages, and myriad, distinct ethnic and religious populations—seems to have nothing in common with the United States.¹ India is the land of gurus, temples, and, more recently, call centers and Bollywood dancing. The United States, on the other hand, is a modern, technologically advanced state, comparatively young in its political history, with a common language and a more homogenous discernible majority population (though that majority is changing).

Despite their differences, the two countries share similarities. Both are democracies, both have large minority populations, and both were once British colonies. They have been indelibly influenced by English liberal political philosophy and jurisprudence. The founding fathers of the United States were heirs to familiar thinkers like John Locke, Thomas Hobbes, and Adam Smith.² It is from these philosophers that Thomas Jefferson, George Washington, John Adams, and our other founders drew inspiration to rebel against the British crown.³ And, when the time came, it is from the United States' founding fathers—along with Indian philosophy, tradition, and culture—that India's founding fathers Mahatma Gandhi, Jawaharlal Nehru, and Vallabhai Patel drew inspiration—so much so that the U.S. Constitution served as a model for the Indian Constitution.⁴

Both countries' judicial systems, moreover, are offshoots of British common-law tradition and share much in their approach to adjudication.⁵ Indian Supreme Court Justices often reference U.S. case law in their decisions,⁶ underscoring both the commonalities and strength of this influence. This Article advances the comparative literature that explores the

1. See *Background Note: India*, U.S. DEPARTMENT ST., <http://www.state.gov/r/pa/ei/bgn/3454.htm> (last visited Sept. 23, 2011).

2. See generally HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (1978).

3. See generally *id.*

4. See M.K.U. Molla, *The Influence of the U.S. Constitution on the Indian Sub-continent: Pakistan, India and Bangladesh*, in *THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH, AND INFLUENCE IN ASIA* 153 (J. Barton Starr ed., 1988).

5. See generally JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009); MITHI MUKHERJEE, *INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1774–1950* (2010).

6. See, e.g., *Rekha v. State of Tamil Nadu*, (2011) 4 S.C.J. 637 (India) (referencing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951)); *Narayan Dutt v. State of Punjab*, (2011) 3 S.C.J. 845 (India) (referencing *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855)).

challenges that both family law systems face as they progress through the new millennium. While one could write several books comparing⁷ India and the United States, the constraints of space in this Article require a much more limited inquiry. As such, I restrict myself to the one overarching tension that pervades both Indian and U.S. family law systems at both federal and state levels: the conflict between traditional religious values and secular law in the practice and regulation of polygamy.

Polygamy has evoked strong reactions in both countries. It is often described as regressive, patriarchal, abusive, and even barbaric.⁸ Women's rights groups are opposed to polygamy because they believe it is inherently unequal and subordinates women.⁹ Certain religious groups oppose polygamy because it offends their particular view of morality. These groups have made common cause on the issue of polygamy and desire its abolition. They tend to support strict measures that criminalize and punish polygamy.¹⁰ Yet, the demands made by anti-polygamists on behalf of women mask the subordination of religious groups that occurs through this "civilizing" discourse and regulation.¹¹

On the other hand, in communities that religiously sanction polygamy, conservatives who support the practice

7. It is important to note here that this Article does not suggest that India and the United States are, in fact, comparable, except perhaps in the most superficial ways and in their positive laws. Society and social facts on the ground and the lived experiences of each population with its diversity and complexity make generalized comparisons nearly impossible. For instance, it is difficult to argue that women are similarly situated in the United States and India given their different cultural, social, and religious milieus. The result is that law also acts differently on them, shaping their lives differently. Polygamy regulation in India, therefore, takes a different shape than it does in the United States. Nevertheless, this does not mean that the two systems cannot glean important lessons from each other. This is the point of this Article.

8. See, e.g., Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1589-93 (1997).

9. Regarding India, see ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY 136 (1992) ("The wives of polygamous unions were given no safeguards, and at the same time polygamy was not made unattractive for men."). Regarding the United States, see Strassberg, *supra* note 8, at 1591-92.

10. In India, the most anti-polygamy religious group has been the Hindu nationalists, not because it offends their morality per se but because it represents an unequal benefit enjoyed by Muslim men and also raises the specter of the ever-increasing Muslim population. See FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 193 (1999).

11. See, e.g., PARASHAR, *supra* note 9, at 139-43.

have argued that it is a God-given “right” and that polygamy is morally superior to the unbridled sexual freedoms allowed in most “progressive” countries.¹² These religious traditionalists demand a position of state noninterference in their religious practice. Traditionalist views elevate religious identity and male supremacy over gender equality.¹³ Thus, the impasse between traditionalists and anti-polygamists is reflected in the legal debates surrounding the criminalization of polygamy.

I take a different position in this Article, neither calling for the abolition of polygamy on moral or egalitarian grounds nor taking the “free exercise” approach of traditionalists. Rather, I call for an acknowledgement that criminalization of polygamy has not resulted in its eradication and that it will never result in complete abolition; indeed, the practice flourishes in some communities even if driven into the closet by the law, and its incidence in the United States might be increasing.¹⁴ Because polygamy raises real issues for all involved that cannot be adequately addressed through criminal law, we need to manage the practice to incentivize fairness. In other words, rather than focusing on stricter policing or more enforcement of laws banning polygamy, redirecting the state’s efforts to the distribution of benefits and burdens within polygamous families is a more fruitful way to change the practice and ultimately make it more equitable (and perhaps less desirable).¹⁵ In this endeavor, the example of the Indian

12. See M. Mustafa Ali Khan, *Islamic Polygamy—A Blessing in Disguise*, in MODERN INDIAN FAMILY LAW 148, 156–57 (Werner F. Menski ed., 2001). Khan notes:

Islam permits conditional polygamy. Christianity forbids but winks at it provided that no legal tie exists with more than one woman. There is pretended monogamy in the West, but in fact there is polygamy without responsibility. The mistress is cast off when the man becomes weary of her and she sinks generally to be the woman of the street, for the lover has no responsibility for her future and she is [a] hundred times worse than the sheltered wife and mother in a polygamous Muslim family.

Id. at 158 (alteration in original).

13. Much of the argument rests on the view that polygamy does not “really” disadvantage women and that Islam is not gender inequitable. See, e.g., Khan, *supra* note 12, at 154–60. See generally MOHAMMAD SHABBIR, MUSLIM PERSONAL LAW AND JUDICIARY (1988) (examining the codified Muslim Personal Law and its conservative interpretation by the Indian courts).

14. See *infra* notes 102–14 and accompanying text.

15. A similar approach is taken by Adrienne Davis in her work on polygamy. See Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2031–32 (2010) (taking an approach that seeks to focus on the rules and regulations that govern polygamous relationships to alter their distributive effects).

judicial approach to polygamy in Hindu communities is instructive. That approach reflects the kind of secularism prevalent in India—accommodative yet also assimilationist, as compared to the predominantly assimilative secularism in the United States where the dominant discourse and regulatory trend is firmly entrenched in abolitionism.

The Article proceeds in three parts: In Part I, I describe the forms of secularism prevalent in the United States and India, underscoring the different approaches taken to address how secularism should interact with religion or tradition in the state. The aim here is to ground the discussion in the legal context within the respective countries in order to show how religion is accommodated. In Part II, I examine the tension between secularism and religion through a selection of polygamy legislation and cases from both the United States and India. These cases present an opportunity to examine the way religious accommodation plays out in the different secular states. This Part draws links between the abolitionist positions taken in both contexts and raises questions about the efficacy of criminalizing polygamy. It also calls attention to the tension between feminist aims of gender equality and religious claims. Finally, in Part III, I conclude that instead of focusing on enforcement of the laws—the appetite for which has been waning in the United States and has never been particularly robust in India—we concentrate instead on reforming the laws that distribute property and obligations within families with a goal of protecting the parties and making them less vulnerable to disinheritance and destitution. As such, laws dealing with support and property distribution will have important economic consequences for polygamous families.

I. DIFFERENT FORMS OF SECULARISM IN TENSION WITH RELIGION

A. *The United States' Secular Framework*

The question of religious accommodation and the place of tradition has been a perennial question in both U.S. and Indian contexts. When confronted with the question of whether religion should play a formal role in the legal system, the founding fathers of the United States answered in the negative. Having witnessed the detrimental effects of religious intolerance in European society, they decided that, while both

the free practice of religion and reasonable accommodation should be afforded, there should be no established state religion.¹⁶ Courts have interpreted the Establishment Clause as an increasingly stringent bar against state favoritism toward a particular religion.¹⁷ In other words, as is familiar to most American lawyers, there has been a separation of church and state preventing the state from entangling itself in establishing a religion while allowing it to accommodate various religious practices and communities.

In family law, where religious beliefs are frequently implicated, courts have tried to respect religion without entangling themselves in matters of religious doctrine and practice.¹⁸ They have attempted to accommodate religion without becoming enmeshed in pronouncing upon matters of religious doctrine. While the limits in the United States seem fairly clear, the bright line becomes blurry when courts must give force to religious contracts such as *mahr* agreements or decide whether a religious marriage was validly entered into.¹⁹

The United States' treatment of religion reflects one form of secularism. In Gary Jacobsohn's view, the U.S. model is assimilative in that it attempts to create a national civic and political identity with which all citizens and aspiring citizens must conform.²⁰ There is room and respect for diversity and particular identities, but when individuals interact in public, religion is, at least theoretically, unimportant.

Another way of describing the U.S. model of secularism is conscriptional secularism. In other words, all those who choose to become citizens of the United States are conscripted into a form of public existence where their religious, racial, ethnic, or other particular identities are subsumed under a national identity: We are Americans first.²¹ Yet America's tolerance for

16. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 1–2 (2007).

17. *Id.* at 18–19.

18. PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION 42–44 (2010).

19. *Id.* at 43–44. There are two types of *mahr* or “dower” paid to the bride upon marriage. Prompt *mahr* is payable at the time of marriage, while deferred *mahr* is payable at a later agreed-upon date or at the occurrence of an event such as divorce. *Id.* at 1.

20. GARY JACOBSON, THE WHEEL OF THE LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 57–72 (2003).

21. Of course, there are more strictly conscriptional secularist models available. For instance, in France, the importance of “Frenchness” and national identity has led to laws that seek to erase differences from the public space in a

diversity through multiculturalism has given rise to a large number of different ethnic and religious communities, most of which flourish without hindrance as long as they obey the laws of the land.²²

Despite this separation of church and state that is enshrined in the Constitution, the United States has struggled with the role of religion in the public sphere. Its secularism evolved from a time when Protestant Christianity's public supremacy was unquestioned to the present when all religions, including the socially dominant Protestantism, exist on seemingly equal footing.²³ This evolution occurred, in part, through legal challenges to school prayer, the appearance of the Ten Commandments in public buildings, and accommodation for religious groups in educational institutions.²⁴

Challenges to certain social mores have also pushed back the public role of religion. For instance, the right to privacy evolved into its current form through challenges to bars against contraception.²⁵ In these cases, the judiciary has had to determine the proper role of religion in the law. The Supreme

rebuke of American multiculturalism. For an interesting perspective on the effects of French *laïcité*, see JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* 15–18 (2007). *Laïcité* means the separation of church and state through the state's protection of individuals from the claims of religion. *Id.* at 15.

22. Increasingly, however, several laws have been proposed that seek to limit accommodation and tolerance for cultural and ethnic differences. For instance, a spate of anti-sharia laws have been proposed in several states that have the effect of publicly stigmatizing Muslims. See Amy Sullivan, *The Sharia Myth Sweeps America*, USA TODAY (June 12, 2011), http://www.usatoday.com/news/opinion/forum/2011-06-12-Sharia-law-in-the-USA_n.htm. Also, immigration laws continue to be used to pursue Latinos, and Arizona has gone so far as to propose a law that prohibits the teaching of ethnic history that causes divisiveness. See H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>.

23. Compare *Reynolds v. United States*, 98 U.S. 145, 164–65 (1878), and *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 48–49 (1890), with *Lee v. Weisman*, 505 U.S. 577 (1992), and *State v. Holm*, 137 P.3d 726 (Utah 2006). The former cases clearly rely on majoritarian values of Protestant Christianity.

24. See *Lee*, 505 U.S. at 599 (“No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.”); *Stone v. Graham*, 449 U.S. 39, 39–43 (1980) (discussing the unconstitutionality of displaying the Ten Commandments in public schools); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209–12 (1948) (holding unconstitutional the use of public school facilities for religious instruction).

25. See generally *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (discussing the line of privacy cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

Court's Establishment Clause jurisprudence, which has been evolving for the past fifty years, applies the test articulated in *Lemon v. Kurtzman* and then modified in *Agostini v. Felton*.²⁶ The test comprises three prongs: First, the state action in question must serve a "secular purpose"; second, it must have a secular effect; and third, it must not result in excessive entanglement between church and state.²⁷ Subsequently, the *Agostini* decision subsumed the entanglement inquiry into the first prong, making it part of the secular purpose inquiry.

The structure of U.S. secularism as it has been understood in the past fifty years—and the jurisprudence supporting it—has made it relatively easy to challenge laws that withhold rights from some segments of the population. Increasingly, the idea that moral repugnance is not enough to sustain certain morals legislation, no matter how traditional, has become common.²⁸ Much of the activity in changing morals legislation has been in the area of family law. Despite the fact that U.S. family law is entirely civil and secular, tradition and religion continue to play an important role in matters of family privacy, particularly in the area of reproduction and sexual relationships.²⁹ Moreover, religion continues to play a role in marriage formation.³⁰ Where there are private agreements informed by religion, the courts are implicated in enforcing these and may be required to engage religion in this context as well. Nevertheless, society's common understanding of family law in the United States is that it is a civil matter that does not require the state to engage religion too deeply.³¹

26. See *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

27. MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* 288–93 (2d ed. 2002).

28. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Secularism at the founding of the nation was not understood to be a total separation of church and state. Indeed, "disestablishment" was achieved incrementally, and Jeffersonian secularism was hotly debated at the time. See generally EDWIN S. GAUSTAD, *SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON* (1996) (providing an account of the evolution of Jefferson's religious thought and its place in the religious thought of his time).

29. Justice Scalia's dissent in *Lawrence v. Texas* indicates how much tradition infused with religious values is at the heart of these matters. See *Lawrence*, 539 U.S. at 588–92 (Scalia, J., dissenting).

30. While no *religious* solemnization is required, some sort of ceremony is, and this is often met by the undertaking of religious rites. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 69 (2d ed. 2009).

31. *Lemon*, 403 U.S. at 614 ("[W]e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

B. India's Secular Framework

Writing from his jail cell in India during the independence struggle, Jawarharlal Nehru, one of the fathers of the modern Indian state, noted: "The United States of America solves its minority problems, more or less, by trying to make every citizen 100 percent American. They make everyone conform to a certain type. Other countries, with a longer and more complicated past, are not so favorably situated."³²

Indeed, India's long history of religious pluralism made it difficult to create a Uniform Civil Code for family law and to remove religion from the public sphere at independence.³³ Nor was that a shared goal of the founders. The importance of religion to the identity of already existing populations at the time of independence and their respective fear of being subjected to forced assimilation and subordinated status required Indian lawmakers to take a different approach than that of their American counterparts two centuries before.³⁴ As a result, Indian secularism is accommodative, allowing for all religions to have equal footing in the public sphere as long as the fundamental rights guaranteed by the Indian Constitution are not breached. This idea is reflected in the ancient Indian saying "*sarva dharma sambhava*" (all religions are equal).³⁵ Rather than attempting to build a complete wall between religion and state, India has enshrined religion into the state while attempting to maintain an overall secular structure.³⁶

India's main concession to religious minority communities was the retention of the codified version of their personal laws or family laws. These laws were initially codified by the British colonial administration in an effort to make their adjudication

32. JACOBSON, *supra* note 20, at 57 (quoting Jawarharlal Nehru). Nehru's statement reflects his concern with the communal divisions in India, compared to the United States, where race was the primary divider. Moreover, as Jacobson points out: "[B]eing an American consists largely of sharing in those constitutive ideas that define membership in the political community. Assimilation in this context relates exclusively to principles, not to ethnically or religiously derived models of ideal behavior working to achieve social conformity." *Id.* at 58.

