

2009

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### Recommended Citation

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

Available at: <http://scholarship.law.berkeley.edu/bjil/vol27/iss2/3>

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# Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law

Claire A. Smearman\*

## I.

### INTRODUCTION

Polygamy played a role in the development of United States immigration law from its very inception. Concerns about the polygamous marriage practices of Chinese immigrants flooding into California in the mid-nineteenth century fueled the passage of early anti-immigrant statutes, with predictions that the immoral Chinese, with their tradition of multiple wives and concubines, would pollute the sanctity of the American family.<sup>1</sup> At the same time, outrage over the practice of polygamy by Mormon settlers in the Western territories sparked a national debate about the importance of monogamy and Christian marriage to democracy and resulted in the passage of a series of federal statutes outlawing polygamy.<sup>2</sup> In 1891, when Congress enacted the first comprehensive federal

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1. See NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 135-39 (2000). See generally Kerry Abrams, *Polygamy, Prostitution and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

2. See, e.g., Edmunds-Tucker Act of 1887, ch. 397, §§ 13, 16, 17, 24 Stat. 635, 637-40 (repealed 1978) (dissolving Mormon Church and escheating property to United States); Edmunds Act of 1882, ch. 47, 22 Stat. 30 (repealed 1983) (creating crime of cohabitation in Utah territories and disqualifying practicing polygamists from holding office); Poland Act, ch. 469, 18 Stat. 253 (1874) (stripping Utah courts of jurisdiction and making polygamy convictions appealable to Supreme Court); Act of July 1, 1862 (Morrill Act), ch. 126, 12 Stat. 501 (repealed 1910) (applying crime of bigamy to practicing polygamists in U.S. territories). See generally Shayna Sigman, *Everything Lawyers Know about Polygamy is Wrong*, 16 CORNELL J. L. & PUB. POL'Y 101, 108-34 (2006); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 353-63

immigration statute, it included polygamists among the categories of persons who would not be admitted to the United States.<sup>3</sup>

In recent years, immigration law and polygamy have been the subject of much attention once again.<sup>4</sup> Yet there has been little discussion in legal scholarship about the impact of polygamy within modern immigration law, even though polygamy has been a bar to admission to the United States since the Immigration Act of 1891. Polygamy as a ground of inadmissibility casts a long shadow throughout the Immigration and Nationality Act of 1952 (INA),<sup>5</sup> the foundation of present immigration law. Currently codified at INA § 212(a)(10)(A),<sup>6</sup> the polygamy ground of inadmissibility (the polygamy bar) is incorporated into numerous provisions of the INA, ranging from adjustment of status (the process for obtaining a green card)<sup>7</sup> to deportation<sup>8</sup> and naturalization.<sup>9</sup> The INA does not recognize a polygamous marriage as a valid marriage for immigration purposes,<sup>10</sup> includes polygamy as a statutory bar to a finding of good moral character,<sup>11</sup> and lists bigamy, the criminal law under

(2003).

3. Law of March 3, 1891 (Immigration Act of 1891), ch. 551, § 1, 26 Stat. 1084. Previous Congressional action on immigration was either limited to a particular concern, *see, e.g.*, Act of Feb 19, 1862 (Coolie Trade Prohibition Act), ch. 27, § 4, 12 Stat. 340, 341 (repealed 1974) (prohibiting Americans from participating in the transport of Chinese slaves), or piecemeal, *see, e.g.*, Act of Mar. 3, 1875 (Act of 1875), ch. 141, 18 Stat. 477 (repealed 1974) (excluding prostitutes and alien convicts).

4. The failure of Congress to pass comprehensive immigration reform in the summer of 2007 ensures that the immigration debate will continue. *See* 153 CONG. REC. S8673-74 (daily ed. June 28, 2007). Polygamy is also in the news as a result of the high-profile prosecutions of fundamentalist Mormon religious leaders such as Rodney Holm, *see, e.g.*, *State v. Holm*, 137 P.3d 726, 730 (2006), *cert. denied*, 127 S. Ct. 1371 (2007) (defendant convicted of one count of bigamy and two counts of unlawful sexual conduct with a sixteen-year-old resulting from his arranged polygamous marriage), and the raid by Texas authorities at the Yearning for Zion Ranch of the Fundamentalist Church of Jesus Christ of the Latter Day Saints in 2008, which resulted in the removal of up to 468 children from their parents. *See* Ralph Blumenthal, *Court Says Texas Illegally Seized Children*, N.Y. TIMES, May 28, 2008, available at <http://www.nytimes.com/2008/05/23/us/23raid.html> (describing outcome of raid on Texas ranch) (last visited Apr. 5, 2009). In July 2008, responding to the Texas raid, Congress held hearings on the crimes associated with polygamy, focusing on the need for a coordinated state and federal response to the problem. 154 CONG. REC., D943 (daily ed. July 24, 2008), available at <http://www.gpoaccess.gov/crecord/08ddd.html> (last visited Apr. 5, 2009).

5. Immigration and Nationality Act of 1952 (INA), ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

6. INA § 212(a)(10) (current version at 8 U.S.C. § 1182(a)(10)(A) (2008)).

7. INA § 245 (current version at 8 U.S.C. § 1255 (2008)). Adjustment of status is the process through which a person with an immigrant visa applies for lawful permanent resident status while they are physically present within the United States. *Id.*; *see* 8 C.F.R. §§ 245.1(a), 1245.1(a) (2008). The document providing proof of lawful permanent resident status is officially known as an I-551 (Alien Registration Receipt Card or Permanent Resident Card) and was once green. *See* USCIS Website, <http://www.uscis.gov/greencard> (last visited Apr. 5, 2009).

8. INA § 237 (current version at 8 U.S.C. § 1227 (2008)).

9. INA § 318 (current version at 8 U.S.C. § 1429 (2008)).

10. *See* discussion *infra* Part III.C.1.

11. *See* discussion *infra* Part III.D.

which polygamy is typically prosecuted, a crime of moral turpitude.<sup>12</sup> The INA has been amended numerous times since its enactment in 1956,<sup>13</sup> and as a result, the sections concerning polygamy are scattered throughout its byzantine structure. Until now, no one has mapped the polygamy provisions within the INA to determine the full extent of the impact of polygamy within immigration law.

Mapping the polygamy provisions in the INA is more than an intellectual exercise. Polygamy is practiced legally in countries around the world, sometimes under the religious law governing an entire nation,<sup>14</sup> and more often within the framework of a pluralistic legal system<sup>15</sup> that applies different religious or customary laws to different segments of the population.<sup>16</sup>

12. See discussion *infra* Part III.E.

13. See, e.g., Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911; Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (amending scattered sections of 8 U.S.C.); Immigration Reform and Control Act (IRCA), Pub. L. 99-603, 100 Stat. 3359 (1986); Immigration Marriage Fraud Amendments (IMFA), Pub. L. 99-639, 100 Stat. 3537 (1986); Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546; Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, 111 Stat. 2160 (1997); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 1501-13, 114 Stat. 1464; USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001); Enhanced Border Security and Visa Entry Act, Pub. L. 107-173, 116 Stat. 543 (2002); Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002); REAL ID Act, Pub. L. 109-13, Div. B, 119 Stat. 231 (2005); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

14. Countries that impose the law of one religion upon all are atypical, but do exist. For example, in Saudi Arabia, all law is based on the Koran, Islam is the state religion, and all citizens must be Muslims; practice of non-Muslim religions in public is prohibited. See U.S. Department of State, 2004 Report on International Religious Freedom, Saudi Arabia (Sept. 15, 2004) [hereinafter International Religious Freedom Report], available at <http://www.state.gov/g/drl/rls/irf/2004/35507.htm> (last visited Apr. 5, 2009).

15. Legal anthropology defines “legal pluralism” as a system of differing legal orders, which coexist in the same political realm but are conceived of as separate entities. See Gunther Teubner, *Rethinking Legal Pluralism*, 13 CARDOZO L. REVIEW 1443, 1444 (1992). Scholars have identified two basic models which are not mutually exclusive and operate in various combinations. The first relies on the constitution to define the parameters of the religious or customary law; the second uses the court structure to determine where and by whom personal status law will be applied. See Christina Jones-Pauly & Neamat Nojumi, *Balancing Relations between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 825, 852-53 (2004).