33. *See id.*

34. *See* Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 45, 52–59 (2008).

35. CHRISTOPHE JAFFRELOT, HINDU NATIONALISM: A READER 327 (2007).

36. *See* JACOBSON, *supra* note 20, at 147.

easier.³⁷ Post-independence, the laws remained in force, and, for some communities, they were reformed and amended.³⁸ For instance, the Hindu personal law was amended and liberalized to provide greater protections for women.³⁹ On the other hand, Muslim personal law has stagnated largely because that community has viewed any efforts to formally amend the laws as an attack on their religious identity and a move toward forced assimilation.⁴⁰

The result of the personal law regime in India has meant that the courts have had to interpret religious laws in a majority of family matters.⁴¹ Far from the U.S. prohibition of excessive entanglement, the Indian judiciary has on occasion had to delve into religious doctrine in order to decide cases.⁴²

37. See Nadya Haider, Comment, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287, 295 (2000); Purushottam Bilimoria, *Muslim Personal Law in India: Colonial Legacy and Current Debates*, EMORY L., <http://www.law.emory.edu/ifl/cases/India.htm> (last visited Mar. 9, 2012).

38. See *Uniformity of Laws in India and England*, in MODERN INDIAN FAMILY LAW, *supra* note 12, at 360, 367.

39. See *id.* at 366–67.

40. See Bilimoria, *supra* note 37.

41. See generally K.B. AGRAWAL, FAMILY LAW IN INDIA (2010) (surveying Hindu, Muslim, Christian, and Parsi personal law codes). The Special Marriage Act of 1954 allows parties to opt in to a secular marriage. However, this law leaves much to be desired and tends to favor the majority community. See LAW COMM'N OF INDIA, FIFTY-NINTH REPORT ON HINDU MARRIAGE ACT, 1955 AND SPECIAL MARRIAGE ACT, 1954 (1974), available at <http://lawcommissionofindia.nic.in/51-100/Report59.pdf>.

42. See, e.g., Khan v. Begum, (1985) 3 S.C.R. 844 (India). This is the now-famous Shah Bano case in which the Supreme Court of India was asked to decide whether a Muslim wife could receive maintenance past the statutory three-month period pursuant to the Code of Criminal Procedure, Act II (1974). Section 125 of the Code requires husbands to maintain their wives. *Id.* at 852. While deciding the case, the Court gratuitously commented:

[I]t is alleged that the fatal point in Islam is the degradation of woman. To the Prophet is ascribed the statement, hopefully wrongly, that [w]oman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly. . . . It is too well-known that [a] Mahomedan may have as many as four wives at the same time but not more.

Id. at 849–50, 856 (internal quotation marks omitted). This statement was made by a non-Muslim judge with no religious training while attempting to interpret a Qur'anic passage. It was certainly not necessary to the central issue. Most Muslim intelligentsia agreed that the Court decided correctly that the Code did not conflict with Islamic law. Danial Latifi, *The Shah Bano Hullabaloo in India*, Foreword to SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON 7, 9 (Lucy Carroll ed., 1998), available at <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/misc/Shah-Bano-eng.pdf>. However, the outcry generated by the case among conservative Muslims resulted in the passage of the perversely named

While the Indian courts have used a variety of interpretive moves to reach just outcomes, they nevertheless cannot escape from adjudicating a set of religious family laws. The conflict between the Indian Constitution's protection of individual liberties (much like the U.S. Bill of Rights) and those rights accorded to groups through personal laws creates difficulties for Indian courts attempting to resolve such cases.⁴³ This tension has become intractable, particularly with regard to women's rights in family law and property.⁴⁴

In the late 1980s and through the 1990s, Indian women's rights activists repeatedly called for the enactment of a Uniform Civil Code to guarantee equal rights for women.⁴⁵ Personal laws, they argued, were a byzantine system that afforded each confessional group a separate set of laws, enshrined sexist religious norms, and conflicted with the fundamental liberties guaranteed by the Indian Constitution.⁴⁶ With the rise of right-wing Hindu groups, the civil code took on a different valence. For Hindu nationalists, the call for a uniform law was a means of removing the "privileges" given to Muslim men.⁴⁷ Of particular vexation was Muslim men's legal right to marry more than one woman. As such, the right-wing Bharatiya Janata Party (BJP) and its affiliated Hindu

Muslim Women (Protection of Rights on Divorce) Act, which closed that avenue and limited the right of maintenance to the statutory three-month period stated in Muslim personal law. *Id.* at 9–11. For excellent examinations of the impact of the Shah Bano case, see Lucy Carroll, *Divorced Muslim Women in India: Shah Bano, the Muslim Women Act, and the Significance of the Bangladesh Decision*, in SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON, *supra*, at 35; Danial Latifi, *Muslim Women Benefited: Shah Bano Revisited*, in SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON, *supra*, at 143.

43. Choudhury, *supra* note 34, at 65. The Fundamental Rights enshrined in the Indian Constitution are extensive and reflect both a formal and substantive understanding of equality. Part III enumerates articles that cover the right to equality (Article 14), prohibitions against discrimination (Articles 15 and 16), freedom of expression (Article 19), and freedom of religion (Article 25). See INDIA CONST. arts. 14–35.

44. Inheritance laws have for the most part maintained male privilege in all of the communities where it has existed. The Hindu inheritance laws were recently amended to put men and women on equal footing, but prior to this, males were preferred, and Muslim inheritance laws clearly favor male heirs. For an interesting analysis of changes in inheritance, see *Modernity and the Family in Indian Law*, in MODERN INDIAN FAMILY LAW, *supra* note 12, at 295, 296–98.

45. See RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA 149–50 (2003).

46. See Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113, 169 (1997).

47. *Id.* at 133–34.

nationalist groups saw the abolition of personal laws as a step to assimilating religious minorities and thus pursued it with aggression.⁴⁸ Women's groups wanted the Uniform Civil Code to improve women's rights, and the Right wing wanted it to reduce minority men's privileges; together, they made strange bedfellows. Progressive women's groups that had traditionally championed the civil code retreated from their position when it became clear that the issue had largely been co-opted by the Hindu nationalists and made into a weapon against minority communities.⁴⁹ Nevertheless, the hope for a gender-just code that replaces personal law still burns, albeit dimly.

Because the realization of a Uniform Civil Code as stated in Article 44 of the Indian Constitution has become a near impossibility,⁵⁰ Indian courts are left in the thickets of religious law. In order to preserve reforms to personal law and uphold laws that conflict with religion, the Indian Supreme Court has taken a two-pronged approach. First, under Article 25(2)(b) of the Constitution, social reform takes precedence over religion, and the Supreme Court has deferred to the legislative branch when it enacts reforms for the good of the people.⁵¹ In other words, the Supreme Court can uphold a particular social reform, even when it infringes religious practice, if it is for the common good. The second approach that was adapted from U.S. free exercise jurisprudence is the "essentials of religion" test, in which the Supreme Court may deny constitutional protection to those practices that are not essential to the religion.⁵²

These two techniques that allow the Court to uphold social reform regardless of its impact on religion are reflective of the

48. *Id.* at 115–16.

49. *See* Choudhury, *supra* note 34, at 79.

50. I have written about this extensively, arguing that, given the political context of modern India and the symbolic importance of personal law as a marker of both difference and independent identity for Muslims, any move toward a uniform law will be vigorously resisted. However, this does not mean that the personal laws cannot be internally reformed. *See id.*

51. *See* INDIA CONST. art. 25, § 2. The Constitution states:

Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

52. *See* JACOBSON, *supra* note 20, at 97.

structure of Indian secularism, which Jacobsohn calls “ameliorative.”⁵³ It is ameliorative because it allows the state to use secularism and secular law as a tool to undo centuries of injustices and inequalities justified through religion.⁵⁴ The Indian judiciary, thus, sees its activism on behalf of social reform as entirely within the bounds of the constitutional framework envisioned by the architects of the Indian state. Despite the use of secularism to undo religiously sanctioned injustice, the state and the courts continue to accommodate *difference*, or pluralism, which is both a legal and cultural value in India.

It is important to stress that Jacobsohn’s categories are not airtight compartments. Rather, because of the heterogeneous and federal nature of both countries, there are multiple co-present tendencies at play. India certainly has an assimilationist bent when it comes to all Hindus regardless of their caste, language, or location, but India is accommodationist when it comes to Muslims. On the other hand, multiculturalism and the commitment to religious liberty have resulted in the accommodation of religious minorities in the United States.

Jacobsohn’s categories, however, are helpful as a framework for understanding the structural differences between India and the United States. India’s secularism allows significant “entanglement” between church and state, with the state administering religious law, while a similar role would be beyond the pale of U.S. judicial authority. Parts II and III below elaborate on the divergences and convergences in the legal accommodation of religion through a discussion on the regulation of polygamy.

II. ABOLITION V. ACCOMMODATION: THE CONTINUING CHALLENGE OF PLURAL MARRIAGES

Although secularism in India and the United States takes very different forms, both countries struggle with similar controversies in family law. These debates and conflicts mirror battles in the social sphere. The tension between traditional religious values and secularism can also be viewed as one between communal or group rights and individual rights. In

53. *Id.* at 91.

54. *Id.*

both countries, constitutionally protected individual liberties run up against the long-held traditions of the majority or the group, whether that is a family or religious community.⁵⁵ The debate surrounding polygamy exemplifies this tension, and the practice has most often been defended or demanded as part of the right to the free practice of religion in both countries. Religion is deployed as a shield to protect the practice of polygamy, pitting faith against claims of modernity, gender justice, and equality. The polygamy laws in the United States and India provide insight into how each legal system reconciles (or fails to reconcile) religion with personal and communal rights. Moreover, the arguments surrounding polygamy also implicate discourses about race and progress that have long been tributaries of this central debate.

In this Part, I describe the historical regulation of polygamy in both India and the United States. The purpose of this discussion is to illustrate the way in which the assimilationist secular framework in the United States led to a vigorous enforcement of a ban on bigamy. Indeed, the fear of Mormon political power in addition to Mormons' adherence to the practice of polygamy gave rise to the suppression of difference. In the United States, the dominant legal discourse still treats polygamy as a moral offense and takes an

55. For a discussion of India's conflict, see TAHIR MAHMOOD, *PERSONAL LAWS IN CRISIS* 6 (1986) (discussing the progression from the pre-constitutional era of personal law to the eventual uniform law and finding that, in the interim, "all laws enacted in the area of personal laws must conform to the provisions of Part III of the Constitution dealing with Fundamental Rights"). For a prime example of this conflict in a state court in the United States, see *State v. Green*, 99 P.3d 820 (Utah 2004). The *Green* court noted:

First, *Green* is not the first polygamist to launch an attack on the constitutionality of a law burdening the practice of polygamy. In 1878, polygamist George Reynolds challenged the constitutionality of the Morrill Antbigamy Act, which prohibited bigamy in all territories of the United States. Reynolds argued that he could not be found guilty under the law inasmuch as he believed that marrying more than one woman was his religious duty. The Supreme Court held that the law did not violate the Free Exercise Clause of the First Amendment, finding, in part, that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Otherwise, reasoned the Court, "professed doctrines of religious belief [would be] superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself." The Supreme Court reviewed the practice of polygamy, found it to be socially undesirable, and upheld Reynolds' bigamy conviction.

Id. at 825 (alterations in original) (citations omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

abolitionist/criminalization position, enforcing a singular moral vision uniformly.⁵⁶

In India, in contrast, the courts carefully navigate between honoring secular tendencies to reform religious personal law and accommodating minority religions. There is both an assimilationist *and* an accommodationist tendency. When the Indian courts have confronted constitutional challenges to positive laws that either permit or ban polygamy, they have been deferential to the legislature.⁵⁷ However, this deference extends only as far as upholding the statutes governing polygamy. In adjudicating the practice of polygamy, Indian courts are much more sensitive to differences in religious communities, the welfare of women and children, and the impact of criminal sanctions.⁵⁸

A. *The United States: Zero Tolerance for Polygamy*

It has become axiomatic that there is no “federal” family law in the United States despite the raft of legislation that touches upon the family. The growth in federal regulation in the last three decades in areas such as interstate child support and custody has fueled the perception that the federal government has embarked on the regulation of families. Depending on your perspective, this increased federalization is

56. For instance, those opposing same-sex marriage often couple it with polygamy as equally morally offensive. The argument typically goes that if we allow same-sex marriage, we are on the path to allowing polygamy. *See generally* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008); Eugene Volokh, *Same Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005). Similarly, Justice Scalia makes this “what next” point in his dissent in *Lawrence*, arguing that we are on a slippery slope toward no regulation of entry into marriage. *Lawrence v. Texas*, 539 U.S. 558, 588–92 (Scalia, J., dissenting). In the subsequent parts of this Article, when I refer to the abolitionist position, I mean a position that considers polygamy to be a moral evil that ought to be eradicated through the criminal law. Although this term is primarily used in conjunction with slavery, it is interesting to note the twin histories of polygamy and slavery, with the same groups of people historically advocating for the abolition of both, polygamy being described as a “form of slavery.” *See infra* notes 183–84 and accompanying text.

57. *See infra* notes 140–57 and accompanying text discussing *Narasu Appa Mali*. In that case, the court noted the legislature’s authority to regulate for the social good.

58. *See infra* notes 228–32 and accompanying text.

either a cause for concern or celebration.⁵⁹ However, even a cursory familiarity with the history of polygamy in the Mormon community shows that there was a time in the 1800s when the federal government was heavily involved in regulating family form. Of course, there were other motives for the anti-polygamy regulations that I will discuss briefly below;⁶⁰ nevertheless, the foray into family law by the federal government is often overlooked in family law texts and by scholars.

From the mid-1800s to the turn of the century, the federal government passed a raft of legislation aimed at curbing the Mormon Church's financial and political power and its practice of polygamy. The first salvo in the war on polygamy was the Morrill Anti-bigamy Act of 1862.⁶¹ The Morrill Act criminalized bigamy and reintroduced mortmain laws restricting the amount of property that the Mormon Church could own in any territory of the Union to a value of \$50,000.⁶² The Morrill Act went largely unenforced "due to difficulties establishing proof of a second marriage without public or church records, uncooperative Mormon witnesses, and Mormon control of the Utah judiciary."⁶³ This ineffectual regulation was supplemented by the Poland Act of 1874.⁶⁴

The Poland Act limited the control of the judiciary by the Mormon Church.⁶⁵ Utah state courts were deprived of jurisdiction over civil and criminal cases, which were instead tried in federal district courts.⁶⁶ After the passage of the Poland Act, the Morrill Act was challenged in the *Reynolds* case discussed below.⁶⁷

59. See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 133–35 (2009).

60. See *infra* notes 80–94, 98–101 and accompanying text.

61. Morrill Anti-bigamy Act of 1862, ch. 126, 12 Stat. 501 (repealed 1910).

62. SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 81–82 (2002). "Mortmain" is defined as

[t]he condition of lands or tenements held in perpetuity by an ecclesiastical or other corporation. Land alienated in mortmain is not inalienable, but it will never escheat or pass by inheritance (and thus no inheritance taxes will ever be paid) because a corporation does not die.

BLACK'S LAW DICTIONARY 1105 (9th ed. 2009).

63. Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 294 n.26 (2010).