16. Akua Kuenyehia, *Women, Marriage and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 387 (2006). Under the term “personal status laws,” these religious and customary law systems are applied in accordance with an individual’s religious or tribal affiliation and govern matters of marriage, divorce, child custody, property rights, and inheritance. See 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, 844 (2001); Hallie Ludson, *Relational Rights Masquerading as Individual Rights*, 15 DUKE J. GENDER L. & POL’Y 195, 208 (2008); Ann Laquer Estin, *Embracing Traditionalism: Pluralism in American Family Law*, 63 MD. L. REV. 540, 548-50 (2004). For

Each year, hundreds of thousands of immigrants<sup>17</sup> enter the United States from countries in which polygamy is legal. According to the Department of Homeland Security (DHS), in 2007 alone, close to half a million immigrants obtained lawful permanent resident status<sup>18</sup> from countries in which polygamy is practiced in Africa, Asia, and the Middle East.<sup>19</sup>

In 2007, the largest number of immigrants from Africa who obtained permanent resident status came from Nigeria and Ethiopia, followed by Egypt, Ghana, Kenya, and Somalia.<sup>20</sup> Polygamy is practiced in all of these countries.<sup>21</sup> Likewise, large numbers of immigrants from Middle Eastern and

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example, Israel provides different religious communities with autonomous courts exercising jurisdiction over marriage and divorce. AYELET SCHACHAR, *MULTICULTURAL JURISDICTIONS* 80 (2001). In South Africa, marriage is governed by the customary law of each African ethnic group, as well as the civil statutory law. Wing, *supra*, at 851.

17. The INA defines an immigrant narrowly as a noncitizen authorized to take up permanent residence in the United States. Immigration and Nationality Act of 1952 (INA), ch. 477, § 245(a), 66 Stat. 163, 217 (current version at 8 U.S.C. § 1255(a) (2008)). According to the U.S. Citizenship and Immigration Service definition, however, the term immigrant is broad enough to include lawful permanent residents and undocumented foreign nationals. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, GLOSSARY, <http://www.uscis.gov/files/article/8%20Glossary.pdf> (last visited Apr. 5, 2009).

18. Lawful permanent resident status, obtained through the process known as adjustment of status, allows a non-citizen to live and work in the United States indefinitely, provided they do not commit certain crimes or other acts that would render them deportable under Section 237 of the INA. INA §101(a)(20), 8 U.S.C. § 1101(a)(20) (2008); *see also* 8 CFR § 274a.12(c)(9) (2008). A lawful permanent resident (hereinafter permanent resident) may apply for citizenship after five years. INA § 316(a) (current version at 8 U.S.C. § 1427(a) (2008)).

19. Permanent residents from Asia and Africa totaled 478,219 in 2007. U.S. DEP'T OF HOMELAND SECURITY, U.S. LEGAL PERMANENT RESIDENTS: 2007, 1, 4 (2008), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR\\_FR\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf) [hereinafter DHS Annual Flow Report].

20. According to DHS, the number of permanent residents from these countries totaled 55,392 in 2007. *See* Dep't of Homeland Security, YEARBOOK OF IMMIGRATION STATISTICS: 2007, tbl. 7, *available at* <http://www.dhs.gov/ximgt/statistics/publications/LPR07.shtm> (last visited Apr. 5, 2009) [hereinafter DHS Yearbook of Statistics]. They broke down as follows: Ethiopia – 12,786; Nigeria – 12,448; Egypt – 9,267; Ghana – 7,610; Kenya – 7,030; Somalia – 6,251. *Id.*

21. For example, in Nigeria, marriages are recognized under customary law, Islamic law, and civil law; polygamy is legal under both customary and Islamic law. *See generally* CENTER FOR REPRODUCTIVE RIGHTS, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES – ANGLOPHONE AFRICA: NIGERIA 83 (2003), *available at* <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/WOWAA05.pdf> (discussing polygamy under Islamic law in Nigeria). In Egypt, where a man may take up to four wives under the Egyptian Code, Law No. 100 of 1985, a recent government study indicates that within the third year of marriage, twenty-five percent of Egyptian husbands take a second wife. *See* Dawoud S. El Alami, *Law No. 100 of 1985, Amending Provisions of Egypt's Personal Status Laws*, 1 ISLAMIC L. & SOC'Y 116 (1994); Leila Reem, *Polygamous Duplicity*, AL-AHRAM WEEKLY ONLINE, Feb. 26, 2004, *available at* <http://weekly.ahram.org.eg/2004/679/lil.htm> (describing recent government study and efforts by Egyptian husbands to circumvent the law requiring notice to existing wives before entering into polygamous marriage). In contrast, in Ethiopia, polygamy has been abolished under the civil code, Civ. Code of Ethiopia, bk. 2, tit. 3, art. 585 (1960), although a recent Ethiopian Demographic Health Survey found that sixteen percent of Ethiopian women were in polygamous marriages. *See* Wuleta Betamariam, *Gender and HIV/AIDS in Ethiopia*, *available at*

Asian countries where polygamy is legal also obtained permanent resident status in 2007.<sup>22</sup> These included immigrants from Iran, Iraq, Afghanistan, Jordan, Yemen, Kuwait, and Saudi Arabia,<sup>23</sup> as well as immigrants from Malaysia and Indonesia, where Muslims are permitted to practice polygamy under the personal status laws.<sup>24</sup> Furthermore, in January 2008, the United States Department of State (the State Department) announced the creation of a new special immigrant visa for Iraqi nationals who worked for or were contractors of the United States government.<sup>25</sup> As a result, an additional 25,000 Iraqis, together with their spouses and children, will be permitted to enter the United States over the next five years.<sup>26</sup> It is likely that some of these families will be polygamous.<sup>27</sup>

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[http://www.newa.info/Background\\_Doc.htm](http://www.newa.info/Background_Doc.htm) (last visited Apr. 5, 2009).

22. In 2007, permanent residents from these countries totaled 30,344. DHS Yearbook of Statistics, *supra* note 20.

23. The numbers were as follows: Iran – 10,460; Iraq – 3,765; Afghanistan – 1,753; Jordan – 3,971; Yemen – 2,396; Kuwait – 1,017; and Saudi Arabia – 1,171. *Id.* Statistics on polygamous marriage in the Arab states are “hard to come by and even harder to verify, although the highest rates appear to be in the Gulf states.” LYNN WELCHMAN, *WOMEN AND MUSLIM FAMILY LAW IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY* 77 (2007). However, in each of these countries a man is entitled to take up to four wives under Islamic law. See ABDULLAH YUSUF ALI, *THE MEANING OF THE HOLY QUR’AN* 4:3 (11th ed. 2004). In Iran, a man must establish that he is capable of supporting an additional wife. Susan Tiefenben, *The Semiotics of Women’s Human Rights in Iran*, 23 CONN. J. INT’L L. 1, 63 (2007). Likewise, in Iraq, a man must obtain permission of the court and establish that he is capable of supporting an additional wife and that all wives will be treated equally. Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance and Sundering*, 16 J. TRANSNAT’L L. & POL’Y 1, 51 (2006). The same is true in Afghanistan. Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 188 (2007).

24. See Emory University School of Law, Law and Religion Program, Global Study of Islamic Family Law, <http://www.law.emory.edu/ifl/index2.html> (last visited Apr. 5, 2009) [hereinafter *Islamic Family Law*]. In Indonesia, polygamy is on the increase among Muslims. See Suzanne Brenner, *Democracy, Polygamy, and Women in Post-Reformasi Indonesia*, 50 SOCIAL ANALYSIS 1, 164 (2006) (describing a recent public campaign to promote polygamy, which included a “Polygamy Awards” ceremony, and a popular restaurateur naming dishes such things as “Polygamy Stir-Fry”). In Malaysia, a study was commissioned in 2006 to determine the effects of polygamy on Muslim families. See Sean Yoong, *Malaysia: Polygamy Survey Commissioned*, ASSOCIATED PRESS, Dec. 28, 2006, available at <http://proggienuslima.wordpress.com/2006/12/28/malaysia-polygamy-survey-commissioned> (last visited Apr. 5, 2009). At the time this article went to press, the results of the study had not been published.

25. See Press Release, USCIS, USCIS Announces New Special Immigrant Visa for Certain Iraqi Nationals Who Worked for the U.S. Government (July 9, 2008), available at [http://www.uscis.gov/files/article/SIV\\_Iraq\\_9Jul08.pdf](http://www.uscis.gov/files/article/SIV_Iraq_9Jul08.pdf) [hereinafter *USCIS Announcement*].

26. *Id.* The Defense Authorization Act of 2008, signed into law in January 2008, creates 5,000 special immigrant visas each year through 2013 for Iraqis who worked for the government for at least one year. It also provides the applicants and their families with resettlement benefits. To qualify, the Iraqi nationals must have provided faithful and valuable service and have experienced ongoing serious threat as a consequence of that employment. Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1244, amended by Pub. L. No. 110-242, § 1; see also [http://travel.state.gov/visa/immigrants/info/info\\_4172.html#1](http://travel.state.gov/visa/immigrants/info/info_4172.html#1) (last visited Apr. 5, 2009).

27. See GIHANE TABET, *WOMEN IN PERSONAL STATUS LAWS: IRAQ, JORDAN, LEBANON, PALESTINE, SYRIA* 9 (Valentine Moghadam ed., UNESCO 2005), available at

In light of the large number of immigrants arriving from countries where polygamy is legal, bringing with them cultural practices and religious traditions that support and sometimes even promote polygamy,<sup>28</sup> it is hardly surprising that polygamy is practiced by immigrant communities in the United States. These communities range from groups of African immigrants in New York City to Hmong immigrants from Vietnam living in Minneapolis.<sup>29</sup> The provisions in the INA applying the polygamy bar will therefore have a significant impact not only on those persons seeking to come to the United States, but on those attempting to remain here as well.

It should be noted that polygamous marriage as it is practiced around the world is almost exclusively the prerogative of men.<sup>30</sup> While "polygamy" is regularly used to denote the practice of a husband taking more than one wife, "polygyny" is the more accurate term.<sup>31</sup> Polyandry, the practice of women taking more than one husband, is exceedingly rare.<sup>32</sup> Human rights advocates have argued that polygamy, practiced as polygyny, directly contradicts the

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[http://portal.unesco.org/shs/en/files/8090/11313662721Women\\_in\\_Personal\\_Status\\_Laws.pdf/Women\\_in\\_Personal\\_Status\\_Laws.pdf](http://portal.unesco.org/shs/en/files/8090/11313662721Women_in_Personal_Status_Laws.pdf/Women_in_Personal_Status_Laws.pdf) (last visited Apr. 5, 2009). See also Organisation of Women's Freedom in Iraq, Campaign to Stop Polygamy in Kurdistan-Iraq, <http://www.ahewar.org/eng/show.art.asp?aid=671> (last visited Apr. 5, 2009).

28. In some African cultures, polygamy is associated with wealth and prestige. See MIRIAM KOKTVEDGAARD ZEITZEN, *POLYGAMY: A CROSS-CULTURAL ANALYSIS* 58 (2008).

29. See Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES, Mar. 23, 2007, available at <http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html?scp=1&sq=In+Secret,+Polygamy+Follows+Africans+to+New+York&st=nyt> (last visited Apr. 5, 2009) (interviewing immigrant polygamous families in New York City from Gambia, Guinea, Ghana, Ivory Coast and Mali); Michael Powell & Nina Bernstein, *In Tragedy, Glimpsing Oft-Overlooked Newcomers' Lives*, N.Y. TIMES, Mar. 10, 2007, available at [http://www.nytimes.com/2007/03/10/nyregion/10mali.html?\\_r=1&scp=1&sq=In%20Tragedy,%20Glimpsing%20Oft-Overlooked%20Newcomers%20Lives&st=cse](http://www.nytimes.com/2007/03/10/nyregion/10mali.html?_r=1&scp=1&sq=In%20Tragedy,%20Glimpsing%20Oft-Overlooked%20Newcomers%20Lives&st=cse) (last visited Apr. 5, 2009) (describing fire in Bronx killing five children in polygamous family of Mali immigrants). See also Greg Aamot, *Hmong Americans Grapple with Lingering Effects of Polygamy*, ASSOCIATED PRESS, Nov. 22, 2002, available at [http://asianweek.com/2002\\_11\\_22/news\\_polygamy.html](http://asianweek.com/2002_11_22/news_polygamy.html) (last visited Apr. 5, 2009); Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NAT'L PUB. RADIO, May 27, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=90857818> (last visited Apr. 5, 2009) (estimating that 50,000 to 100,000 Muslims in the U.S. live in polygamous families).

30. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 566 (2004).

31. The term "polygamy" is a gender-neutral term used to describe the taking of more than one spouse by either a woman or a man. ZEITZEN, *supra* note 28, at 3. The term "polygyny," which denotes the practice of a man taking more than one wife, more accurately reflects the reality of the practice throughout the world. See SUSAN DELLER ROSS, *WOMAN'S HUMAN RIGHTS* 512 (2008). In this article, the term "polygamy" is used for consistency with immigration law and is meant to represent a family structure of one husband and two or more wives. "Polyandry," the practice of a wife taking more than one husband, is rare, although it is practiced in the mountains of Bhutan. See Jaime Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within The Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 592-94 (2008) (polyandry, while legal and once common in Bhutan, has become a rare phenomenon in modern Bhutanese society).

32. Sigman, *supra* note 2, at 161.

principle of equality because it grants one spouse, the husband, the right to take multiple wives and then requires the wives to share the resources of the marriage as a result of the husband's decision.<sup>33</sup> Despite any social and economic advantages that polygamy may have offered in traditional society, it causes many social ills under modern conditions, especially in the areas of resource allocation, ownership of property, and inheritance.<sup>34</sup> Although no international human rights treaty explicitly prohibits the practice, polygamy is widely viewed as a serious obstacle to gender equality that should be discouraged and prohibited.<sup>35</sup>

Mapping the polygamy bar in U.S. immigration law reveals that its application has a different impact on men and women that reflects the gender inequality inherent within polygamy itself, particularly in family-based immigration and in the application of the Violence Against Women Act.<sup>36</sup> Part I of this article outlines the historical development of the anti-polygamy provisions in United States immigration law and the influence of the federal campaign against Mormon polygamy on these provisions. Part II maps the operation of the polygamy bar in modern immigration law, examining the effects of the polygamy bar as a ground of inadmissibility in the INA and analyzing the impact of polygamous marriage on family-sponsored immigration. In addition, it evaluates the impact of polygamy as a statutory bar to a finding of good moral character and the consequences of the fact that polygamy, most often prosecuted as the crime of bigamy, is a crime of moral turpitude under the INA. It also considers the effects of polygamous marriage in asylum law. Finally, Part III assesses the gendered impact of the polygamy bar under the INA, analyzing the ways in which it affects male and female immigrants differently. It concludes with a proposal to waive the requirement of proof of a bona fide marriage and the statutory bar to a finding of good moral character for battered immigrant women in polygamous marriages who seek relief under the Violence Against Women Act.

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33. Nicholas Bala et al., *An International Review of Polygamy: Legal and Policy Implications for Canada*, POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN – A COLLECTION OF POLICY RESEARCH REPORTS, Nov. 2005, at 76, 102 (internal citation omitted), available at [http://epe.lac-bac.gc.ca/100/200/301/swc-cfc/polygamy-e/pdf/200511\\_0662420683\\_e.pdf](http://epe.lac-bac.gc.ca/100/200/301/swc-cfc/polygamy-e/pdf/200511_0662420683_e.pdf) (last visited Apr. 5, 2009).

34. See Kuenyehia, *supra* note 16, at 390-91.

35. U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW Committee), 13th Sess., Gen. Recommendation No. 21, ¶ 14 (1994).

36. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (codified as amended in scattered sections of Titles 28 and 42 of the U.S. Code), amended by Pub. L. 106-386, §§ 1501-13, 114 Stat. 1464 (2000) and Pub. L. No. 109-162, 119 Stat. 2960 (2006).



## II.

### HISTORICAL TREATMENT OF POLYGAMY IN U.S. IMMIGRATION LAW

#### *A. Polygamy and the Development of Immigration Law in the Nineteenth Century*

Prohibitions against polygamy played an important role in the development of U.S. immigration policy even before the federalization of immigration law in the late nineteenth century.<sup>37</sup> The influx of Chinese immigrants into California in the 1850s generated concern about the “vast and insuperable differences” between the Chinese and American societies.<sup>38</sup> The significant differences between the American system of monogamous marriage and Chinese attitudes toward sexuality and family structure led to distrust and fear that the Chinese practices of polygamy and prostitution would gain a foothold in immigrant communities in the United States.<sup>39</sup> In fact, most Chinese women who immigrated to California in the nineteenth century were second wives, concubines in polygamous marriages,<sup>40</sup> or prostitutes.<sup>41</sup> Fears about Chinese polygamy, together with the threat of cheap labor from Chinese “coolies,” fueled anti-Chinese sentiment in California and resulted in state laws denying Chinese immigrants citizenship, excluding them from schools and certain occupations, and levying special taxes against them.<sup>42</sup> Politicians justified this anti-Chinese legislation by focusing on the “aberrant” practice of polygamy,

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37. During the colonial era and the early years of the nation's development, immigration was a local issue addressed by each colony or state, which sought to bar the entrance of individuals who posed a potential burden on society, including criminals, the sick, and the poor. Lolita Buckner Inniss, *Dutch Uncle Sam: Immigration Reform and Notions of Family*, 36 BRANDEIS J. FAM. L. 177, 183-84 (1998).