64. Poland Act of 1874, ch. 469, 18 Stat. 253.

65. See GORDON, *supra* note 62, at 111–13.

66. See Poland Act § 3.

67. See *infra* notes 74–86 and accompanying text.

Despite being upheld as constitutional, the Morrill and Poland Acts failed to curb the practice of polygamy. The next piece of legislation that sought to redress that defect was the Edmunds Act of 1882.⁶⁸ This law criminalized cohabitation, punishing it with a fine of \$300 (a very steep fine equivalent to approximately \$6,600 in current terms⁶⁹) or six months in prison. The law also disqualified polygamists and believers in polygamy from serving on juries⁷⁰ and barred polygamists from voting or holding public office.⁷¹

Unfortunately for the federal authorities, the Edmunds Act was just as ineffective at stamping out polygamy as the Morrill and Poland Acts. The final attack on polygamy came with the Edmunds-Tucker Act of 1887.⁷² This was the most severe of the laws passed to date, and Martha Ertman summarizes:

This law eliminated evidentiary obstacles in polygamy prosecutions, allowed the state to compel wives to testify against their polygamous husbands, allowed adultery prosecutions to be instituted by the state rather than the spouse, required registration of every “ceremony of marriage, or in the nature of a marriage ceremony,”

68. See GORDON, *supra* note 62, at 152–55. For an interesting article reporting on the Supreme Court decision upholding the Edmunds Act, see *The Anti-polygamy Law—Its Constitutionality Upheld by the Supreme Court*, N.Y. TIMES (Mar. 24, 1885), <http://query.nytimes.com/mem/archive-free/pdf?res=9D05E6DC1030E433A25757C2A9659C94649FD7CF>.

69. See MEASURING WORTH, <http://www.measuringworth.com/uscompare> (last visited Dec. 7, 2011) (enter 1882 for “Initial Year,” \$300 for “Initial Amount,” and 2010 for “Desired Year”).

70. Edmunds Act of 1882, ch. 47, § 5, 22 Stat. 30, 31.

71. *Id.*; see also GORDON, *supra* note 62, at 152–55. In *Davis v. Beason*, the U.S. Supreme Court upheld a law passed by Idaho prohibiting polygamists and proponents of polygamy from holding public office. Samuel D. Davis was indicted under the law for attempting to procure himself along with other disqualified parties as electors of the County of Oneida. 133 U.S. 333, 334, 347–48 (1890). The Court, following its prior jurisprudence, made a distinction between free belief and religiously sanctioned practice that conflicts with government criminal laws:

It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as “religion.”

Id. at 345.

72. See GORDON, *supra* note 62, at 196–98.

federalized the probate courts, disinherited the children of polygamists, re-established dower to assert the power of the first wife in a plural marriage, disenfranchised Utah woman [sic], and placed schools, districting, and the territorial militia known as the Nauvoo Legion under federal control. But most importantly, the Edmund-Tuckers [sic] Act reaffirmed the Morrill Act's revocation of the Mormon Church's corporate status and directed the Attorney General to wind up the corporation's affairs and seize Church property.⁷³

While these acts were being legislated, Mormons mounted challenges to their constitutionality. The often-cited, seminal case dealing with polygamy in the United States is *Reynolds v. United States*.⁷⁴ The test case was brought after the enactment of the Poland Act and challenged the constitutionality of the Morrill Act.⁷⁵

Reynolds is a familiar case to First Amendment and family-law scholars because the Court was confronted for the first time with the task of reconciling the claim to freedom of religion and the state's disapprobation of polygamy. Mr. Reynolds, a practicing Mormon, was convicted of bigamy for entering into a plural marriage and challenged the criminal law on First Amendment grounds.⁷⁶ One of the questions presented in the case was whether the accused should have been "acquitted if he married the second time, because he believed it to be his religious duty."⁷⁷ The Court categorically answered negatively.⁷⁸

The Court found that the state may criminalize behavior and action that was subversive of "good order."⁷⁹ Monogamy was ideologically linked to the societal structure that the state was meant to preserve.⁸⁰ And it was polygamy that threatened

73. Ertman, *supra* note 63, at 294–95 n.26 (citation omitted) (quoting Edmunds-Tucker Act of 1887, ch. 397, 24 Stat. 635, 636 (repealed 1978)).

74. 98 U.S. 145 (1878).

75. See GORDON, *supra* note 62, at 97.

76. *Reynolds*, 98 U.S. at 164–67.

77. *Id.* at 153.

78. *Id.* at 162.

79. *Id.* at 167 ("To permit [a defense of religious belief against criminal conviction] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.")

80. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1261–63 (2010).

the secular, political institution of democracy, as Alice Ristroph and Melissa Murray note:

Moreover, if monogamous marriage was the foundation “[u]pon [which] society may be said to be built,” children raised in polygamy would be dangerously ignorant of the “social relations and social obligations and duties” associated with monogamy. Their understanding of the “family,” that critical unit of society and democracy, would be shaped by the norms and values more familiar to “Asiatic and . . . African people.” And perhaps most troubling of all, through the power of reproduction, polygamy would expand with each successive generation of Mormons to the point that polygamous families could eventually disrupt the predominance of the monogamous marital family.⁸¹

The Court in *Reynolds* made a distinction between sincere belief and action. While the former could be respected as a matter of conscience, action or practice could be circumscribed when there were higher values like democracy and societal order at stake.⁸² The Court also added that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.”⁸³ The Court insinuated that this form of family was unjust to women, a thread that was later taken up by abolitionists using the concern for women and children to justify criminalization.⁸⁴

The Court linked the form of marriage to the viability of the state itself. If the state were to refrain from applying criminal sanctions against polygamists because of the defense of religious obligation, “every citizen [would] become a law unto himself.”⁸⁵ The Court underscored the limits of tolerance by giving the example of human sacrifice, a practice that the Court would not tolerate regardless of whether it was an obligation of a religious group.⁸⁶ However, the Court’s concern about polygamy’s impact on the state hides the Court’s real

81. *Id.* at 1262–63 (alterations in original) (footnotes omitted) (quoting *Reynolds*, 98 U.S. at 164–65).

82. *Reynolds*, 98 U.S. at 167.

83. *Id.* at 166.

84. *Compare id.*, with *State v. Green*, 99 P.3d 820 (Utah 2004).

85. *Reynolds*, 98 U.S. at 167.

86. *Id.* at 166.

concern about the Mormon Church and its political and economic power in general.

Tracing the history of the Mormon Church's interaction with the state, David Chambers has shown that Mormons encountered resistance from the Protestant majority well before they began to engage in polygamy.⁸⁷ The Protestants saw the Mormons' existence as a political threat, resulting in increasing amounts of regulation and violence.⁸⁸ Despite very little evidence supporting the Protestants' stereotypical claims of immorality, violence, and subordination of women and children, Congress continued to pass laws to regulate Mormons. Moreover, in decisions like *Mormon Church v. United States*, the Court routinely upheld the constitutionality of laws which went so far as to allow seizure of church assets and disestablishment.⁸⁹

In the *Mormon Church* decision, the Court made a number of incredible assertions:

The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.⁹⁰

Use of terms such as "barbarism" and the overt reference to Christianity as the litmus test of civilization is rare in Supreme Court decisions today.

Further, in *Cleveland v. United States*, the Court held that polygamous practices fall within the purview of the Mann Act's prohibition of the transportation of women and girls across

87. See Chambers, *supra* note 56, at 61–74 (detailing the history of governmental regulation of polygamy).

88. *Id.*; see also *Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (holding that the Mormon Church's property could be seized and that the Church could be disincorporated because of its adherence to the practice of polygamy made illegal by federal law).

89. See *Latter-Day Saints*, 136 U.S. at 49; see also Chambers, *supra* note 56, at 65.

90. *Latter-Day Saints*, 136 U.S. at 49.

state borders “for the purpose of prostitution or debauchery, or for any other immoral purpose.”⁹¹ Similar to prior cases, Justice Douglas opined that a defense of sincere religious belief against the Mann Act “would place beyond the law any act done under claim of religious sanction.”⁹² He also somewhat gratuitously remarked that polygamous households are a “notorious example of promiscuity.”⁹³ The overt privileging of the dominant religion would obviously not stand now, but, at the time, the Court had no qualms about voicing its prejudice and incorporating the vernacular of civilization.⁹⁴

In the cases that came after the turn of the twentieth century, the sharp distinction between belief and practice somewhat eroded. The Court conceded that state infringement

91. *Cleveland v. United States*, 329 U.S. 14, 16 (1946) (quoting White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 826 (1910)).

92. *Id.* at 20. The Court held:

[I]t has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. Whether an act is immoral within the meaning of the statute is not to be determined by the accused’s concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.

Id. (citation omitted).

93. *Id.* at 19.

94. It is interesting to note the evolution of “morality” and the deference to Congressional definitions of such concepts in the Court’s jurisprudence. While religious belief still provides no shelter from prosecution, morality is no longer an adequate rationale for legislation without some other basis. For instance, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that disapprobation of a particular minority alone would not provide the legislature with a rational basis for carving it out of antidiscrimination laws:

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”

Id. at 634 (second and third alterations in original) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Further, in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court opined:

[T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . [But the] issue before us is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Lawrence, 539 U.S. at 571 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).

on certain practices, regardless of whether it was justified as a necessity to ensure good order or democracy, was a violation of the First Amendment.⁹⁵ For instance, in *Wisconsin v. Yoder* and *Pierce v. Society of Sisters*, the Court held that infringing upon parents' rights to not send their children to public school or to choose religious education instead of public education violated the Free Exercise clause of the First Amendment.⁹⁶ If one concedes that public education is as important as family form in creating a citizenry with shared values, these cases clearly pulled back from *Reynolds* and revealed the weakness of the *Reynolds* argument. *Cleveland*, decided temporally between *Pierce* and *Yoder*, saw a return of *Reynolds*' reasoning that belief and practice must be differentiated. This culminated in *Employment Division v. Smith*, in which the Court further clarified that any neutral law of general applicability will not fail even if it burdens religious exercise as long as the law is not targeted specifically toward that religious exercise.⁹⁷

Anti-polygamy laws did not ostensibly target Mormons as a group for their religious beliefs, or so the argument went. Rather, historically Congress aimed the laws at the preservation of Protestant Christian morality, the protection of women and children, and the promotion of a shared set of civic values.⁹⁸ In more recent times, the Court has upheld laws prohibiting bigamy because it offends "public policy."⁹⁹ In

95. For instance, in several cases, the Court held that the state could not infringe on parental rights to educate their children according to religious belief. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). The fact that public education is a very important means by which a citizenry is trained to share values seems to undercut the rationale put forth in *Reynolds*.

96. *Yoder*, 406 U.S. at 234; *Pierce*, 268 U.S. at 534–35.

97. *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'") (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

98. See *Cleveland v. United States*, 329 U.S. 14, 19 (1946); *Davis v. Beason*, 133 U.S. 333, 345 (1890); *Reynolds v. United States*, 98 U.S. 145, 168 (1878).

99. Any scholarship on the history of federal regulation of polygamy is inevitably indebted to the work of Sarah Barringer Gordon. In her book *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA*, she traces the evolution of federal regulation to show how the federal government was indeed very concerned about the growing power of Mormons. The fact that they as a separate community would have control over an entire state was cause for deep anxiety. Polygamy laws were a way to reign in Mormons for a practice that was largely viewed negatively. The court cases that were brought enforcing polygamy say nothing about Mormonism or its political

reality, the history of the legal enactments against the Mormon Church reveals that these laws were primarily targeted at a church that unsettled the dominant religious establishments with its political, economic, and territorial power.¹⁰⁰ The ongoing pressure to discipline the Mormon Church did have some effect. The Church elders officially repudiated “celestial marriage” or polygamy in 1890.¹⁰¹ The declaration of the end of polygamy as a religious principle or obligation saw only a formal end in doctrine. Yet, this was not the end of the practice or the story.

As the practice continued, so did the pursuit of polygamists. The definitive assault on the Mormon Church came in 1953 when the Governor of Arizona authorized a massive raid on Short Creek, a town on the border between Arizona and Utah, in order to rescue the women and children of a polygamous community.¹⁰² In the prosecution of the Black family, captured in that raid, the government asserted that the children were inadequately fed and clothed; however, the government was unable to prove these charges.¹⁰³ Ultimately, the children were removed because the court found the children to have been neglected based on the family’s polygamous lifestyle.¹⁰⁴ The Utah Supreme Court upheld the removal, with Justice Worthen asserting that the juvenile court had been “too

power generally. Rather, the cases again and again refer to morality and the civic impact of such practices. See GORDON, *supra* note 62, at 3–15, 81–83, 135. Although morality has gone out of fashion in terms of being the basis for what is essentially “morals legislation,” the reason that anti-polygamy bans are upheld and that foreign polygamous unions are not given comity is usually public policy. See, e.g., CAL. PENAL CODE §§ 281–284 (West 1872); FLA. STAT. § 826.01 (1868); N.Y. PENAL LAW § 255.15 (McKinney 1965); *State v. Holm*, 137 P.3d 726, 754–55 (Utah 2006) (Nehring, J., concurring); *State v. Green*, 99 P.3d 820, 829–30 (Utah 2004).

100. The various federal enactments contain not just criminal sanctions for the practice of polygamy but also measures weakening the Mormon Church and its adherents. For a discussion of federal acts and prohibitions on voting, serving on juries, holding public office, and attempts at curbing property holdings and disestablishment of the Mormon Church, see *supra* notes 61–67 and accompanying text.

101. PATRICK Q. MASON, *THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH* 18 (2011).

102. Short Creek, Arizona sits on the border of Utah and Arizona and has continued to be a polygamous stronghold. It is now two towns, Colorado City on the Arizona side and Hildale on the Utah side. In the aftermath of the raid, both Arizona and Utah prosecuted the polygamists. See generally MARTHA SONNTAG BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* (1993).

103. *Id.* at 168–74.

104. *In re Black*, 283 P.2d 887, 910–11 (Utah 1955).

lenient” because it had left open the possibility of returning the children to the parents if they reformed, that is to say, eschewed polygamy.¹⁰⁵ As one commentator observed, Justice Worthen “would have preferred to sever parental rights so that the children could be brought up ‘as law-abiding citizens in righteous homes.’”¹⁰⁶

After the disastrous failure of the Short Creek encounter, which produced a societal backlash and raised sympathy for the polygamists, prosecutions subsided.¹⁰⁷ Polygamy prosecutions rose once again in the late 1990s and the 2000s, primarily as a result of the involvement of young girls in child marriages.¹⁰⁸ More recent prosecutions of what are now fringe elements of the Mormon Church are in line with the dominant abolitionist position.¹⁰⁹

In *State v. Holm*, the Utah Supreme Court upheld the conviction of a polygamist for violating the state law prohibiting people from “purporting to marry” or cohabiting with a woman while being married to another.¹¹⁰ The case involved a man who had married one woman legally and two others in religious ceremonies. One of the “informal” wives was the sister of his legal wife and was a minor at the time.¹¹¹ Certainly, laws sanctioning sex with a minor would have

105. *Id.* at 913.

106. Chambers, *supra* note 56, at 69 (quoting *Black*, 283 P.2d at 913).

107. See Neil J. Young, *Short Creek's Long Legacy*, SLATE (Apr. 16, 2008, 1:15 PM), http://www.slate.com/articles/life/faithbased/2008/04/short_creeks_long_legacy.2.html.

108. *Id.* Polygamist sects of the Mormon Church have been in the news more recently with the prosecution of Warren Jeffs, the leader of the Fundamentalist Church of Jesus Christ of the Latter-Day Saints. See, e.g., Lee Benson, *Texas Raid Has Opened Can of Worms*, DESERET NEWS (Apr. 20, 2008, 12:24 AM), <http://www.deseretnews.com/article/695272068/Texas-raid-has-opened-can-of-worms.html>; *Texas: Polygamist Leader Convicted*, N.Y. TIMES (Aug. 4, 2011), <http://www.nytimes.com/2011/08/05/us/05brfs-Texas.html>.

109. See, e.g., *State v. Jeffs*, 243 P.3d 1250 (Utah 2010); *State v. Holm*, 137 P.3d 726 (Utah 2006); *State v. Green*, 99 P.3d 820 (Utah 2004).