38. See COTT, *supra* note 1, at 135. There was also great concern about the glut of cheap labor with the arrival of Chinese “coolies.” *Id.*

39. See ABRAMS, *supra* note 1, at 642-43. Polygamy was commonly practiced in China, with first wives holding the highest status in Chinese families, followed by second wives and concubines. *Id.* at 653. Since the first wife typically was responsible for the maintenance of the residence and remained with the husband's family in China, many wives who immigrated to the United States were second wives. *Id.* at 656.

40. A concubine was considered a legal wife, although an inferior one, and not a mistress, and her children were treated as legitimate children. See *Matter of Kwan*, 13 I. & N. Dec. 302, 303 (B.I.A. 1969) (describing a form of customary law in which the taking of a concubine involved a formal ceremony and introduction of the concubine into her husband's household).

41. Some historians estimate that approximately fifty percent of Chinese women in San Francisco in 1870 were prostitutes. See GEORGE ANTHONY PEPPER, *IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION 11* (1999) (arguing that census figures exaggerated the number of Chinese prostitutes at seventy percent and that fifty percent was a more accurate figure). Notably, in Chinese culture, prostitution did not have the same stigma as in Western cultures, and prostitutes could move into working class society by marrying a laborer. See ABRAMS, *supra* note 1, at 656.

42. Buckner Inniss, *supra* note 37, at 187. See, e.g., Act of Apr. 26, 1862 (Chinese Police Tax), ch. 339, 1862 Cal. Stat. 462 (repealed 1939) (taxing each person “of the Mongolian race” and over the age of eighteen \$2.50 per month).

distinguishing Chinese polygamy from proper monogamous marriage and comparing polygamy to slavery.<sup>43</sup>

The rhetorical connection between polygamy and slavery had its origins in the federal campaign against the Mormon practice of polygamy in the Utah territories.<sup>44</sup> In the mid-nineteenth century, the Mormon efforts to attain statehood for Utah sparked an intense political campaign against their practice of polygamy.<sup>45</sup> According to Joseph Smith, the founder of the Mormon religion, Mormon men and women must enter into “celestial marriage,” the marriage of one man and multiple wives, in order to attain the “Kingdom of Heaven.”<sup>46</sup> In the Utah territories, the Mormons established a theocratic government and openly practiced “celestial marriage,” which outraged American politicians, who viewed polygamy as a threat to democracy.<sup>47</sup>

Rhetoric that equated polygamy with slavery became an integral part of the national debate on slavery. Members of Congress routinely invoked the horrors of Mormon polygamy and its similarities to slavery in order to argue against the admission of the slave states to the Union.<sup>48</sup> Antislavery politicians compared the sexual practices of Southern slaveholders to those of the Mormons, arguing that slaveholders had harem-like privileges over their female slaves<sup>49</sup> and condemning the “twin relics of barbarism” – polygamy and slavery.<sup>50</sup>

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43. Abrams, *supra* note 1, at 690-94. Politicians also characterized Chinese “coolie” labor as a form of slavery or indentured servitude, even though Chinese laborers were really voluntary immigrants using a credit-ticket system to pay off the cost of their passage out of the earnings from their first job. *Id.* at 651.

44. See COTT, *supra* note 1, at 73. A number of historical accounts have been written about the rise of the Mormon religion, known formally as the Church of Jesus Christ of the Latter-day Saints. See, e.g., LEONARD ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS* (University of Illinois Press 2d ed. 1992); SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); DAVID L. BIGLER, *FORGOTTEN KINGDOM: THE MORMON THEOCRACY IN THE AMERICAN WEST, 1847-1896* (1998); RICHARD VAN WAGONER, *MORMON POLYGAMY: A HISTORY* (Signature Books 2d ed. 1992); Gregory Pingree, *Rhetorical Holy War: Polygamy, Homosexuality and the Paradox of Community and Autonomy*, 14 AM. U. J. GENDER SOC. POL’Y & L. 313 (2006).

45. See COTT, *supra* note 1, at 72-76.

46. See, e.g., Strassberg, *supra* note 2, at 359-61. Joseph Smith stated that celestial marriage was “the most holy and important doctrine ever revealed to men on earth,” a practice central to the full restoration of Christ’s true church, and a solemn ritual that “sealed” a man to each of his wives through eternity. See Pingree, *supra* note 44, at 321-22. According to Smith, Mormon women must enter celestial marriage or risk an eternity as mere “ministering servants.” See Strassberg, *supra* note 2, at 360.

47. See COTT, *supra* note 1, at 73.

48. For example, one Congressman described polygamy as “a crying evil . . . It is often an adjunct to political despotism; and invariably begets among the people who practice it the extremes of brutal blood-thirstiness or timid and mean prevarication.” CONG. GLOBE, 36th Cong., 1<sup>st</sup> Sess. 1514 (1860) (Statement of Rep. McClelland).

49. See COTT, *supra* note 1, at 113.

50. GORDON, *supra* note 44, at 55.

Simultaneously, opponents of Mormon polygamy urged the federal government to extinguish the barbaric practice of polygamy, which, they argued, was the equivalent of female slavery.<sup>51</sup> The Republican platform in the presidential elections of 1856 and 1860 included a pledge to eradicate polygamy as well as slavery.<sup>52</sup> Although President James Buchanan sent 2500 federal troops to Utah in 1857 to impose federal order,<sup>53</sup> the Mormons continued their practice of polygamy. Congress responded in 1862 with the Morrill Act for the Suppression of Polygamy, which made bigamy<sup>54</sup> a federal crime in the Utah territories, punishable by imprisonment of up to five years, and limited the ability of the Mormon Church to hold property.<sup>55</sup>

During the 1870s and 1880s, anti-polygamy rhetoric took a decidedly racist turn. Congressmen began referring to Mormon women as "Indian squaws," and commonly linked Mormon polygamy to "Mohammedan barbarism."<sup>56</sup> In 1878, when *Reynolds v. United States*, a case challenging the constitutionality of the Morrill Act, reached the Supreme Court,<sup>57</sup> the Court adopted similar rhetoric. It equated the practice of polygamy with despotism<sup>58</sup> and traced the origins of polygamy to the Chinese, among other non-Caucasian races, stating that "[p]olygamy has always been odious among the northern and western nations of

51. See Sigman, *supra* note 2, at 1.

52. See COTT, *supra* note 1, at 659; GORDON, *supra* note 44, at 62.

53. See Sigman, *supra* note 2, at 116.

54. Polygamy, illegal throughout the history of Anglo-American law, was most often prosecuted as the crime of bigamy. English common law considered polygamy and bigamy as offences against society and punishable by death. See *Reynolds v. United States*, 98 U.S. 145, 165 (1879). The thirteen original colonies adopted the English bigamy laws, with various modifications. See generally, Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 *FORDHAM L. REV.* 1477, 1507 (2005) (noting that all of the American colonies outlawed bigamy). Adultery and fornication were also criminal acts. COTT, *supra* note 1, at 28.

55. Morrill Act, ch. 126, §§ 1-3, 12 Stat. 501 (1862) (repealed 1910) (limiting the ability of the Mormon Church to own real estate with a value greater than \$50,000). The Morrill Act was ineffective, however, because Utah judges and jurors, often Mormons themselves, refused to convict. See VAN WAGONER, *supra* note 44, at 107-08. The Morrill Act was followed in 1874 by the Poland Act, which addressed this issue by revoking the jurisdiction of Utah courts in all civil, criminal, and chancery matters other than divorce; thereafter, federal courts had jurisdiction over bigamy cases. Poland Act, ch. 469, § 3, 18 Stat. 253 (1874). See Sigman, *supra* note 2, at 121-22.

56. COTT, *supra* note 1, at 113. Lawmakers also portrayed polygamy as linked to the Chinese race; as one senator stated, "[the] yellow race; the Mongol race [were] people to whom polygamy is as natural as monogamy is to us." *Id.* (citing Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan).

57. *Reynolds v. United States*, 98 U.S. 145 (1878). In upholding congressional authority to prohibit the practice of polygamy, the Supreme Court drew a distinction between the legislative power over mere religious belief and opinions and the legislative power over religious practices, finding that laws may regulate religious practices. *Id.* at 166. A majority of the Supreme Court cited this limitation on the scope of the free exercise clause with approval in *Employment Division v. Smith*, 499 U.S. 872 (1990).

58. *Reynolds*, 98 U.S. at 166. The Court stated, "[P]olygamy leads to the patriarchal principle, . . . which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." *Id.*

Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>59</sup> In holding that the Morrill Act did not violate the free exercise clause of the First Amendment, the Court upheld the authority of Congress to “determine whether polygamy or monogamy shall be the law of the society under its dominion.”<sup>60</sup>

The *Reynolds* decision was followed by the Edmunds Act of 1882, which denied polygamists in the Utah territories the right to vote, hold public office, or sit on juries,<sup>61</sup> and the Edmunds-Tucker Act of 1887, which repealed the incorporation of the Mormon Church and escheated the property of the Mormon Church to the federal government.<sup>62</sup> The Edmunds-Tucker Act was the final blow to the practice of polygamy by members of the Mormon Church. Within a year of the Supreme Court’s decision in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,<sup>63</sup> which upheld the Edmunds-Tucker Act,<sup>64</sup> the Mormon Church issued a “Manifesto” denouncing the practice of polygamy.<sup>65</sup> When Utah was finally admitted as a state in 1896, its constitution provided that “polygamous or plural marriages are forever

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59. *Id.* at 164. The Court also equated monogamy with democracy, stating, “In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.” *Id.* at 165-66.

60. *Id.* at 166.

61. The Edmunds Act, ch. 47, 22 Stat. 30, 31-32 (1882) (repealed 1983). It also criminalized bigamous “unlawful cohabitation,” which lowered the evidentiary bar for polygamy prosecutions. *See* COTT, *supra* note 1, at 118. This provision made it unnecessary for prosecutors to prove an actual marriage, which was quite difficult because Utah did not register marriages. *See id.* at 112 (noting that without formal marriage registration in Utah, polygamists could simply deny that a second marriage had occurred). The Edmunds Act was upheld as constitutional by the Supreme Court in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). In *Murphy*, the Court extolled the virtues of monogamous marriage, stating, “For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.” *Id.*

62. The Edmunds-Tucker Act, ch. 397, §§ 13, 17, 24 Stat. 635 (1887) (repealed 1978). The Edmunds-Tucker Act also created a receivership to facilitate the process of managing the Church’s property, made fornication and adultery federal crimes in the Utah territory, and revoked women’s suffrage. *Id.* at §§ 3, 5, 13, 20. Utah had granted women the right to vote in 1870. *See* GORDON, *supra* note 44, at 97.

63. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

64. In upholding the Edmunds-Tucker Act, the Supreme Court in *Latter-Day Saints* again resorted to racist language, stating that polygamy was “a blot on our civilization . . . The organization of a community for the spread 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.” *Id.* at 49.

65. *See* ARRINGTON & BITTON, *supra* note 44, at 183-84; VAN WAGONER, *supra* note 44, at 133-40.

prohibited.”<sup>66</sup>

Given the racist rhetoric of the campaign against Mormon polygamy, the use of similar language and arguments in early efforts to limit Chinese immigration is not surprising. Politicians described the Chinese as a less advanced race that would “arrest the development of our civilization” and as an “indigestible mass in the community,” inassimilable to American values of freedom.<sup>67</sup> They characterized Chinese women as prostitutes by nature,<sup>68</sup> willing to submit to slavery-like conditions, including polygamy.<sup>69</sup> By the 1870s, anti-Chinese clubs were prevalent in California and mob violence against the Chinese would occasionally erupt.<sup>70</sup>

In 1875, three years before the Supreme Court’s decision in *Reynolds*, Congress responded to persistent complaints from California against the Chinese and passed the first federal law to restrict immigration.<sup>71</sup> Known as the Page Law,<sup>72</sup> the statute’s explicit aim was to prohibit the admittance of a “subject of China, Japan or any Oriental country” who “entered into a contract or agreement for a term of service ... for lewd and immoral purposes.”<sup>73</sup> The purported purpose of the Page Law was to protect the institution of monogamous marriage from the system of Chinese prostitution.<sup>74</sup> In reality, the Page Law resulted not only in the prohibition of Chinese prostitutes, but also in the virtual exclusion of

66. Utah Const., art. III (1895). Article III of the Utah Constitution reads, “The following ordinance shall be irrevocable without the consent of the United States and the people of this State: [Religious toleration. Polygamy forbidden.] First:--Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.”

67. COTT, *supra* note 1, at 135.

68. See Cong. Globe, 39th Cong., 1st Sess. 1056 (1866). One Congressman stated, “Judging from the daily exhibition in our streets, and the well-established reputation among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You can not make citizens of them.” *Id.*

69. Abrams, *supra* note 1, at 658-59.

70. *Id.* at 651.

71. See Buckner Inniss *supra* note 37, at 187.

72. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974). While scholars commonly assert that federal exclusion of Chinese immigrants began in 1882 with the Chinese Exclusion Act, in fact the Page Law preceded the Chinese Exclusion Act and explicitly prohibited the entry of Chinese “coolies” and prostitutes. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, § 1, 22 Stat. 58, 59, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600 (prohibiting the immigration of Chinese laborers for a period of ten years); Page Law, ch. 141, 18 Stat. 477. See Abrams, *supra* note 1 at 645-48.

73. Page Law, § 1. The Page Law also made it a felony to import women into the United States for the purpose of prostitution and prohibited the entry of coolie laborers who were brought into the country involuntarily and held for a term of service. *Id.* §§ 2-4.

74. See Abrams, *supra* note 1, at 702. President Ulysses S. Grant supported the Page Law as a protection for Chinese immigrant women, stating that Chinese women “are brought for shameful purposes to the disgrace of the communities where settled. ... If this evil practice can be legislated against, it will be my pleasure as well as my duty to secure so desirable an end.” See E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 65 (1981).

Chinese women from the United States because second wives and concubines were also classified as prostitutes by immigration officials and denied admittance.<sup>75</sup> The Page Law was the first federal immigration statute to declare a class of immigrants excludable.<sup>76</sup>

The second federal law to restrict immigration, the Chinese Exclusion Act of 1882, banned the immigration of all Chinese laborers for ten years.<sup>77</sup> While it did not address polygamy or prostitution directly, it did reinforce the racist belief that the Chinese were a “standing menace to republican institutions” and to “the existence there of Christian civilization.”<sup>78</sup> The Chinese Exclusion Act, often misconstrued as barring all Chinese from immigrating,<sup>79</sup> specifically exempted “Chinese persons other than laborers,” such as merchants, teachers, students, and tourists, who were permitted entry with proof of status.<sup>80</sup> It also extended the anti-Chinese agenda by prohibiting Chinese residents from becoming citizens through naturalization.<sup>81</sup>

In 1888, the Scott Act broadened the ban against Chinese laborers by prohibiting the entry of all Chinese laborers, even those who were U.S. residents returning from a visit to China.<sup>82</sup> This made it impossible for Chinese men to return to China to maintain their often polygamous families in their homeland.<sup>83</sup> The Scott Act was upheld in *Chae Chan Ping v. United States*,<sup>84</sup> better known as the Chinese Exclusion Case, in which the Supreme Court declared that the origins of the federal immigration power were in the plenary power of Congress,<sup>85</sup> thus creating the basis for the virtually unfettered exercise of Congressional power in the area of immigration.<sup>86</sup>

75. See COTT, *supra* note 1, at 138.

76. See Buckner Inniss, *supra* note 37, at 188.

77. Chinese Exclusion Act, ch. 126, § 14.

78. See COTT, *supra* note 1, at 138. One senator opined, “[W]hether this door [of citizenship] shall now be thrown open to the Asiatic population . . . [for the Pacific Coast, this would mean] an end to republican government there, because it is very well ascertained that those people have no appreciation of that form of government; it seems to be obnoxious to their very nature; they seem to be incapable either of understanding it or of carrying it out.” Volpp, *supra* note 1, at 412 n.26 (citing Cong. Globe, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Cowan)).

79. See Abrams, *supra* note 1, at 645-47; Volpp, *supra* note 1, at 465-69.

80. Chinese Exclusion Act, ch. 126, § 6.

81. *Id.* § 14.

82. Act of Oct. 1, 1888, ch. 1064, § 1, 25 Stat. 504, 504 (repealed 1943).

83. See Abrams, *supra* note 1, at 710.

84. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

85. *Id.* at 605-06.