110. *Holm*, 137 P.3d at 732 (“*Holm* was convicted pursuant to Utah’s bigamy statute, which provides that ‘[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.’”) (alteration in original) (quoting UTAH CODE ANN. § 76-7-101 (West 2003)).

111. *Id.* at 730. *Holm* married Suzie Stubbs in a legal ceremony and Wendy Holm in a religious ceremony. He then married Ruthie Stubbs, sister to Suzie, when she was sixteen. He was prosecuted under the bigamy statute and also charged with unlawful sexual conduct with a sixteen- or seventeen-year-old. *Id.*

adequately punished Mr. Holm in this case; however, he was also convicted of violating the polygamy ban.¹¹²

Mr. Holm's subsequent challenge on constitutional grounds followed the well-traveled arguments based on the right to privacy. The Utah Supreme Court was unsympathetic to claims that informal marriages should not be regulated because they seek no state recognition.¹¹³ The case is particularly important because it punished informal polygamous relationships when there was only one legal marriage. No privacy right was found to protect the consensual, adult relationships in the de facto polygamous household.¹¹⁴

112. *Id.*

113. *Id.* at 732–33. The court was very unsympathetic to a strictly formalist reading of the statute. Holm's contention that no party was under any illusion that the marriages subsequent to the first legal marriage would receive any state recognition did not help him escape the reach of the statute. Rather, the court looked at the reality behind the ceremonies and applied a substantive approach to its analysis of marriage:

Specifically, Holm argues that he did not “purport to marry” Ruth Stubbs, as that phrase is used in the bigamy statute, because the word “marry” in subsection 76-7-101(1) refers only to legal marriage and neither Holm nor Stubbs contemplated that the religious ceremony solemnizing their relationship would entitle them to any of the legal benefits attendant to state-sanctioned matrimony. Second, Holm argues that his conviction under the bigamy statute was unconstitutional as applied in this case because it unduly infringes upon his right to practice his religion, as guaranteed by our state constitution. Third, Holm argues that his conviction under the bigamy statute was unconstitutional under the federal constitution. Fourth, Holm argues that the trial court improperly excluded expert testimony that was offered to rebut the State's characterization of polygamous culture.

We reject each of these arguments. The “purports to marry” language contained in the bigamy statute is not confined to legal marriage and is, in fact, broad enough to cover the type of religious solemnization engaged in by Holm and Stubbs. We further conclude that the ability to engage in polygamous behavior is expressly excepted from the religious protections afforded by our state constitution. We are also unpersuaded that the federal constitution mandates that the states of this union tolerate polygamous behavior in the name of substantive due process or freedom of association. Additionally, in the face of controlling United States Supreme Court authority, we are constrained to conclude that the federal constitution does not protect Holm from bigamy prosecution on religious freedom grounds. Finally, we conclude that the trial court did not abuse its discretion by excluding Holm's proffered expert testimony because the testimony was not directly related to the questions before the jury and may have confused or distracted the jury.

Id.

114. *Id.* at 743. The Court distinguished Holm's case from *Lawrence v. Texas* in two ways. First, marriage has a public character and as such cannot be considered to be a wholly private consensual act. Second, Holm's case involved a minor,

While the case raises questions about the extent of state power in regulating private, consensual, adult sexual activity—both spatial and decisional privacy rights thought to be safe after *Lawrence v. Texas*—it is fully in line with the troubling history of polygamy abolitionism and the majoritarian disgust for the institution. As I noted above, polygamy was not the sole concern driving the persecution of Mormons; there were also political reasons for the aggressive approach taken by the state that concerned the regional power of the Mormon Church.

Nathan Oman has argued that *Reynolds* should be read as part of an imperial project of building the American empire in the Reconstruction period.¹¹⁵ By tying the practice of polygamy to Asiatic and African races, the *Reynolds* court was positioning itself as part of a civilizing force and equating the Mormons with the less evolved “barbarians.”¹¹⁶ The Court then went on to reinforce this characterization, asking “if a wife religiously believed it was her duty to burn herself upon the funeral pile [sic] of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?”¹¹⁷ Oman argues that this was not simply a glib comparison to Hinduism’s practice of *sati* or widow immolation but that

[i]t was a jurisprudential reference with a long history in the anti-polygamy battles. At the heart of this reference was a two-step move. First, the Mormons were conceptualized as a foreign race akin to the inhabitants of the Indian subcontinent, and second, the federal rule in territorial Utah was likened to the British Raj in India, bringing civilization through law to the benighted masses over whom it ruled.¹¹⁸

Having equated Mormons with an alien people complete with barbaric practices, odd biological functions, and lascivious

which immediately placed it in a different category from the conduct at issue in *Lawrence*. *Id.* at 743–44.

115. See Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 666–67 (2011).

116. See *id.* at 698–702.

117. *Reynolds v. United States*, 98 U.S. 145, 166 (1878); see also Oman, *supra* note 115, at 664–67.

118. Oman, *supra* note 115, at 681.

natures, the state put itself in the position of the civilizer and law-bringer.¹¹⁹

Indeed, as Martha Ertman argues, the Mormon difference was worse because it was also race-traitorous.¹²⁰ While the Asiatic, African, and Islamic practices of polygamy were considered barbaric, they were also considered natural to those races and beliefs.¹²¹ Mormons as white men were acting against their nature and their race. The practice of polygamy placed them on the same footing as Hindus and Muslims, where *sati* and polygamy were normal. Women from those communities were thought to be trained for it, while Mormon women were subjugated into the other “peculiar institution.”¹²² The anti-polygamists argued that they were in the same position of the Raj in banning *sati*.¹²³ Oddly, while some in the decriminalization camp argued that the comparison was inapposite because the British Raj did not ban polygamy (*sati* is quite a different practice in its impact on the practitioners) and that it did not consider it a contravention of divine law, that argument had no traction.¹²⁴

While the state was key in pursuing and prosecuting Mormon polygamists, much of the social impetus to support such regulation came from abolitionist women who knew next to nothing about the real lives of polygamous women, and whose information was taken from “refugees” of Mormon polygamy.¹²⁵ The rise of the anti-polygamist novel fueled the

119. See Ertman, *supra* note 63, at 308 (“Again and again, commentators from high culture (media and legal experts mainly) and popular culture (cartoonists and authors of magazine articles) portray Mormons as barbaric, lascivious, despotic, disorderly, foreign, Black, Asian, and/or childish.”).

120. *Id.* at 288–90.

121. *Id.* at 313.

122. See GORDON, *supra* note 62, at 55 (discussing the close links between polygamy and slavery abolitionism).

123. See Oman, *supra* note 115, at 695–96.

124. See *id.* The Indian Penal Code of 1860 criminalizes polygamy for communities in which it is religiously prohibited. Thus, for Hindus and Muslims whose religious traditions countenance polygamy, there is no sanction. In a peculiar mirroring, Hindus in Bangladesh and Pakistan can marry an unlimited number of wives but Muslims are restricted to no more than four. In India, Hindus can no longer marry more than one wife legally. See *infra* note 132 and accompanying text.

125. See GORDON, *supra* note 62, at 30 (“In the 1850s, fiction was a valuable tool for bringing home to readers the fear of betrayal and spiritual desolation that novelists claimed were the consequences of polygamy.”). See generally Leonard J. Arrington & John Haupt, *Intolerable Zion: The Image of Mormonism in Nineteenth Century American Literature*, 22 W. HUMAN. REV. 243 (1968); Karen

fantasy that women were either being forced into lives of virtual slavery or seduced by notions of sexual freedom into lives of whoredom.¹²⁶ The victimization of women was and continues to be a key element to the abolitionist argument.¹²⁷ Politicizing victimization, the writers of the nineteenth century also argued that democracy could only flourish in a monogamous household where fidelity to one partner was the norm.¹²⁸ They argued that polygamy, akin to adultery, was a faithless institution leading to despotism (as evidenced, according to these writers, by the actions of the Mormon Patriarchs).¹²⁹

In this history of the federal regulation of marriage, we see the kind of conscriptional secularism described above at work. The idea that Mormon difference could be accommodated was met with the fear that the difference would entirely undermine the state, and that the courts had to strictly impose “shared” civic values and punish transgressions through criminal law. American identity is forged through assimilation or the privatization of difference within certain constraints. *Lawrence v. Texas* may have sparked conversations about both spatial and decisional privacy with regard to adult, consensual sexual relationships, but as *State v. Holm* shows, it did not puncture the abolitionist armor when it comes to the public regulation of

Lynn, *Sensational Virtue: Nineteenth-Century Mormon Fiction and American Popular Taste*, DIALOGUE, Autumn 1981, at 101.

126. See GORDON, *supra* note 62, at 29–40. Some examples of anti-polygamist novels are ORVILLA S. BELISLE, *THE PROPHETS; OR, MORMONISM UNVEILED* (Phila., Wm. White Smith 1855); ALFREDA EVA BELL, *BOADICEA; THE MORMON WIFE: LIFE-SCENES IN UTAH* (Baltimore, Arthur R. Orton 1855); METTA VICTORIA FULLER, *MORMON WIVES; A NARRATIVE OF FACTS STRANGER THAN FICTION* (N.Y.C., Derby & Jackson 1856); and MARIA WARD, *FEMALE LIFE AMONG THE MORMONS; A NARRATIVE OF MANY YEARS' PERSONAL EXPERIENCE* (N.Y.C., J.C. Derby 1855).

127. See, e.g., PARASHAR, *supra* note 9, at 136.

128. See sources cited *supra* note 126.

129. As Illinois State Representative Shelby Moore Collum said in 1870:

Polygamy . . . is regarded by the civilized world as opposed to law and order, decency and Christianity, and the prosperity of the state. Polygamy has gone hand [in] hand with murder, idolatry, and every secret abomination. . . . Instead of being a holy principle, receiving the sanction of Heaven, it is an institution founded in lustful and unbridled passions of men, devised by Satan himself to destroy purity and authorize whoredom.

PHILIP L. KILBRIDE, *PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION?* 70 (1994) (quoting 8 M. MILLER, *GREAT DEBATES IN AMERICAN HISTORY* 443 (1913)).

marriage.¹³⁰ Even the privatization of this practice, in which adults consent to enter a polygamous union and where none is harmed, is beyond accommodation when marriage is itself defined in law through the dominant cultural and religious tradition.¹³¹

B. *India: Reform and Accommodation*

The tendency toward abolition of polygamy is also present in India. This tendency has existed since the colonial period when the imperial authority attempted to define family law in order to simplify and ease the administration of a complex, heterogeneous population. The British imperial administration formally banned polygamy in the Indian Penal Code of 1860 for those communities in which it was not a traditional practice.¹³² The British made an exception for Hindus and Muslims whose personal laws recognized plural marriages as valid.¹³³ While the British were interested in reforming Hindu law and did so, the Indian Rebellion of 1857 made the British reformers question whether the beneficiaries of these laws would meekly allow their traditions and religious beliefs to be reformed from the outside without protest.¹³⁴ Moreover, family form was of lesser concern than more serious social issues like *sati* or widow remarriage.¹³⁵ On the other hand, the British considered

130. See *supra* note 110 and accompanying text.

131. Recent polygamy scholarship has pressed this point. The idea that polygamy inevitably results in the perpetuation of gender inequality has been challenged. Moreover, despite complementarity's many critics, even in monogamy, there are proponents of that arrangement between the sexes rather than equality, the idea being that partners in a marriage may arrange the division of labor in the family in a manner that best suits them. However, one must be cautious about such doctrines where they attempt to hide a reversion to stereotypical gender roles and constrain the choice of partners into what is considered "appropriate" roles. See, e.g., Davis, *supra* note 15; see also Michele Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L.J. 3, 14, 28 (2007).

132. INDIA PEN. CODE (1860), ch. XX, art. 494; Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).

133. See PEN. ch. XX; see also W. MORGAN & A.G. MACPHERSON, THE INDIAN PENAL CODE, (ACT XLV OF 1860,) WITH NOTES 433 (Calcutta, G.C. Hay & Co. 1861) (noting that the Code prohibited polygamy in those religions in which it is not supported by tradition).

134. See Choudhury, *supra* note 34, at 54–56.

135. See Varsha Chitnis & Danaya Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, 64 WASH & LEE L. REV. 1315, 1323–24 (2007).

Muslim law to be more progressive and did not meddle in quite the same manner with that community.¹³⁶

Werner Menski argues that the modernist factions within Indian society working at the state level before independence were the impetus for reform of polygamy.¹³⁷ Indeed, the nascent women's organizations that were starting to work on the advancement of Indian women were a key group that pushed for the legislation at the state level. The principality of Baroda was the first state to formally ban polygamy after receiving support from the Hindu religious establishment.¹³⁸ Polygamy abolition then took place in a piecemeal fashion, with other states following. The Bombay Prevention of Hindu Bigamous Marriages Act of 1946 is perhaps the most well-known enactment that preceded the federal legislation post-independence.¹³⁹ The case testing that enactment's validity has become a cornerstone of polygamy jurisprudence in India.

In *Narasu Appa Mali*, the High Court of Bombay was faced with a constitutional challenge to the Bombay legislation.¹⁴⁰ In its decision, the court came to a conclusion similar to that of *Reynolds* and *Cleveland* in upholding the criminalization of bigamy for Hindus.¹⁴¹ However, the court also found that the prohibition did not violate equal protection by treating Hindu males differently from Muslim males.¹⁴² The case is intriguing because the justices had the unenviable task of reconciling support for the ban for the Hindu population—despite ample evidence that polygamy is a religiously sanctioned practice—while arguing that no such ban was required for Muslims.

In *Narasu Appa Mali*, a Hindu man was criminally convicted of violating the Bombay Prevention of Hindu Bigamous Marriages Act 1946.¹⁴³ He challenged the law, claiming that it was a violation of his fundamental rights guaranteed by Articles 14, 15, and 25 of the Indian Constitution.¹⁴⁴ The High Court of Bombay, citing the U.S.

136. See Flavia Agnes, *Economic Rights of Women in Islamic Law*, 31 *ECON. & POL. WKLY.* 2832, 2832–33 (1996).

137. See WERNER F. MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* 383–89 (2003).

138. *Id.* at 385.

139. *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84, ¶ 18 (India).

140. *Id.*

141. *Id.* ¶¶ 11, 15.

142. *Id.* ¶¶ 8–12.

143. *Id.* ¶¶ 1, 16.

144. *Id.* ¶¶ 3–8.

Supreme Court's decision in *Davis v. Beason*,¹⁴⁵ held that a "sharp distinction must be drawn between religious faith and belief and religious practices."¹⁴⁶ The High Court of Bombay held that under Article 25(a)(b), the state is empowered to change the personal laws of Hindus as a measure of social reform.¹⁴⁷ In fact, the Act did not discriminate against Hindus because they were the beneficiaries of a positive reform toward progress and modernity.¹⁴⁸ The counterargument—that if Hindus are given this benefit, then denying Muslims the same would amount to discrimination against Muslims—was unavailing. The Court reasoned that in the Muslim community, "polygamy is recognised as a valid institution,"¹⁴⁹ and that the Indian Constitution recognizes distinct communities and different conceptions of marriage and divorce among religious groups. Whereas a social reform might be advisable for one community, other communities may not be ready for it.¹⁵⁰

At least in this decision, the formal persistence of polygamy is the only intimation that Muslim difference amounts to a lack of progression into modernity. The High Court of Bombay did not indulge in the kind of disparaging dicta that the U.S. Supreme Court did in its early polygamy cases.¹⁵¹ Though the characterization of the bigamy law (a benefit to the Hindu community) may seem very convenient and somewhat peculiar, the decision shows an understanding of social facts that the state may take into consideration when devising its reform agenda. The High Court of Bombay

145. *Id.* ¶ 5. In *Davis v. Beason*, the U.S. Supreme Court upheld laws that restricted the ability of polygamists to hold public office. 133 U.S. 333, 345 (1890). In the Indian context, a similar case arose in *Javed v. State of Haryana*, in which a Muslim man challenged a law prohibiting a person with more than two children from running for political office. In the case, the Supreme Court of India held that population control was a key government interest and that even though the law might disparately impact polygamous Muslim men who are likely to have more than two children and also women who might not be able to fully control their reproduction, the law was constitutional. *Javed v. State of Haryana*, A.I.R. 2003 S.C. 3057, ¶¶ 18, 44, 60 (India).