86. See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 154-74 (2002) (discussing the debate about whether the plenary powers doctrine is properly understood as a doctrine of deference to the political branches based on a theory of institutional competence or whether it is a more radical tenet that the political branches are unconstrained by the Constitution in their substantive immigration decisions); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 U.C.L.A. L. REV. 1, 5 (1998) (quoting 4 RONALD D. ROTUNDA & JOHN E. NOWAK,

Two years later, Congress passed the Immigration Act of 1891,<sup>87</sup> the first comprehensive federal immigration law not directed solely at the Chinese, but applicable to all immigrants. The Immigration Act of 1891 excluded many categories of people previously excluded by state laws, such as felons, public charges, and idiots.<sup>88</sup> It also included “polygamists” among the categories of persons excluded from entering the United States.<sup>89</sup> Each Congressional bill to create a comprehensive immigration statute introduced from 1888 until the law was enacted in 1891 had included “polygamist” as an excludable category.<sup>90</sup> Some historians see the addition of “polygamists” in the Immigration Act of 1891 as a continuation of the anti-Chinese efforts;<sup>91</sup> others regard it as a legacy of the campaign against Mormon polygamy.<sup>92</sup> Whatever the underlying reason, a version of the category “polygamists” has remained among the classes of persons excluded from admission to the United States continuously from 1891 to the present.

### *B. Polygamy and Twentieth-Century Immigration Law*

Congress revised the language of the polygamy exclusion several times during the twentieth century.<sup>93</sup> In 1907, it expanded the prohibition from “polygamists” to “polygamists, or persons who admit their belief in the practice of polygamy.”<sup>94</sup> This change paralleled a similar expansion of the category of

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TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 22.2, 598 (2d ed. 1992)); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for Ongoing Abuses of Human Rights*, 10 ASIAN L. J. 13, 14 (2003) (discussing the Supreme Court’s use of the plenary power doctrine in its decision to defer to the immigration policy decisions of Congress and the Executive branch).

87. Law of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, Stat. 1084, 1084.

88. *Id.*

89. *Id.* The Immigration Act of 1891 stated, “[T]he following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, *polygamists*. . .” *Id.* (emphasis added).

90. HUTCHINSON, *supra* note 74, at 96-103.

91. See Abrams, *supra* note 1, at 711.

92. COTT *supra* note 1, at 139. There is little legislative history to shed light on the underlying motivation. See HUTCHINSON, *supra* note 74, at 96-103.

93. The Immigration Act of 1903 added to the categories of excludable persons, but reenacted the law with the term “polygamists” unchanged. Law of Mar. 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214.

94. Law of Feb. 20, 1907 (Immigration Act of 1907), ch. 1134, § 2, 34 Stat. 898, 898-99. The polygamy provision stated, “[T]he following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are

persons who were convicted of a felony to include those who admitted to having committed a felony.<sup>95</sup> The expansion of the polygamy bar to include those “who admit their belief in the practice of polygamy” caused a diplomatic fracas with the Ottoman Empire, as it raised the question of whether all Muslims were barred from entering the United States because their religion permitted polygamy.<sup>96</sup> In response to protests from the Turkish government, the United States opted to distinguish between belief in a religion that tolerated polygamy and the practice itself,<sup>97</sup> thereby averting the problem. Nevertheless, from July 1908 to February 1910 alone, 131 people were denied entry because they were polygamists.<sup>98</sup>

The Immigration Act of 1917 expanded the language of the polygamy exclusion once again, providing for the exclusion of “polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy.”<sup>99</sup> Senator Reed of Missouri offered this language as part of a series of proposed amendments to exclude “all aliens not of the Caucasian race,” “all members of the African or black race,” and all “Turks and East Indians.”<sup>100</sup> Only his amendment regarding polygamy made it into the final bill, which became law in 1917.<sup>101</sup>

From 1917 until 1952, the polygamy provision in the INA remained the

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certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; *polygamists, or persons who admit their belief in the practice of polygamy*, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials . . .” *Id.* (emphasis added). The exclusion language in the Immigration Act of 1907 was amended by the Immigration Act of 1910, but the polygamy section stayed unchanged. See Law of Mar. 26, 1910, ch. 128, § 1, Stat. 263, 263-64 (amending § 2 of the Immigration Act of 1907 by adding an exclusion for aliens supported by prostitution).

95. See HUTCHINSON, *supra* note 74, at 140.

96. COTT, *supra* note 1, at 139.

97. See *id.*

98. *Id.*

99. Law of Feb. 5, 1917 (Immigration Act of 1917), ch. 29, § 3, 39 Stat. 874, 875-76. The Immigration Act of 1917 stated, “[T]he following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; *polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy*; anarchists . . .” *Id.* (emphasis added).

100. HUTCHINSON, *supra* note 74, at 163.

101. *Id.* President Wilson vetoed an earlier version of the bill in 1915 because he opposed the inclusion of a literacy test. *Id.*



same. In 1952, Congress enacted the Immigration and Nationality Act of 1952,<sup>102</sup> which as amended constitutes the foundation of immigration law today. The INA consolidated previous immigration laws, included a national origins quota system, and established a preference system for skilled workers and relatives of U.S. citizens and permanent residents.<sup>103</sup> It also revised the polygamy provision without legislative comment and excluded from admission “[a]liens who are polygamists or who practice polygamy or advocate the practice of polygamy.”<sup>104</sup> The language and location of the polygamy exclusion stayed the same, with minor changes to the section titles and headers, until 1990.

Congress completely revised the exclusion provisions of the INA in the Immigration Act of 1990 (the 1990 Act)<sup>105</sup> and significantly narrowed the polygamy exclusion. The revised language applied prospectively only and provided that “[a]ny immigrant who is coming to the United States to practice polygamy is excludable.”<sup>106</sup> The legislative history of the 1990 Act indicates that one of the goals of Congress was to remove “grounds that caused private injury without protecting United States society.”<sup>107</sup> As a result, the 1990 Act removed several grounds of exclusion, including homosexuality and the past practice of prostitution, from Section 212(a)(11) of the INA.<sup>108</sup> The Congressional subcommittee studying the issue proposed deleting the language excluding those “who are polygamists or who practice polygamy or advocate the practice of polygamy” and changing it to “any immigrant who is coming to the United States to practice polygamy,” based on the desire to “shift the focus of these exclusions from past deeds and belief to anticipated future conduct.”<sup>109</sup>

102. Law of June 27, 1952 (Immigration and Nationality Act of 1952), 66 Stat. 163.

103. See THOMAS ALEXANDER ALENIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 173 (2008) (citing U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981)).

104. Immigration and Nationality Act of 1952, ch. 477, § 212(a)(11), 66 Stat. 163, 182 (codified at 8 U.S.C. § 1182(a)(11) (1952)). The INA of 1952 changed both the location and the language of the polygamy exclusion, which read: “Sec. 212 (a) Except as otherwise provided in the Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . . Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy . . .” *Id.* See also HUTCHINSON, *supra* note 74, at 297-313.

105. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

106. *Id.* at § 601(a). The provision was revised to state, “(a) CLASSES OF EXCLUDABLE ALIENS.—Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States . . . (9) MISCELLANEOUS.—(A) PRACTICING POLYGAMISTS.—Any immigrant who is coming to the United States to practice polygamy is excludable.”

107. 18 IGOR KAVASS & BERNARD REAMS, JR., THE IMMIGRATION ACT OF 1990: A LEGISLATIVE HISTORY OF PUB. L. NO. 101-649, at 757 (1997).

108. Homosexuality as a ground of exclusion was removed completely from Section 212(a)(11); prostitution as a ground of exclusion was amended to address only those coming to the United States principally or incidentally to practice prostitution. *Id.*; see also Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067.

109. See KAVASS & REAMS JR., *supra* note 107, at 786.

The Committee described the change as creating a more easily implemented provision by barring “only those who are coming to the United States for the express purpose of engaging in conduct deemed detrimental to U.S. society.”<sup>110</sup>

The substance of the polygamy bar adopted in the 1990 Act remains the same under the current INA.<sup>111</sup> However, amendments to the INA in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) changed the term “excludable” to “inadmissible.”<sup>112</sup> As a result, the current polygamy bar at INA Section 212(a)(10)(A) provides that “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”<sup>113</sup> As described in the following section, this provision has broad implications throughout the INA.

### III.

#### IMPACT OF POLYGAMY ON CURRENT IMMIGRATION LAW

##### *A. Introduction*

Mapping the provisions of the INA in which polygamy is a factor takes one well beyond the Section 212(a) polygamy ground of inadmissibility that has been included in the federal immigration statutes since 1891. Modern immigration law is a complex labyrinth of statutes and regulations, and the multiple grounds of inadmissibility set forth in Section 212(a) are incorporated into numerous other provisions of the statute. Thus, the polygamy bar has consequences throughout the immigration process.<sup>114</sup> In the first instance, the polygamy bar makes all applicants for immigrant visas inadmissible, meaning that their visa requests will be denied, if they acknowledge during the application process that they intend to practice polygamy while they are in the U.S.<sup>115</sup> Polygamy as a ground of inadmissibility also affects the ability of a

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110. *Id.* Polygamy as a ground of exclusion also was moved to the new category of “Miscellaneous” and was codified at Section 212(a)(9)(A). Immigration Act of 1990, Pub. L. 101-649(a)(9).

111. INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2008).

112. Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C., 110 Stat. 3009-546 (1996). IIRIRA deleted the definition of “entry” from Section 101(a)(13) of the INA and substituted a definition of “admission.” See INA § 101(a)(13), 8 U.S.C. § 1101(a)(4) (2008). What were previously exclusion grounds are now grounds of inadmissibility. See ALEINIKOFF ET. AL., *supra* note 103, at 508.

113. INA § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A).

114. Section 212(a) grounds of inadmissibility are referenced in, *inter alia*, INA §§ 207, 209, 210, 211, 213(A), 216, 232, 235, 240A, 240B, 241, 244, 245, and 249.

115. Section 212(a) of the INA sets forth 10 categories of inadmissibility: health-related, criminal, security, public charge, labor certification, illegal entrants and immigration violators, document violators, ineligibility for citizenship and miscellaneous (which contains the polygamy proscription). INA § 212(a), 8 U.S.C. § 1182(a). The INA defines admission to the United States as lawful entry after inspection and authorization by an immigration officer. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).

non-citizen to become a lawful permanent resident<sup>116</sup> through adjustment of status,<sup>117</sup> which applies to recipients of all forms of immigrant visas (employment-based,<sup>118</sup> diversity lottery,<sup>119</sup> and special immigrant<sup>120</sup>), as well as to individuals who receive asylum,<sup>121</sup> cancellation of removal,<sup>122</sup> and other immigration relief.<sup>123</sup> The polygamy bar is also a ground for deportation under Section 237(a), which incorporates the grounds of inadmissibility into a wide range of grounds of deportability.<sup>124</sup>

Although the INA does not define marriage, decades of case law confirm that a polygamous marriage will not be recognized as a valid marriage for immigration purposes and will not confer the status of spouse on an individual for purposes of obtaining immigration benefits.<sup>125</sup> This has consequences not only in family-based immigration, but also for recipients of employment-based immigrant visas, diversity lottery visas, and other immigrant visas who may bring their spouses to the U.S. as derivative beneficiaries.<sup>126</sup> Polygamous marriage also affects the determination of whether a person has status as a child, parent, or sibling in family-based cases, for derivative beneficiaries, and for naturalization petitions.<sup>127</sup>

Polygamy is a statutory bar to a finding of "good moral character" under Section 101(f) of the INA.<sup>128</sup> Good moral character is a necessary prerequisite

116. Lawful permanent resident status allows non-citizens to live and work in the United States indefinitely, provided they do not commit certain crimes or other acts that would render them deportable under Section 237 of the INA. A lawful permanent resident may apply for citizenship after five years (in most cases). INA § 316(a), 8 U.S.C. § 1427 (2008).

117. INA § 245, 8 U.S.C. § 1255 (2008). This process is unavailable to many (but not all) persons who entered the United States without proper documentation or who violated their visa status while in the United States, as well as for many others. INA § 245(a), 8 U.S.C. § 1255(a) (2008). *See, e.g.*, 8 C.F.R. §§ 245.1(b)(4)-(6), (9)-(10), 1245.1(b)(4)-(6), (9)-(10) (2008).

118. *See, e.g.*, INA § 203(b)(1), 8 U.S.C. § 1153(b)(1) (2008).

119. INA § 203(c), 8 U.S.C. § 1153(c) (2008).

120. INA § 101(a)(27), 8 U.S.C. § 1101(a)(27).

121. INA § 208, 8 U.S.C. § 1158 (2008).

122. INA § 240A, 8 U.S.C. § 1229(b) (2008).

123. For example, adjustment of status applies to a person who is eligible for registry under Section 249, having been in the United States continuously since January 1, 1972, upon proof that he or she is not inadmissible under Section 212(a), is a person of good moral character, and is not ineligible for citizenship and not deportable. INA § 249, 8 U.S.C. § 1259 (2008).

124. INA § 237(a)(1)(A), 8 U.S.C. § 1227 (2008). Section 237(a) lists the categories of deportable aliens, which include those found inadmissible under Section 212(a). Thus, the grounds for deportation are broader than, but include, the grounds of inadmissibility, so that a person could be deportable but not inadmissible. However, the practice of polygamy is a ground of both inadmissibility and deportability.

125. *See* discussion *infra* Part III.C.1. The enactment of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2008), in 1996 has now provided a definition of marriage for all federal legislation that limits a marriage to one man and one woman.

126. INA § 101(b)(1)(A)-(F), 8 U.S.C. § 1101(b)(1)(A)-(F) (2008).

127. *See* discussion *infra*, Part III.C.

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

to obtaining certain benefits and relief under the statute.<sup>129</sup> Most significantly, battered immigrant women who seek to self-petition under the Violence Against Women Act<sup>130</sup> must establish good moral character, which they are precluded from doing if they are in a polygamous marriage.<sup>131</sup> Proof of good moral character is also a requirement for naturalization,<sup>132</sup> cancellation of removal,<sup>133</sup> voluntary departure,<sup>134</sup> and registry.<sup>135</sup> Further, bigamy is a crime of moral turpitude under Section 212(a).<sup>136</sup> Therefore, a non-citizen in the United States who is in a polygamous marriage and is convicted of bigamy, or who admits to facts that would constitute the crime of bigamy, is guilty of a crime of moral turpitude, which makes him or her inadmissible and subject to deportation.<sup>137</sup> Finally, polygamy comes into play in asylum law. The treatment of polygamy in each of these areas will be explored below.

### *B. Polygamy as a Ground of Inadmissibility*

The key provision in the INA regarding polygamy is Section 212(a)(10)(A), the polygamy bar, which provides that “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”<sup>138</sup> As previously discussed, the Immigration Act of 1990 amended the language of the polygamy bar, which had broadly excluded from admission three categories of individuals: polygamists, those who practiced polygamy, and those who advocated the practice of polygamy.<sup>139</sup> The 1990 amendments narrowed the application of the ground of inadmissibility and made it prospective, deeming inadmissible only those polygamists who indicate that they intend to practice polygamy once they enter the United States. The 1990 amendments also significantly reduced coverage by doing away with the polygamy bar for people who merely advocated the practice and for those who had practiced polygamy in the past.<sup>140</sup> The polygamy bar of Section 212(a) applies to all categories of

129. *Id.*

130. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (1994) (codified in scattered sections of Titles 8, 18, and 42 of the U.S. Code).

131. 8 C.F.R. § 316.10(b)(2)(ix) (2008). The same applies to cancellation of removal for VAWA eligible petitioners. 8 U.S.C. § 1229b(b)(2)(A)(iii) (2008).

132. INA § 316(a), 8 U.S.C. § 1427(a) (2008).

133. INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B) (2008).

134. INA § 240B(b)(1)(B), 8 U.S.C. § 1229c(b)(1)(B) (2008).

135. INA § 249(c), 8 U.S.C. § 1259(c) (2008).

136. A crime of moral turpitude is a ground of inadmissibility under INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182 (a)(2)(A)(i)(I) and a ground of deportation under INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2008).

137. See *Gonzalez-Martinez v. Landon*, 203 F.2d 196 (9th Cir. 1953) (holding that bigamy is a crime involving moral turpitude).

138. INA § 212(a)(10)(A), 8 U.S.C. § 1182 (2008).

139. See discussion *supra*, notes 102-04.

140. See discussion *supra*, notes 105-10. The Department of State Foreign Affairs Manual

non-citizens seeking to come to the United States as immigrants, not simply those who are seeking admission in a spousal category.<sup>141</sup>

Section 212(a)(10)(A) does not define polygamy, but according to the Board of Immigration Appeals, “[i]n immigration law, the terms ‘bigamy’ and ‘polygamy’ are neither synonymous nor interchangeable.”<sup>142</sup> To sustain a charge of polygamy, the non-citizen must be found<sup>143</sup> to subscribe specifically to the religious practice or historical custom of polygamy, that is, the taking of plural wives.<sup>144</sup> In contrast, immigration law defines bigamy as “a criminal act resulting from having more than one spouse at a time without benefit of a prior divorce.”<sup>145</sup> Thus, a person who is a bigamist does not trigger the polygamy bar.<sup>146</sup> Rather, the religious or customary practice of polygamous marriage specifically renders a non-citizen inadmissible under Section 212(a)(10)(A). This inadmissibility applies not only to a husband who takes multiple wives in a polygamous marriage, but to any and all of the wives in the marriage as well.<sup>147</sup> Thus, if any party to a polygamous marriage admits the intention to practice polygamy in the United States, the visas of all parties to the polygamous marriage will be denied.<sup>148</sup>

The ground of inadmissibility for practicing polygamy also applies when a person in the United States petitions for an adjustment of status to become a permanent resident after receiving a family-based, employment-based, diversity lottery, or special immigrant visa. It applies as well to individuals who have

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provides: “In order for ineligibility to result the alien must intend to actually practice polygamy in the United States. The alien’s mere advocacy of or belief in the practice, or the fact that the alien at one time in the past may actually have practiced polygamy would not be sufficient to render a finding of ineligibility [for a visa].” 9 FAM 40.101 N2 (Feb. 24, 1997).