146. *Narasu Appa Mali*, A.I.R. 1952, ¶ 5.

147. *Id.* ¶ 13.

148. *Id.*

149. *Id.* ¶ 10.

150. *Id.*

151. For instance, in U.S. jurisprudence, ongoing moral condemnation of practitioners of polygamy as "promiscuous" and destructive of the fabric of social life and law and order is common. See *supra* notes 79–85 and accompanying text.

recognized that the incremental approach taken by the state is a result of diversity within the state.¹⁵²

Regarding the claim that polygamy is a form of sex discrimination, Justice Gajendragadkar asserted in his concurrence in *Narasu Appa Mali* that a law permitting polygamy is not sex discrimination within the ambit of Article 15(1) unless the basis for discrimination is sex alone and refers to no other “reasonable ground.”¹⁵³ Marriage as a social institution is a result of contemporary conditions; it reflects the “natural” differences between sexes, and considerations may legitimately arise from these differences.¹⁵⁴ Unfortunately, the justice did not go on to explain how the differences undergirding polygyny are legitimate in a modern state with a constitutional guarantee of sex equality (should there be polyandry?) without resorting to some sort of biological difference argument.

In contrast to *Reynolds*'s dubious concern for women, the Bombay High Court was unconcerned about the claimed unequal treatment of Muslim women as “victims” of polygamy.¹⁵⁵ The Court, however, recognized that Hindu women would not be forthcoming in prosecuting their husbands. As such, the anti-bigamy law had to be crafted to be cognizable and non-compoundable and thereby not reliant on wives' complaints.¹⁵⁶ This would allow the police to enforce the

152. See *Narasu Appa Mali*, A.I.R. 1952, ¶ 10. Chief Justice Chagla noted: One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Article 11 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise.

Id.

153. *Id.* ¶ 24 (Gajendragadkar, J., concurring).

154. *Id.*

155. The issue of sex discrimination is cursorily treated in one paragraph at the very end of the majority opinion and is simply dismissed as irrelevant. See *id.* ¶ 14 (majority opinion).

156. See *id.* ¶ 11. A cognizable offense is one in which the police can institute an investigation and file a First Information Report without a court order and arrest without a warrant, typically for serious crimes. A non-compoundable offense is one that cannot be settled privately. INDIA CODE CRIM. PROC. ch. 1, § 2 (1973) (defining different types of offenses). The Bombay Prevention of Hindu Bigamous Marriages Act, No. 25, Acts of Parliament, 1946 (India), was superseded by the Hindu Marriage Act of 1955, No. 25, Acts of Parliament, 1955 (India), and the Indian Code of Criminal Procedure of 1973, section 494 makes the offense bailable (punishable by seven years' imprisonment or fewer), non-cognizable (requiring a warrant issued by the court), and compoundable, except in

bigamy laws without the help of wives. While the succeeding legislative acts have made the nature of the crime less severe by only prosecuting the violation if a wife complains, subsequent cases at the state level have repeatedly upheld the polygamy ban for Hindus while finding it permissible for Muslims.¹⁵⁷ In sum, *Narasu Appa Mali* has become the definitive case upholding the validity of the dual treatment of polygamy in India.

In the years after independence, the Indian federal legislature banned polygamy for the Hindu majority.¹⁵⁸ The Hindu Marriage Act of 1955 (HMA) formally abolished polygamy for the Hindu community throughout the Indian territories.¹⁵⁹ The HMA provides:

A marriage may be solemnized between any two hindus, if the following conditions are fulfilled, namely:-

- (i) neither party has a spouse living at the time of the marriage¹⁶⁰

Where a second marriage takes place, the HMA essentially applies the relevant sections of the Indian Penal Code of 1860 on bigamy to Hindus.¹⁶¹ However, in order for the marriage to

Andhra Pradesh, where it has been made harsher, CRIM. PROC. § 494; *see also* LAW COMM'N OF INDIA, NO. 227, PREVENTING BIGAMY VIA CONVERSION TO ISLAM—A PROPOSAL FOR GIVING STATUTORY EFFECT TO SUPREME COURT RULINGS 14–15 (2009), *available at* <http://lawcommissionofindia.nic.in/reports/report227.pdf>.

157. *See, e.g.*, Sambireddy v. Jayamma, A.I.R. 1972 A.P. 156 (India); Aiyer v. Amma, 78 A.I.R. 1952 Mad. 193 (India) (citing Reynolds v. United States, 98 U.S. 145 (1878)).

158. Hindu Marriage Act § 5(i).

159. *Id.*

160. *Id.*

161. Chapter XX, section 494 of the Indian Penal Code of 1860 (titled “Marrying again during lifetime of husband or wife”) reads:

Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such

be legally valid, it must conform to the customary rituals that Hinduism prescribes.¹⁶² Bigamous marriages that do not formally meet these requirements are not recognized as legal marriages under Hindu personal law. Unlike the Utah law, the HMA recognizes only the formal requirements in finding a second marriage. If the formalities have not been met, there is no marriage under a literal reading of the HMA.¹⁶³ As a result, a properly solemnized second marriage is void *ab initio* and triggers the criminal sanctions, but a defective marriage that does not meet the legal requirements does not trigger criminal penalties even if the husband cohabits with the second wife.¹⁶⁴

Both before and after independence, during the formative years of the Indian state, the battle lines between Hindu and Muslim communities were drawn.¹⁶⁵ Muslims were concerned about the majority's power to legislate away their personal laws, which had increasingly become part of an Indian-Muslim identity.¹⁶⁶ Following the British example, the Indian government chose not to undertake a lengthy conflict over family law with its largest minority group.¹⁶⁷ Thus, while Muslims (and tribal peoples) have had the practice of polygamy protected via personal law, this protection has generated a continued countermovement to eradicate polygamy entirely.¹⁶⁸

The activism against polygamy has been largely focused on Muslims. The anti-polygamy stance has resulted in some strange interest convergences, particularly between secular

marriage takes place, inform the person with whom such marriage is contracted

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 7 years and fine—Non-cognizable—Bailable—Triable by Magistrate of the first class—Compoundable by the husband or wife of the person so marrying with the permission of the court.

162. See MENSKI, *supra* note 137, at 398 (discussing *Ram v. Himachal Pradesh Administration*, A.I.R. 1966 S.C. 614 (India), where the Supreme Court of India reiterated its stance in *Lokhande v. State of Maharashtra*, A.I.R. 1965 S.C. 1564 (India), that a bigamy conviction could not be sustained in the absence of the performance of essential ceremonies in a Hindu marriage). Compare this to the statute in Utah under attack in *Holm*, where anyone who “purports to marry” would be guilty of bigamy. See *supra* notes 110–14 and accompanying text.

163. See Hindu Marriage Act § 5.

164. See MENSKI, *supra* note 137, at 398.

165. See Choudhury, *supra* note 34, at 56–59.

166. *Id.* at 61.

167. *Id.* at 67.

168. *Id.* at 79 (explaining that both Hindu right-wing groups and feminist groups have found themselves on the same side against Muslim polygamy).

women's rights advocates and right-wing Hindu politicians.¹⁶⁹ In spite of the opposition to Muslim polygamy by some groups, there is also a countervailing position demanding recognition for religious pluralism that prevents the Indian federal government from enacting a blanket criminalization of polygamous marriages across communities.¹⁷⁰ Largely, that position has been adopted by traditional Muslims seeking to retain group autonomy within the state, but it has also found some acceptance within the judiciary and the state. As a result, while Hindu law was reformed, Muslim personal law has been frozen in time, with the clock stopping in 1938.¹⁷¹

As discussed above, the issue of polygamy continues to be a bone of contention between some Hindu and Muslim groups and between women's organizations and traditional religious leaders. It is a complex issue. In the 1980s and 1990s, the Hindu Right used the issue to push for a Uniform Civil Code, arguing that the disparate treatment privileged Muslim men.¹⁷² Women's rights groups have long championed the aspirational goal of a uniform family law enshrined as a hortatory provision in Article 44 of the Indian Constitution.¹⁷³ They strategically claimed that the Muslim personal law subordinated Muslim women. Both groups, though for markedly different reasons, sought the abolition of personal

169. *Id.* The BJP and feminists agree that polygamy is bad but for entirely different reasons. Whereas the Hindu Right has argued to abolish polygamy because it is a "benefit" that is given to Muslim men but not Hindus, feminists have argued that formal laws allowing for polygamy enshrine the subordination of Muslim women. *Id.* at 69–77.

170. *See* Khan, *supra* note 12, at 160 ("It is, therefore, religiously not permissible to abolish polygamy altogether. And what is not allowed religiously should not be legally done.").

171. The current family law statute for Muslims in India is the Muslim Personal Law (Shariat) Application Act of 1937. While this law has not been codified, it would be misleading to say that no development of the law has taken place. Judicial interpretation and activism has moved some areas of the law to be more responsive to the needs of women in the Muslim community. *See generally* Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631 (2008).

172. *See* Cossman & Kapur, *supra* note 46, at 147.

173. *See* RAJAN, *supra* note 45, at 156–65. Article 44 reads: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." INDIA CONST. art. 44. As a directive principle, it is not law. As Article 37 states, "[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." *Id.* at art. 37.

laws and with it polygamy.¹⁷⁴ However, these factions have not prevailed.

Any attempt to reform Muslim personal law by the state has been met with vigorous and entrenched resistance.¹⁷⁵ That said, internal reforms undertaken by Muslim groups have made some inroads.¹⁷⁶ Much ink has been expended on Muslim polygamy and its effects on women and families.¹⁷⁷ Indeed, it seems one cannot discuss polygamy in India without considering Muslim and Hindu practices as though the two are somehow coupled. While the topic of Muslim polygamy certainly has not been exhausted, the focus of this Section is not on the minority, which continues to “enjoy” the formal right to plural wives. Rather, the salient point here is that the Indian government *was* able to enact a nationwide ban on polygamy for Hindus with relative ease due to the considerable movement toward that end in the states. The prospects for a sweeping reform of Muslim personal law, by comparison, are bleak.

In the Indian context, legal reform has been complicated by the tension between uniformity and the push for a Uniform Civil Code on one hand and the tolerance for legal pluralism that continues to accommodate various religious family law regimes on the other. Despite the ability of the Indian federal government to reform Hindu personal law, it has not resulted in the eradication of polygamy in that community.¹⁷⁸ By contrast, the legal landscape in the United States is far more uniform even after the repeal of the federal laws on polygamy. The states’ legislative approach of criminalizing bigamy is comparable to the Hindu Marriage Act of 1955. Yet the uniform criminalization of bigamy in the United States has not led to

174. See Choudhury, *supra* note 34, at 77.

175. *Id.* at 78.

176. See *India Muslim Divorce Code Set Out*, BBC NEWS (May 2, 2005, 7:05 AM), http://news.bbc.co.uk/2/hi/south_asia/4504889.stm; Geeta Pandey, *Muslim Women Fight Instant Divorce*, BBC NEWS (Aug. 4, 2004, 6:25 AM), http://news.bbc.co.uk/2/hi/south_asia/3530608.stm; Balraj Puri, *Nikahnama—A Reply to Triple Talaq*, DECCAN HERALD (Aug. 13, 2004), <http://archive.deccanherald.com/Deccanherald/aug132004/edst.asp>.

177. See generally THE DIVERSITY OF MUSLIM WOMEN’S LIVES IN INDIA (Zoya Hasan & Ritu Menon eds., 2005); ZOYA HASAN & RITU MENON, UNEQUAL CITIZENS: A STUDY OF MUSLIM WOMEN IN INDIA (2004); SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA—POLITICAL AND PRIVATE REALITIES: 1890S–1980S (1990); VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA (2008); Alexandre, *supra* note 131.

178. GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 116 (2011).

the end of the practice either. Despite the ambivalent result of family law reform, we are not left bereft of options for regulation. Before I assess these options, I want to explore a few of the more important features of these laws in India and the United States.

III. COMPARATIVE LESSONS: NARRATIVES OF PROGRESS, WOMEN'S EQUALITY, AND RELIGIOUS ASSIMILATION AND ACCOMMODATION

To a large extent, the social and political realities reflected in the secular framework existing in each country help explain their respective legislative approaches to polygamy regulation. In India, an existing, politically powerful, Muslim minority resisted any interference with pre-independence laws that permitted minorities to practice polygamy.¹⁷⁹ As a result, the Indian federal government targeted the majority population rather than the minority. In the United States, the Mormon minority became powerful in the cradle of an already existing dominant social and political context with a markedly Protestant valence.¹⁸⁰ On the heels of the Civil War and during the growth of federal power, the U.S. federal government forced Mormons to assimilate in a way that was improbable in India one hundred years later.

In this Part, I highlight similarities and differences in polygamy regulation beyond the formal laws described above. Three aspects are of particular note: First, in both countries, the justification for polygamy regulation includes a discourse about progress and modernity. In this discourse, polygamy is construed as a backward and uncivilized practice, whereas

179. See Choudhury, *supra* note 34, at 93–96.

180. While there were, of course, groups that were entirely different from the dominant group—such as the Native American nations, African-Americans, Chinese-Americans, and Japanese-Americans—none of these groups was able to define the social, political, or legal system. They were all subject to it without franchise. Native Americans were given the right to vote with the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401 (2006)). The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973 (2006)), prohibited discriminatory voting practices that were responsible for the disenfranchisement of African-Americans. These discriminatory practices included literacy tests, poll taxes, grandfather clauses, and Jim Crow laws. *Id.* The Magnuson Act of 1943, ch. 344, 57 Stat. 600, repealed the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, which had effectively blocked Chinese immigrants from entering the United States and prohibited settled Chinese immigrants from obtaining U.S. citizenship.

monogamy is a mark of modernity. In both contexts, there is an underlying racial discourse at play that constructs polygamy as an inferior choice of family form. Second, in a related discourse, women's groups take up a modernist position claiming that polygamy subordinates women. Thus, as a matter of equality, polygamy must be abolished.¹⁸¹ Further, women's groups have also adopted the racial construction of polygamy as part of the practices of "inferior" peoples latently, if not overtly.¹⁸² Finally, one area of difference between the two countries' approaches to marriage regulation is the willingness of the state to tolerate some form of polygamy in society under the protection of religious rights. In particular, the Indian judicial approach to enforcing the Hindu polygamy ban is more nuanced than that of the United States. As such, competing visions of modernity coexist. While the social conditions are quite different, the ability of Indian courts to regulate different family forms holds some interest for scholars of U.S. family law struggling with challenges to the dominant conceptions of family.

A. *Discourses of Progress: Monogamy = Modernity?*

The narratives of progress that surround reform of law in general have also had their corollary in the reform of family law. Despite a long history of the coexistence of monogamy and polygamy in societies stretching from Asia to Europe, monogamy has emerged as the hallmark of a modern family.

181. See generally PARASHAR, *supra* note 9.

182. This sentiment is obvious in other contexts as well. For instance, Geetanjali Gangoli has found that racial and communal bias in women's organizations dominated by the elite majority is rife with assumptions about Muslim women. She quotes a Hindu social worker in domestic violence who expresses the view that Muslim women have a "very low status": "This is because their religion gives more status to men. (Muslim) men can easily give 'talaq' and desert women. Muslim women are more oppressed and vulnerable (than Hindu women). Their oppression is sanctioned by their religion." GEETANJALI GANGOLI, *INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA* 111 (2007) (alterations in original). She further notes:

[S]uch images of Muslim men as being rapacious, bigamous and violent are based on communal perceptions of Muslim communities, and in cases of feminist intervention, leads [sic] to a belief that Muslim women are fated to suffer. This is apparent in this response of a Hindu social worker to a battered woman who had approached her through a feminist collective in which Muslim women play a significant role, where the worker is reported to suggest that domestic violence was inevitable in a context where men were allowed to be polygamous.

Id.

Moreover, the nuclear monogamous family has moved from communal to individual and from status to contract, thus exemplifying “modernity.” In the United States, this construction of “monogamy = modernity” while “polygamy = barbarism” is explicit in the case law and debates surrounding the legislation against the Mormon Church. In the various polygamy judgments discussed above, the idea that a modern, democratic society cannot support polygamy is so self-evident that supporters do not have to defend it except tautologically (i.e., polygamy is not consistent with modernity because it is backwards).

In the United States of the 1800s, polygamy was one of the “twin relics of barbarism” (the other being slavery).¹⁸³ As Gordon notes:

In nineteenth-century American thought barbarism occupied a special, un-Christian place. It constituted the inversion of progress, a Manichean counterweight to its successor, civilization. Native cultures and their “savage” customs made barbarism more than an abstract concept for most Americans. Popular fear of “Indian barbarisms” fed insecurities about the vulnerability of civilization, especially private relations of property and marriage, which were the cornerstones of civilized societies.¹⁸⁴

Those who practiced polygamy were immediately “othered” into inferior, less civilized groups of people. In the United States, this betrayal was keenly felt because it was race-traitorous.¹⁸⁵ As noted by the *Reynolds* Court, whites were not supposed to act like the “Asiatic” or “African” races.

In India—a decidedly Asiatic place—similar discourses about civilization were circulating, particularly among the educated elites influenced by British Liberalism.¹⁸⁶ In the broader context of the civilizing mission of the colonial authorities, a push to reform the most regressive social customs was undertaken. Legal reform resulted in passing laws banning *sati* and child marriage and allowing remarriage

183. See GORDON, *supra* note 62, at 55.

184. *Id.* at 56.

185. See Ertman, *supra* note 63, at 308.

186. See Rachel Struman, *Marriage and Family in Colonial Hindu Law*, in *HINDUISM AND LAW: AN INTRODUCTION* 89, 89–104 (Timothy Lubin et al. eds., 2010).

of Hindu widows.¹⁸⁷ While the colonial authorities did not directly tackle polygamy, there was a social movement already underway that took up the cause.¹⁸⁸ At the time of independence, the modernists pushed for the wholesale ban on plural marriage backed by Mahatma Gandhi.¹⁸⁹ As a result, the enactments banning Hindu polygamy happened piecemeal on a state-by-state basis before a federal ban was enacted.¹⁹⁰ The modernist position against polygamy was eventually folded into the feminist position by women's groups who subsequently took up the abolitionist cause, advocated for more robust criminal prosecution, and continue to argue that the laws are insufficiency enforced.¹⁹¹

In sum, in both the Indian and U.S. contexts, polygamy opponents depicted the practice as premodern and oppressive, one that would be better off as a historical relic. Without an explicit explanation of why monogamy is modern, we are left with the assumption that it is due to its dyadic form, which allows for equality between partners. However, such an assumption both glosses over many of the injustices within monogamous families and deterministically conflates form with substance. It is worth recalling that until recent times, monogamous marriages allowed for much the same kinds of inequalities found in polygamous families. For instance, in the twentieth century, women in monogamous marriages could only divorce if they had fault grounds, husbands still had the right to chastise their wives physically (although not violently), women were unable to contract freely because of coverture, and, because title was dispositive in property settlement, women had little access to marital property.¹⁹² Women shared

187. See generally RINA VERMA WILLIAMS, *POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE* (2006).

188. See generally *id.*

189. *Id.* at 385.

190. See MENSKI, *supra* note 137, at 103.

191. *Id.* at 410 (quoting VIJAY SHARMA, *PROTECTION TO WOMEN IN MATRIMONIAL HOME* 95 (1994), on the inefficacy of the judiciary and law enforcement in tackling bigamy).

192. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 10 (2005); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11–12 (2000). See generally KATHLEEN S. SULLIVAN, *CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA* (2007). It should also be noted that domestic violence within monogamous marriages and the challenges to the public/private distinction in family law became a rallying point among feminists in the 1970s and 1980s. Prior to that, the state's willingness to prosecute what was seen as a private matter was minimal. See LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 107–10

these burdens regardless of the marital form in which they found themselves. Nevertheless, it is the women and children in plural marriages that are of particular concern. For instance, they are referred to in the *Reynolds* case despite the incongruity of the Court's concern for this group of women in plural marriages, distinguishing them from their monogamous sisters who suffered many of the same harms alleged to be the effects of polygamy.¹⁹³

B. Women's Equality, Race/Religion, and Sex in the Polygamy Debate

In more recent decades, the debate about ongoing practices of polygamy has centered on its negative effects on women and children.¹⁹⁴ While recent feminist positions are much more

(2012). *See generally* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

193. *See* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring); Justice Bradley noted:

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

Id.

194. Even though Emily Duncan calls for legalization of polygamy, she singles out women and children as the subjects of the beneficial regulation when polygamy is brought out of the closet and into the state's regulatory grasp. Emily

nuanced, and include those who suggest that there might be a feminist pro-polygamy argument,¹⁹⁵ there is still a strong anti-polygamy critique that can be linked to the historical antipathy to Mormon polygamy.¹⁹⁶ Sarah Barringer Gordon explored in-depth the historical role that women novelists had on the debates on polygamy in the nineteenth century.¹⁹⁷ The prevalent view then was that monogamous marriage was infused with morality, the self-sacrifice of committed partners versus licentiousness, political stability, uniformity as opposed to chaotic difference, and justice and order over criminality. Women were alternatively described as victims of rapacious Mormon men or whores willing to enter into “free-love” relationships.¹⁹⁸ At stake was the very nature of women and their relationship to sex. Gordon is worth quoting at length. Speaking about second wives, she notes:

Single women were frequently depicted as complicit in the tragedy. The potential for real moral difference between women was among the most nagging and relentless of the problems that plagued popular fiction. The glorification of the household and its “guardian angel” was undermined by the presence of women whose morals defied the claim that women were by nature monogamous. The infidel Fanny Wright had proved earlier in the century that women could be tempted away from the “home of liberty.” Novelist Maria Ward described one aspiring Mormon wife as a “coquette,” who was in part culpable “for the continuation of polygamy because [she] *preferred a rich man, with a dozen wives, to a poor one without any . . .*”¹⁹⁹

If women in polygamous unions were considered unchaste and wayward, the depiction of Mormon men was nothing short of predatory. Polygamy, then, is portrayed as an institution that permits men to give free rein to their sexual desires and lasciviousness.

J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love Is a Many Splendored Thing,”* 15 DUKE J. GENDER L. & POL’Y 315, 316 (2008) (“Thus, if there is to be a rational policy in this area, it should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous communities to emerge from the shadows, and openly assisting the women and children who live in them.”).

195. *Id.*; see also Alexandre, *supra* note 131, at 5.

196. See *infra* note 200.

197. See GORDON, *supra* note 62, at 29–53.

198. See *id.* at 42–43.

199. *Id.* (alteration in original) (emphasis added).

Over one hundred years after *Reynolds*, the regulation and prosecution of polygamy continues to be accompanied by a discourse of protecting women and children.²⁰⁰ Without a doubt, there are concerns about some polygamist communities that engage in illegal activity, such as sex with minors. However, marriages in such communities do not represent polygamous unions in general, just as abusive monogamous marriages do not define monogamy. Nor are such activities evidence that polygamy *inevitably* leads to abuse. The feminist preoccupation with abuse in polygamous marriages conveniently ignores the reality that women are vulnerable in the home regardless of family form.

Another liberal feminist concern—most often expressed these days in critiques of Muslim polygamy—focuses on equality.²⁰¹ The conflation of a dyadic family form with equality, as I have already argued above, is anything but evident. Nevertheless, the idea that women might have equal power and decision-making capabilities within a polygamous family where there is one husband and multiple wives is met with skepticism.²⁰² The logic behind this view is that the distribution of power must take place strictly along gender lines. For instance, if in a dyadic relationship power is allocated equally, both parties get fifty percent. Yet, in a plural family, the assumption seems to be that the husband gets fifty percent—or sometimes even more—while the wives must share the remaining fifty percent among them. Those who challenge this assumption have suggested a more democratic form in which each member has an equal share (in which case, the single male is outnumbered).²⁰³

200. In recent literature discussing polygamy, the focus squarely remains on women; this is true for both scholarly work and case law. See *supra* note 194; see also Cynthia T. Cook, *Polygyny: Did the Africans Get It Right?*, 38 J. BLACK STUD. 232, 239–40 (2007) (arguing that polygyny is harmful to the health and well-being of women and children despite its benefits on fertility and population).

201. See CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 129 (2006); Rebecca J. Cook, *Structures of Discrimination*, 28 MACALESTER INT'L J. 33, 46–49 (2011); Strassberg, *supra* note 8, at 1535–37, 1586–94. I attended a family law conference in 2008 during which a discussion of current issues in family law took place. At one point, in the plenary session, one of the scholars made a statement to the effect of “we don’t want polygamy,” indicating a widespread agreement on the undesirability of the practice.

202. See sources cited *supra* note 201; cf. Davis, *supra* note 15, at 1990–91.

203. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 177 (2006).

Another equality problem arises with regard to a woman's right to marry multiple men. It is argued that in a legal system that affords equal protection of the laws and prohibits arbitrary gender discrimination, polygamy would have to be equally available for both men and women.²⁰⁴ Modern ideas of multiple partners make this a real possibility. In some sense, new formations like polyamorous partnerships that supposedly evade the historical gender inequities garner feminist support more easily than does the historically existing polygamous one.²⁰⁵

The typical discourse that arranges feminism and multiculturalism in dualistic, oppositional ways, pitting women's rights against cultural rights as though the boundaries are easily definable, is changing.²⁰⁶ Recent literature suggests an opening up and questioning of the possibility of gender-equitable forms of polygamy, at least in the United States.²⁰⁷ Part of that opening is the understanding that the deep moral repugnance against having multiple partners has been eroded by an increasingly permissive society that values personal choice and sexual expression.²⁰⁸ Thus, as long as adults exercise meaningful choice, the law should leave them well enough alone. Certainly, as Elizabeth Emens has argued, plural relationships can be principled rather than simply licentious.²⁰⁹

In the Indian context, polygamy reform was similarly bound up in the progress narrative and the demands of modernity. The current discourses pitting Muslims against

204. See MIRIAM KOKTVEDGAARD ZEITZEN, *POLYGAMY: A CROSS-CULTURAL ANALYSIS* 125 (2008).

205. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 302, 325 (2004).

206. See generally SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004); WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (2006); WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

207. Susan Moller Okin's book has become a mainstay of this kind of inquiry. The seeming conflict and attempts to resolve it have been an ongoing preoccupation of feminists. See generally SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

208. For example, the laws punishing fornication and adultery are falling by the wayside because of desuetude. And given that there is rarely prosecution of such extramarital relationships, what substantive difference is there between a man who keeps a long-term mistress while being married and polygamy other than, in the latter case, the first wife knows of the existence of the second?

209. See Emens, *supra* note 205, at 320–30.

Hindus are often laden with ideas of Muslim backwardness because polygamy remains a legal institution and is equated with the mistreatment of women.²¹⁰ Moreover, Muslim traditionalists have issued apology after apology for the practice, claiming that it is morally superior to serial monogamy or infidelity without tackling the real issue of women's roles in polygamy brought up by its feminist critics.²¹¹

Consequently, Indian feminists' concerns about polygamy center less on sexual fidelity, morality, or sexual expression than on economic and gender subordination.²¹² Society has primarily depicted women in polygamous marriages as victims and not freely-choosing agents (which at least the "whores" in the Mormon victim/whore dichotomy were). The attention has been particularly focused on Muslim women and their subordination at the hands of patriarchal Muslim men.²¹³

However, Hindu women have also been cast in the victim role.²¹⁴ In a relatively recent post about polygamy, Deepali Gaur Singh writes that:

Multiple marriages have socially and legally punished women rather than men. The Bigamy Law has been under cloud for some time especially since the Supreme Court passed a decision that women in substantially long live-in relationships should be given the same rights as a legally wedded wife. This was to protect the second wife who under the bigamy law loses all rights since the marriage is considered null and void in the absence of the dissolution of the former. Besides, in the event of the death of the spouse the family often disinherited them since the marriage would not be legally recognized. And with uneducated women very often duped into such marriages or unable to get out of them for fear of ostracism, social boycott and stigma

210. See GANGOLI, *supra* note 182, at 111.

211. See Khan, *supra* note 12, at 156–57; see also MAHMOOD, *supra* note 55, at 115–17; M. Fazlul Haq, *Polygamy in Islam: Misrepresented and Ill-judged*, in MODERN INDIAN FAMILY LAW, *supra* note 12, at 180, 180–84. There seems to be a common thread that polygamy has a beneficial effect on society by preventing adultery and prostitution. However, no data are presented to support this claim. A point of further study would be to gather data on the incidence of adultery and prostitution in polygamous societies. On another note, the role of women as providers of sexual services in a range of contexts from marriage to prostitution is missing in these analyses.

212. See generally PARASHAR, *supra* note 9.

213. See GANGOLI, *supra* note 182, at 111.

214. Deepali Gaur Singh, *Bigamy, Conversion and Women's Rights in India*, RH REALITY CHECK (Oct. 5, 2009, 6:00 AM), <http://www.rhrealitycheck.org/blog/2009/10/05/bigamy-conversion-and-womens-rights-in-india>.

continuing to live within such a legally tenuous alliance, this was the protection that the courts were offering.²¹⁵

It should be noted here that the economic constraints that might have prompted women to enter bigamous marriages are placed in direct opposition to the interests of the first wife.²¹⁶ The result is that the first wife is cast as a double victim, entirely innocent, while the second wife is both a victim and a perpetrator. That victimization can be very real, but this conception is complicated when some degree of choice is involved.²¹⁷

Even in the Mormon context, women activists in the 1800s had a difficult time deploying victimization narratives when women's actual choices and constraints made them less than entirely innocent. A woman's choice to be the second or third wife of a rich man who provided financial support instead of being the sole wife of a pauper immediately cast doubt on her moral integrity if her choice could not be explained through victimization.

Nevertheless, as feminists argue, choices are necessarily constrained by economic and social factors. At the heart of these tensions are questions of identity and politics. What is a defensible feminist position on polygamy? Can women who assert that their religious identity is as important as their gender truly be feminists? Can polygamy be defended as a sex-positive choice, and under what conditions? And even if one is anti-polygamy, does that necessarily translate to support for state regulation through criminal law? These are vexed questions to which no easy answers are available. What can be said while we grapple with these questions is that holding to the construction of polygamy as a backward, necessarily subordinating practice that ought to be abolished prevents feminists from working to "normalize" it and making it more just. As a result, polygamy is pushed into the closet and is allowed to retain its gender subordinating practices without intervention and advancement.

215. *Id.*

216. *Id.* In any polygamous family with dependent wives and children, the resources that go to support one wife would necessarily diminish the resources available to other wives. As such, wives are in competition with each other over resources.

217. See *Kumari v. Singh*, A.I.R. 1990 H.P. 77 (India) (discussing a woman who petitioned the court to allow her husband to marry a second wife).

C. *Religious Accommodation and Abolition*

In the United States and India, both the state and elites have consistently looked down on polygamy for moral reasons. As discussed in Part II, in the United States the moral disapprobation coupled with political fears of Mormon strength resulted in an aggressive effort to abolish the practice. As Oman has shown, it was part of an imperial, assimilationist agenda.²¹⁸ The types of interventions made by the U.S. government at both the state and federal level are in keeping with the overall structure of secularism (infused at that time with Protestant Christianity). Secularism elevates similarity over difference and seeks to create a more uniform political and social citizenry. Debates about multiculturalism are a late arrival on the scene.

By contrast, India has not dictated a particular family form but has allowed variation across religious and cultural groups.²¹⁹ India, too, has undertaken legal reform abolishing polygamy, but not uniformly. The legislature, finding that the practice was not an essential part of Hinduism, abolished it for the Hindu community, thereby assimilating all Hindus under a particular view of Hinduism.²²⁰ However, because it is a family form explicitly recognized in the Qur'an, the Muslim holy book, the legislature could not make a similar claim that it was not an essential part of Islam. Thus, Indian statutory personal laws remain moored to religious laws.²²¹

Reynolds and *Narasu Appa Mali* (and the cases that follow these decisions) have obvious commonalities. The Indian courts often comparatively cite U.S. cases, and in *Narasu Appa Mali* the Bombay court borrowed the distinction made between belief and practice and found that the former is protected but not necessarily the latter.²²² The judiciaries both share a legal system rooted in the English tradition and are deeply

218. See Oman, *supra* note 115, at 665–67 and accompanying discussion on federal regulation of polygamy.

219. See SOLANKI, *supra* note 178, at 66.

220. See *State v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84, ¶ 4 (India).

221. The *Qur'an* 4:3 (Trans. M.H. Shakir) (alterations in original) (footnotes omitted) states:

If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three, or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias.

222. *Narasu Appa Mali*, A.I.R. 1952, ¶ 5.

influenced by Liberal jurisprudence.²²³ The bench and bar in both countries are comprised of the elite and reflect this similarity.²²⁴

It is not surprising therefore to find a similar disdain for “regressive” practices like polygamy and a view that modernity demands that they be abandoned. At heart, these normative positions comprise a sense of what are “truly” Hindu or American (historically conflated with Protestant Christian) norms. There is also a shared sense that social reform or public policy are both important governmental interests that might override religious practice, particularly when it is the very practice that is the target of reform.

On the other hand, there are important divergences. First, India’s polygamy ban binds the majority community, but leaves the minority community’s practice untouched. For the Indian courts, moreover, the concern is not preservation of traditional values—the typical inquiry in any fundamental right claim in the United States—but reform.²²⁵ The way that the courts have rationalized the criminalization of bigamy for Hindus is through the explicit conclusion that polygamy is not essential to Hinduism and that marriage is different for Hindus, a sacrament rather than a contract.²²⁶ These are

223. Liberal philosophy has had an impact on the very notions of progress and modernity. As described above, monogamy is part of the progress/modernity narrative, and therefore it is not surprising that polygamy would be treated as a vestige of premodernity. For an excellent discussion of Liberalism and progress narratives, see UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999).

224. See, e.g., V.R. Krishna Iyer, Op-Ed., *Against Abuse of the Contempt Power*, HINDU (July 24, 2010) <http://www.thehindu.com/opinion/op-ed/article530271.ece> (“Indian judges belong to an elite class like their English counterparts, and can be relieved only by impeachment which is a political operation beyond the pragmatic capabilities of the masses.”). Justice Iyer served on the Supreme Court of India from 1973 to 1980. *Hon’ble Mr. Justice V.R. Krishna Iyer*, SUP. CT. INDIA, <http://www.supremecourtindia.nic.in/judges/bio/vrkrishnaiyer.htm> (last visited Mar. 11, 2012).

225. See, e.g., *Narasu Appa Mali*, A.I.R. 1952, ¶ 11.

226. *Id.* ¶¶ 5–6. The Chief Justice reluctantly engaged in this analysis:

It is only with very considerable hesitation that I would like to speak about Hindu religion, but it is rather difficult [to] accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognizes the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame work of monogamy.

Id. ¶ 6.

pronouncements on religious doctrine. This kind of religious analysis is absent in U.S. courts. Such religious inquiry now would certainly run afoul of the entanglement prong of the *Lemon* test.²²⁷

Second, with regard to the minority Muslims, while the High Court of Bombay reasons that the Muslim community may not be ready for such reform, there is an underlying view that the Indian Constitution acknowledges a plural society, not a uniform one.²²⁸ In other words, the Indian Constitution recognizes the reality of legal pluralism and attempts to balance the tension of such pluralism with uniformity. That approach tends to restrain the impulse to discipline and assimilate difference.

Despite the different legal treatment of polygamy for Hindu and Muslim communities, a more detailed study of the on-the-ground realities reveals that family forms overlap between the two communities. This is true in part because of the heterogeneity often missed by those looking purely at the formal legal system.²²⁹ Both the legal tolerance for difference and a sense of inclusiveness have allowed Muslims to retain a group identity in the face of majoritarian pressures, sheltering them from the kind of regulation faced by Mormons. India's

227. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

228. See *Narasu Appa Mali*, A.I.R. 1952, ¶ 22. Justice Gajedragadkar writes:

Article 41 of the Constitution is, in my opinion very important in dealing with this question. This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognises the existence of different codes applicable to the Hindus and Mahomedans in matters of personal law and permits their continuance until the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in this country owe their origin to scriptural texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour [must] hereafter be to secure a uniform civil code throughout [the] territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Article 44 shows this impatience was tempered by considerations of practical difficulties in the way[.] That is why the Constitution contents itself with laying down the directive principle in this article.

Id.

229. See SOLANKI, *supra* note 178, at 66–68.

secularism, which is avowedly accommodationist, is not offended by the existence of different laws for different groups even while aspiring to uniformity. As the Andhra High Court held in *Sambireddy v. Jayamma*:

Article 14 of the Constitution assures to all persons equality before the law and equal protection of the laws. It is now well settled that while Article 14 forbids class legislation, it does not forbid a reasonable classification for the purposes of legislation, provided that the classification is founded on an intelligible differentia and that differentia has a rational relation to the object of the statute.²³⁰

Social and religious values differ and may be deeply held, and in India there is room for such difference in the legal framework. The *Reynolds* decision, on the other hand, was part of an impetus to forcibly reform the minority Mormon community. The impetus in the U.S. courts today is to tolerate private difference, but the morality of Protestantism is so infused in the common law that it continues to color our notions of what is truly “normal.”²³¹ Thus, the different approaches adopted by the two countries reflect different secular frameworks.

Among the similarities and differences between the United States and India, there is one factual similarity that is of particular interest. In the United States, between thirty to fifty thousand people live in polygamous households, and that number continues to increase.²³² This increase is in spite of the

230. See *Sambireddy v. Jayamma*, A.I.R. 1972 A.P. 156, ¶ 3 (India). This is in keeping with India’s understanding of positive discrimination or affirmative action, which has on occasion resulted in serious civil unrest. However, the idea that substantive equality is as much a value as formal equality is firmly rooted in India’s constitutional framework. See generally Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and “Personal Laws,”* 4 INT’L J. CONST. L. 181 (2006).

231. It is difficult to clarify the framework of Protestant secularism that has become normalized in the United States. See generally TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

232. *Polygamy in America*, PUB. RADIO INT’L (Feb. 12, 2010), <http://www.pri.org/stories/politics-society/polygamy-in-america1873.html>; see also Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NAT’L PUB. RADIO (May 27, 2008), <http://www.npr.org/templates/story/story.php?storyId=90857818>; Barbara Bradley Hagerty, *Philly’s Black Muslims Increasingly Turn to Polygamy*, NAT’L PUB. RADIO (May 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=90886407&ps=rs>. For those who might argue that this is an indicator that the law is working to deter polygamy, it might be noted that this is an unprovable counterfactual. We do not know

criminal ban and the states' appetite for prosecution. In India, the incidence of polygamy is almost the same for both Hindus and Muslims—approximately five to seven percent—in spite of the threat of criminal prosecution for Hindus.²³³ The inference is that formal bans are insufficient to abolish the practice and that tolerance for the practice does not necessarily mean an increase in it.

Moreover, it calls into question the deterrent value of the law. If Muslims and Hindus practice polygamy in equal numbers, is there any validity to the claim that the criminalization is having a deterrent effect? In fact, some Hindu communities still consider polygamy licit, while some Muslim communities have prohibited it.²³⁴ In the United States, polygamous communities continue to defy the bans. Further, informal polygamy continues to grow, making the law only a deterrent to formal polygamy. Analogously, in the United States, there are increasing numbers of people in the majority community who are not Mormons with multiple sexual partners and children from those unions, resulting in a sort of de facto polygamy that, because of the lack of enforcement of fornication and adultery laws, goes largely unregulated.²³⁵ Despite legal bans, the actual formation of polygamous families occurs.²³⁶ These local norms are often

whether polygamy would become socially widespread if it were allowed. Arguably, it was never particularly widespread even in its heyday in the 1800s.

233. 1 FLAVIA AGNES, FAMILY LAW: FAMILY LAWS AND CONSTITUTIONAL CLAIMS 164 n.143 (2011).

234. See SOLANKI, *supra* note 178, at 64 n.21.

235. See sources cited *supra* note 232; see also Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 857 (2001); Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1676 (2005).

236. See Wing, *supra* note 235, at 854–62; see also Pauline Bartolone, *For These Muslims, Polygamy Is an Option*, S.F. CHRON. (Aug. 5, 2007), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/05/INTBR80JC1.DTL&ao=all>; *Polygamy in America*, *supra* note 232. In contrast to the perception that polygamy is always a burden for women, one of the wives interviewed by Bartolone provides an alternative perception of polygamy:

“We get our time off, we got a sisterhood thing going on,” chuckles Asiila, 50, Ali’s wife of 15 years. She crosses her ankles underneath her overhead khimar, a black dress that covers her from head to toe. “To me, polygyny (polygamy) is for the woman. It’s really for the woman.”

Bartolone, *supra* (alteration in original). Given that one of the reasons forwarded for the limited support for the practice of polygamy in Islam was a shortage of men as marital partners, the following observation is intriguing:

more germane than state, national, or centralized laws.²³⁷ The reality is that polygamy continues to be a part of the family landscape in both countries with or without formal recognition in the law. In the concluding section below, I suggest that feminists and the state take a more nuanced approach to polygamy, one that focuses on the economic power distribution within the family. I briefly examine some ways in which we can redirect our efforts to changing polygamy's effects on women instead of pushing for more enforcement through criminal law.

IV. REDIRECTING OUR EFFORTS AT CHANGING POLYGAMY'S LIVED CONSEQUENCES

At first glance, the treatment of polygamy for Hindu Indians and for Americans would seem quite similar or equivalent. In both countries, a formal criminal prohibition punishes bigamy with prison sentences and a fine. Yet polygamy still continues in India and the United States, and it may be growing.²³⁸ The lessons of both India and the United States should make us skeptical about attempts at formal uniformity and criminalization to achieve the goal of gender justice. A concentration of efforts on elimination through prosecution does little to change the lived experiences of women who are part of polygamous families. The feminist critique of polygamy continues to be important. From a feminist perspective, polygamy as it currently stands is not an optimal choice regardless of its legality.²³⁹ Thus, any proposal that seeks to decriminalize the practice cannot discount the very real gender disparities that exist in polygamous families and the vulnerability of women in such families. Even where women choose to become part of polygamous marriages,

"Most African American women who are into polygyny do so by choice," says [associate professor and chairwoman of philosophy and religious studies at Beloit College Debra Mubashir] Majeed, adding that their reasons range from their interpretation of the Quran, to desire for independence, to needing a father for their children.

She says that a shortage of marriageable Black Muslim men may be one reason polygamy is embraced.

"With the high number of African American men in prison, on drugs, out of work, or unavailable in some other way . . . the options are limited," Majeed said.

Id. (second alteration in original).

237. See SOLANKI, *supra* note 178, at 68.

238. See *supra* notes 232–33 and accompanying text.

239. See generally HASAN & MENON, *supra* note 177.

without an adequate understanding of the circumstances, we cannot accept those choices as wholly unconstrained. In this Part, I briefly examine the distributive consequences of polygamy and suggest some reforms of family property laws that might begin to change the internal economy of polygamous families. In turn, I argue that these reforms will improve the lives of women who engage in polygamy. Such reforms would be beneficial even if we remain skeptical about women's choices with regard to entering into plural marriages.

As noted by feminists, polygamy as it has been traditionally practiced in various cultures continues to reflect a stereotypical sexual division of labor (male breadwinner/female bread-maker) that economically disadvantages women.²⁴⁰ Age disparities between husband and wives tend to exacerbate these gender inequalities.²⁴¹ And concerns about consent to enter into a polygamous union in traditional polygamous societies, particularly if marriages are undertaken at young ages, are quite salient.²⁴² Polygamous marriage, which has perhaps seen less reform because of non-recognition or light regulation, is open to a number of critiques that have driven beneficial reform of monogamous marriage.²⁴³ While feminists have championed criminal responses to the ills of domestic violence, a greater reform effort has focused on the economic distribution of marital property.²⁴⁴ The result has been more equality in monogamous marriages and an advancement in the status of women.²⁴⁵

Regarding the use of state criminal law to end violence in marriage, this approach has yielded some positive results. However, a robust critique of law enforcement's focus on plural

240. See generally KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* (2011); ARLIE R. HOCHSCHILD, *THE SECOND SHIFT* (1997); Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322 (2000).

241. See ZEITZEN, *supra* note 204, at 125.

242. See generally Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111 (2010).

243. See sources cited *supra* note 240.

244. For examples of recent scholarship surveying the criminal justice responses, see GOODMARK, *supra* note 192; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007). For discussions of reform of laws that have an impact on the distribution of property in marriage, see Margaret Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1984); J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419 (2008).

245. See Mahoney, *supra* note 244; Oldham, *supra* note 244.

marriage has been underway in the United States for nearly a decade.²⁴⁶ Such critiques have focused on the fact that stringent criminal enforcement has produced its own dark side by disincentivizing dependent women from seeking state help, which has increased incarceration and had disparate effects on minority communities. It is timely, therefore, to reconsider criminal approaches to plural marriage, which may produce similar problems. Many women in India, for instance, do not support their husbands taking multiple wives, but this does not mean that they are willing to turn their spouses in to the authorities for criminal prosecution.²⁴⁷ As the High Court of Bombay acknowledged in *Narasu Appa Mali*, most Hindu wives would not come forward to prosecute their husbands.²⁴⁸ Criminal prosecution does not necessarily translate into the kind of economic and social security that might open up more palatable choices for women. Reform is more likely to be accomplished through social change and changes in the laws affecting women's economic well-being.

In this Part, I explore some alternative legal approaches. Rather than concentrating our efforts on stricter enforcement, we would better serve women by changing property and inheritance laws to be more equitable for partners in marriage regardless of the form of their family. In this regard, the Indian judiciary's nuanced approach to recognition of families regardless of the formalities can be instructive for the United States. Moreover, family law reform in the United States providing for more equitable distributions of marital property may be similarly instructive for India.

The Indian judiciary has come to recognize the gap between formal legal regulation and the substantive reality of the persistence of plural marriages and its attendant problems. As a result, the similarities between India and the United States are only surface deep. While the United States has given no quarter to polygamists, the Indian judiciary has taken a much more nuanced if somewhat inconsistent approach. It tends to categorize polygamy cases into two types, both of which involve husbands disavowing the marriage; in the first type of cases, they do so to try to avoid being jailed or fined, and, in the second, they do so to avoid paying maintenance to wives.

246. See sources cited *supra* note 244.

247. See *State v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84 (India).

248. *Id.* ¶ 11.

As Warner Menski opines, with regard to the first type of cases, the judiciary has been very lenient toward polygamous Hindu men when faced with prosecuting them for violating the bigamy ban.²⁴⁹ This is so even when a first wife is actively attempting to have her husband put behind bars.²⁵⁰ The prevalent argument is based on the decision by the Indian Supreme Court in *Bhuroo Shanker Lokhande v. State of Maharashtra*, in which the Court declined to find a legal marriage because all the requisite ceremonies of a Hindu marriage were not performed.²⁵¹

On the other hand, another trend has emerged in which second wives who are vulnerable to disinheritance have received a measure of protection from the courts. In these cases, second wives have found a much more sympathetic court willing to distribute property to them and their children.²⁵² While this approach results in inconsistent outcomes at least with regard to the enforcement of polygamy, it also creates some tension between first and second wives. But it does not result in the complete disinheritance of a second wife. Moreover, there is truth to the claim that such a soft approach to enforcement fails to send any kind of message to willful violators who slip through the loophole by neglecting some ceremonies in the marriage formalities.²⁵³ The approach is far from perfect. Yet, it recognizes a reality: Polygamy is a family form that is here to stay.

In the United States, the courts have preferred to deal more consistently with polygamous marriages, even going so far as recognizing and criminalizing substantive but informal marriages.²⁵⁴ This is so even in the face of decisions that presumably call into question the criminal bans against adult

249. See MENSKI, *supra* note 137, at 394.

250. See, e.g., *Ghosh v. Ghosh*, A.I.R. 1971 S.C. 1153 (India) (finding a second marriage invalid and acquitting the husband, even over the vigorous objection of the wife and her active participation in his prosecution).

251. *Lokhande v. State of Maharashtra*, A.I.R. 1965 S.C. 1564 (India). The court found that without the ceremonies of *homa* and *saptapadi* involving the circumambulation of the holy fire, there could be no legal marriage. Of course, this ignores the forms of marriage that are normative in India. In other words, there is no singular, orthodox form of marriage. See e.g., *In re Dalgonti Raghava Reddy*, A.I.R. 1968 A.P. 116 (India) (holding that, in the Telengana Reddy community, a marriage without these rituals would still be valid).

252. See MENSKI, *supra* note 137, at 402 (citing *Devi v. Choudhary*, A.I.R. 1985 S.C. 765 (India) (holding that various forms of customary marriages were valid when faced with a complaint by the second wife seeking maintenance)).

253. *Id.* at 410.

254. See, e.g., *State v. Holm*, 137 P.3d 726 (Utah 2006).

consensual sexual behavior. But a move to formally decriminalize polygamy does not appear on the horizon even after *Lawrence v. Texas*. In other words, the criminal laws prohibiting polygamy are likely here to stay alongside de facto polygamy. So, the question must be how to regulate and where to best make interventions. The choice of intervention is, of course, determined by the position that one takes toward polygamy.

In this Article, I have tried to show how moral disapproval leading to aggressive pursuit of polygamists in U.S. history has had limited success in eradicating the practice. Nevertheless, there is still an appetite for strong criminal prosecution.²⁵⁵ India's case is far more mixed in reality, with social approval varying, judicial enforcement inconsistent, and formal bans firmly in place.²⁵⁶ If one takes the view that polygamy is a social evil, it may follow that the most logical intervention is a more aggressive enforcement of criminal laws and harsher punishments. But, I would argue that such a position is inconsistent with the trend of greater choice in family formation and a view that adult polygamous unions, freely and consensually entered into, should not be criminalized by the state. From this position, my primary concern then would be to ensure that parties are treated fairly within the economy of the family and that the law's distributive effects are just.

While different forms of family and sexual freedom challenge the supremacy of heterosexual monogamy, particularly in the United States, polygamy is an ancient form of marriage.²⁵⁷ It has historically been organized in the breadwinner/bread-maker model, with women being dependent on their husbands, exchanging the duty to obey for support.²⁵⁸ However, there is no reason to suppose that the effects of the internal hierarchy cannot be influenced in ways beneficial to its constituents. Such intervention would have to take into

255. See *id.*; see also *State v. Green*, 99 P.3d 820 (Utah 2004).

256. See *supra* notes 229–30 and accompanying text.

257. See *Lewis v. Harris*, 875 A.2d 259, 270 (N.J. Super. Ct. App. Div. 2005) (“[T]here is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex ‘because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies.’” (quoting George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628 (1999)) (second alteration made by the court).

258. See Carrie A. Miles, “What’s Love Got to Do With It?": *Earthly Experience of Celestial Marriage, Past and Present*, in *MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES* 185, 187–89 (Cardell K. Jacobson & Lara Burton eds., 2011).

account the legal and social contexts in which decisions to enter a polygamous marriage are made. And they would not cover those marriages in which fraud or deceit procured the consent of partners to enter into the marriage, such as nondisclosure of a prior marriage.²⁵⁹

As a general matter, women may be better served with laws that ensure that their *choices*—even when constrained—are valued. Instead of treating women as either morally corrupt for choosing polygamy or victims of it, the law might be morally agnostic.²⁶⁰ Such a stance would look to protect women's rights to marital property and economic support (it might assume that agency is present, but that is not necessary). Although India's judiciary has protected the rights of the second wife in a plural marriage in the absence of legislation, the marital property regime in general requires reform in order to protect *all* wives from disinheritance. By contrast, in the United States, marital property reform has been successful; however, with regard to polygamous marriages, these reforms exclude second or third wives because of the illegality of the relationship and because the wives

259. Fraud that goes to the essentials in monogamous marriages is grounds for voiding the union, and this should not be changed, as it invalidates consent. *See, e.g.,* ABRAMS ET AL., *supra* note 30, at 152–54; *see also In re Marriage of Meagher* 31 Cal. Rptr. 3d 663 (Ct. App. 2005) (finding that lying about wealth does not amount to fraud as to the essentials of the marriage); *Summers v. Renz*, No. H024460, 2004 WL 2384845 (Cal. Ct. App. Oct. 26, 2004) (holding that even discovery of a husband's prior attempted murder of his previous wife by shooting her while she slept did not amount to fraud as to the essentials of the marriage).

260. The question of choice is quite vexed. *See generally* KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* (2011); ROSEMARY HUNTER & SHARON COWAN, *CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY* (2007). Feminist differences about what “valid” choices women may make has led to a charge and countercharge of “false consciousness.” There is no means by which to judge whether a choice is “good” for a woman without entering into normative judgments about what is a “good life.” Liberal feminists have articulated a particular view of womanhood that elevates individuality and equality over dependence, interconnectedness, and complementarity. While I agree that the idea of separate spheres has been used historically to deny women entry into traditionally male spheres and that any claims based on this notion should be vigorously examined, I am reluctant to assert that all women who choose particular forms of existence that are more “traditional” are falsely conscious and “in reality” are actually unhappy or oppressed. This reluctance comes from a recognition that choices that are constrained by external factors (such as a lack of alternative better choices) may nevertheless be rational. Take for instance the choice to partner in a polygamous union and to bear children with a shared father rather than to remain single and childless or to raise children as a single parent. What would be a “good” choice under these circumstances? *See* Bartolone, *supra* note 236.

knowingly enter into the relationship.²⁶¹ Knowledge then bars them from using equitable remedies like the putative wife doctrine discussed below.

In either country, a property regime that does not penalize women for consensually entering polygamous marriages and that allows them a fair share of the marital assets would ensure that one wife does not pay because she came second in time regardless of the understanding of the members of the family. To this end, a first step in the Indian context would be to reform the prevalent title theory of property and recognize marital property. The current property regime in India follows the largely discarded title regime in the United States.²⁶² This has meant that husbands that accumulate property and title it in their own names are deemed the separate owner of the property regardless of whether it was obtained with marital assets.²⁶³ Clearly, this divests many women of a share of the assets even when their own assets were used to purchase the new property.²⁶⁴ Such a change would preserve rights in marital property to the wives of both Hindu and Muslim polygamous men, disincentivizing them from discarding their first, often older, wives in favor of a second wife.²⁶⁵ In other words, the state should take the “treat them equally” admonition seriously and make it clear that a man will not escape his financial responsibilities by repudiating a first wife or taking a second wife only to disregard the first. Moreover, it is not enough to force a husband to give alimony to his ex-wife because maintenance is often paltry and contingent on the willingness of a husband to continue to pay.²⁶⁶ Wives must have a right to a share of marital property at divorce or death, which will give them some measure of security.

As a corollary to reforming marital property law, it is also important to protect the property that women bring into the marriage. The possibility that a wife’s assets will be controlled

261. See ABRAMS ET AL., *supra* note 30, at 150.

262. See Kamala Sankaran, *Family, Work and Matrimonial Property: Implications for Women and Children*, in REDEFINING FAMILY LAW IN INDIA 258, 261–75 (Archana Parashar & Amita Dhanda eds., 2008); see also ABRAMS ET AL., *supra* note 30, at 469–70.

263. See BINA AGARWAL, *A FIELD OF ONE’S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA* 199, 292–315 (1994).

264. *Id.*

265. Sankaran, *supra* note 262, at 259–66.

266. See *id.* at 265–66.

by the husband is quite real.²⁶⁷ As such, it is important to be able to separately protect dower assets unless there is consent to make such property marital. Further, polygamous families may have a division of labor that is quite different from that of monogamous families. The law needs to be sensitive to valuing the contribution of the various members to the family's overall wealth. Work such as childcare and housework must be taken into account. Many of these reforms have already happened in the United States and have benefitted women's autonomy in the family.

Since the 1980s, family courts in the United States have taken the division of labor into consideration and attempted to value marital contributions in monogamous marriages, even if their methods were inadequate.²⁶⁸ Moreover, they have also had to determine property rights with regard to unmarried cohabitants. Given that the United States is unlikely to pull back from its long-held criminalization stance to recognize plural "marriage," the remedies available to unmarried cohabitants are the most promising in securing rights for plural wives.

These remedies fall into contract and equity. Contractual remedies like those used in *Marvin v. Marvin*, a seminal case in the field of cohabitation, require some form of contract between the parties.²⁶⁹ However, some courts have required a "marriage-like" relationship to accompany the contract.²⁷⁰ This requirement is reflected in the American Law Institute's Principles, which define domestic partners as "two persons of the same or opposite sex, not married to one another."²⁷¹ Although not widely followed, the principles enshrine the dyadic nature of "marriage-like" relationships even while

267. See BIPASHA BARUAH, *WOMEN AND PROPERTY IN URBAN INDIA* 104–38 (2010). For an example of this in the Muslim community, see Gregory C. Kozlowski, *Muslim Women and the Control of Property in North India*, in *WOMEN AND SOCIAL REFORM IN MODERN INDIA: A READER* 326 (Sumit Sarkar & Tanika Sarkar, eds., 2008).

268. See, e.g., *Pratt v. Pratt*, 475 S.E.2d 102 (W. Va. 1996). See generally Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713 (2000); Carolyn J. Frantz & Hanoach Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

269. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); see also A.L.I., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 6.03(1) (2002) (defining domestic partners as two people of the same or opposite sex who have shared life as a couple).

270. See, e.g., *Devaney v. L'Esperance*, 949 A.2d 743 (N.J. 2008).

271. A.L.I., *supra* note 269, § 6.03.

moving toward acceptance of same-sex unions.²⁷² It is, therefore, likely that contract remedies will be foreclosed unless this definitional hurdle is overcome.

Equitable doctrines are similarly unavailable. The putative spouse doctrine requires proof that the remedy-seeking party did not know of the prior existing marriage.²⁷³ In order to make the doctrine work for plural marital partners, the “innocence” or “knowledge” requirement would need to be removed. Then, courts can recognize the injustice of allowing a spouse to retain all the marital property simply because the partners were aware that a valid marriage already existed and nevertheless chose to enter into a plural family, much in the way they do for monogamous putative spouses. In effect, this change would diminish the distinction between valid and invalid marriages. However, the change is not overly concerning because the bigamy statutes would still punish those who entered into a bigamous marriage while perhaps protecting substantive marriages that are plural. In the absence of decriminalization, this would be an intermediate step.

As is evident, without reform, in both Indian and U.S. contexts, a second marriage is void *ab initio*, leaving second spouses with few rights if they knowingly entered into the marriage.²⁷⁴ The Indian courts have preserved the rights of second families by recognizing a substantive marriage in cases involving Hindus who marry bigamously, but the courts are not uniform in their application. Further, this is effectively a judicial end run around the statute that voids second marriages.²⁷⁵ Nevertheless, the formal law prohibiting recognition of bigamous marriages is not a categorical bar to recovery of some property.

272. See generally ROBIN FRETWELL WILSON, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2006).

273. The “putative spouse doctrine” requires that an “innocent spouse has relied in good faith on a mistaken belief in the validity of the marriage.” ABRAMS ET AL., *supra* note 30, at 172.

274. See Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955, § 11 (India); see also ABRAMS ET AL., *supra* note 30, at 150; SOLANKI, *supra* note 178, at 109–10.

275. See MENSKI, *supra* note 137, at 404 (“[D]espite the legislative prohibition of Hindu polygamy, the courts have continued to take a rather lenient approach towards polygamous Hindu men when it comes to protecting them against criminal convictions. But the courts are not lenient when financial claims of women and children are at stake.”).

Comparatively, in the United States, a similar acknowledgment that cohabitation may occur in more forms than the dyadic one would bring plural marriages—and other forms of family already existing and growing—under the protection of the law.²⁷⁶ Already, some scholars have suggested alternative ways to construct marriages that borrow from other areas of the law. New approaches that move away from marriage as status towards marriage as contract, for instance, might consider a consensual polygamous marriage as a multi-party partnership (though this analogy has its limits).²⁷⁷ The economic distribution of marital assets then would be different than in a status-based construction where marital partners' rights to property are based on different ideas of obligation.²⁷⁸ Current law that forces plural relationships into the monogamous straitjacket is unlikely to do justice to all members of a polygamous family.²⁷⁹

CONCLUSION

Polygamy as a practice is unlikely to vanish. It is a family form that has survived into modernity. Instead of trying to find ways to eradicate it because it is “barbaric” or medieval, a more realistic approach would be to treat polygamy like a modern phenomenon and to use our tools to change it. Criminalization has proved to be a blunt instrument in this regard, and moral disapprobation seems a flimsy rationale for continuing on that path. A jail sentence for a polygamous husband results in the deprivation of the breadwinner in most traditionally structured polygamous families.²⁸⁰ In the United States, perhaps this is less problematic given the existence of a social safety net and the ability of wives to rely upon the state to support their children to some extent. Nevertheless, the negative economic

276. See Emens, *supra* note 205, at 361–75.

277. See Davis, *supra* note 15, at 2002–24.

278. See Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 22–34 (2012).

279. For instance, the legal rule that a second marriage is void *ab initio* regardless of its length makes it difficult for second wives to sue for marital property. See, e.g., ABRAMS ET AL., *supra* note 30, at 141.

280. In India, bigamy is punishable by fine or imprisonment of up to seven years. In the United States, state laws govern the crime, which is usually a felony offense. See INDIA PEN. CODE (1860), ch. XX, § 494. In Utah, it may result in a five-year jail term. See UTAH CODE ANN. § 76-7-101 (2003); see also *Criminal Penalties*, UTAH ST. CTS., <http://www.utcourts.gov/howto/criminallaw/penalties.asp> (last modified Aug. 11, 2011).

impact of divorce on women has been well-established,²⁸¹ and this would be even worse given that no support would be forthcoming from a jailed spouse. Moreover, incarceration occurs not because the husband poses a threat to his family or to the state but because of moral repugnance for polygamy. We have moved away from prosecuting fornication, adultery, and homosexual sex, yet we continue to criminalize plural marriages. In this Article, I have argued that we ought to be more interested in accommodation and recognition of adult, consensual arrangements of family. The state can continue to regulate the family by making changes to marital rights and obligations of the constituents of any marriage in order to make marriage more just for the partners. In both India and the United States, this form of intervention offers more options for maximizing the liberties of all families while protecting important political and social values.

281. See STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 123 (1998).