141. 9 FAM 40.101 N3 (Feb. 24, 1997).

142. In the Matter of G, 6 I. & N. Dec. 9 (B.I.A. 1953).

143. Inadmissibility may be determined by a U.S. State Department consular officer at an embassy overseas, by a USCIS immigration officer, or by an immigration judge. See generally INA § 212(b), 8 U.S.C. § 1182(b) (2008).

144. *Matter of G*, 6 I & N Dec. at 11. The court stated, “the words polygamist and polygamy refer to the historical custom and religious practice, which the Mormons typified in this country until the statutory abolition of the practice in the latter part of the 19<sup>th</sup> century. Prior to 1882, the practice of polygamy (plurality of wives) was a recognized Mormon custom and requirement of their religious belief, with disobedience being severely penalized under Mormon Church rules.” *Id.* at 10-11.

145. 9 FAM 40.101 N1 (Aug. 26, 1991). Bigamy has been further explained as “implying wrongdoing on the part of one of the spouses in failing to inform the other spouse and the authorities of an existing marriage, although in some cases the bigamous spouses collude.” *Id.*

146. *Id.*

147. See, e.g., In re X, 11 Immig. Rptr. B2-58 (A.A.U. Mar. 16, 1993) (Mormon wife argued unsuccessfully that, as first wife, she was the legal wife and therefore not practicing polygamy).

148. The U.S. Department of State Foreign Affairs Manual provides that if a consular officer has facts available which would lead a reasonable person to conclude that the alien intends to take up or resume the practice once in the United States, (e.g., an alien acknowledges belief in polygamy and has divorced all but one of his wives just prior to visa application and a divorced wife has recently obtained a nonimmigrant visa), the visa may be denied. 9 FAM 40.101 N2 (Feb. 24, 1997).

been granted asylum and to derivative beneficiaries of any of the previous categories if they petition to become permanent residents.<sup>149</sup> Any person seeking to adjust status in the United States, whatever the category of immigrant visa, must establish that none of the grounds of inadmissibility in Section 212(a) apply to them.<sup>150</sup>

Immigration officials and the courts have interpreted the meaning of the statutory language “coming to the United States to practice polygamy” to include individuals who enter into polygamous marriages after they have been in the United States for some time, even if they can establish that at the time they arrived, they did not intend to practice polygamy. For example, the application to adjust the status of a Mormon woman from Canada was denied, even though she had lived in the United States with her husband for eight years before he took a second wife.<sup>151</sup> Likewise, members of immigrant communities who are otherwise eligible to become permanent residents, but who enter into polygamous marriages, will be denied lawful permanent resident status and be subject to removal if they attempt to adjust status and their polygamous marriage is discovered.<sup>152</sup>

Interestingly, prior to the 1990 amendments, the polygamy bar applied to applicants for nonimmigrant visas as well as immigrant visas.<sup>153</sup> A nonimmigrant visa is available to a foreign national who comes to the United States for a variety of reasons but who has no intention of settling permanently in the United States.<sup>154</sup> Nonimmigrant visas range from those for tourists to

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149. See discussion *supra* notes 116-17.

150. INA § 245, 8 U.S.C. § 1255 (2008). Waivers may apply for particular grounds of inadmissibility for certain categories of immigrants. See, e.g., INA § 245(h)(i), 8 U.S.C. § 1255(h)(i). Discretionary waivers may be applied by the Attorney General to inadmissibility based on drug offenses, health issues, or certain family-related circumstances. INA § 212(d)(12), (g), (h), 8 U.S.C. § 1182(d)(12), (g), (h) (2008). Marriage waivers include those for good faith marriages ended in divorce, hardship and spousal abuse. INA § 216(c)(4)(A)-(C).

151. See *In re X*, 11 Immig. Rptr. B2-58 (adjustment of status denied to Canadian Mormon woman who consented to the taking of a second wife by her U.S. citizen husband).

152. Fraud or willful misrepresentation of a material fact to procure a visa or other immigration benefit is also a ground for inadmissibility. INA § 212(a)(6)(c)(i), 8 U.S.C. § 1158(a)(6)(c)(i). This would be a ground of removal for an immigrant attempting to hide a polygamous marriage.

153. Immigration Act of 1990 § 601(a).

154. The categories for non-immigrants are set forth as part of the statutory definition of “immigrant” in the INA, which defines immigrant as “an alien except” those who fall into one of the nonimmigrant categories listed. INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2008). Section 214 of the INA governs admission of non-immigrants and creates a presumption of immigrant intent, which places the burden on the applicant to prove they do not intend to remain in the country. INA § 214(b), 8 U.S.C. § 1184(b) (2008). The most important requirement for establishing nonimmigrant intent is proof of residence in a foreign country that the non-citizen has no intention of abandoning. See, e.g., INA § 101(a)(15)(B), (F), (J), 8 U.S.C. § 1101(a)(15)(B), (F), (J). However, non-citizens may have “dual intent” if they desire “to remain in this country permanently in accordance with the law, should the opportunity to do so present itself.” *Matter of Hasseinpour*, 15 I. & N. Dec. 191, 192 (B.I.A. 1975).

students to athletes to diplomats to skilled and unskilled laborers.<sup>155</sup> Nonimmigrant visas may be valid for as little as 30 days or as long as 10 years.<sup>156</sup> After the 1990 amendments, nonimmigrants may enter the United States even if they intend to practice polygamy while they are in the country.<sup>157</sup> Although they may bring spouses to the United States as derivative beneficiaries, they may not apply for derivative visas for multiple spouses.<sup>158</sup> The Department of State Foreign Affairs Manual provides, however, that a consular officer in a U.S. Embassy overseas may use discretion to issue B-2 (tourist) visas to multiple spouses who are otherwise eligible to receive them.<sup>159</sup>

The polygamy bar in Section 212(a)(10)(A), which bars admission of a practicing polygamist to the United States, is the core principle from which all other provisions in immigration law regarding polygamists flow, as the following discussion will illustrate.

### *C. Polygamy and Definitions of Marriage and Family in Immigration Law*

The area in which the practice of polygamy has the greatest impact by far is in family-based immigration.<sup>160</sup> More immigrants obtain legal status in the United States through family relationships than through any other visa category.<sup>161</sup> The question of whether a marriage is valid, and whether a person's relationship as a spouse, child, parent, or sibling will be recognized for immigration purposes, is a critical issue in every case. A polygamous marriage affects each of these determinations in different ways. The issue arises most obviously in determining a person's eligibility to immigrate as a spouse, whether as an immediate relative spouse of a United States citizen,<sup>162</sup> a second

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155. See INA § 101(a)(15)(A)-(V), 8 U.S.C. § 1101(a)(15)(A)-(V).

156. See, e.g., INA § 102, 8 U.S.C. § 1102 (2008).

157. 9 FAM 40.101 N4 (Feb. 24, 1997).

158. *Id.* While there are only multiple wives in polygamous marriages, the Foreign Affairs Manual uses the gender-neutral term "spouse" throughout the discussion of polygamy. *Id.*

159. *Id.*

160. In 2007, sixty-one percent of immigrants entered as immediate relatives of U.S. citizens and family-sponsored preference category 2A relatives. DHS Yearbook of Statistics, *supra* note 20, tbl. 7.

161. When the derivative beneficiaries of employment-based, diversity lottery, and special immigrant visas, as well as asylum, are added to this number, the total represented eighty-three percent of legal immigration in 2007. *Id.*

162. An immediate relative of a citizen is defined as a spouse, an unmarried child under the age of twenty-one, or the parent of an adult over the age of twenty-one. INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2008). Immediate relatives are not subject to the numerical limitations of Section 201(a); therefore, an immediate relative may obtain permanent residency as soon as the eligibility for the classification has been established. INA § 204(b), 8 U.S.C. § 1154(b) (2008). However, in the case of a spouse, if the marriage has been less than two years, only conditional residence will be granted. INA § 216, 8 U.S.C. § 1186a (2007). See also INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2008) (definition of "child").

preference category spouse of a lawful permanent resident,<sup>163</sup> or a derivative beneficiary spouse under a principal beneficiary's visa.<sup>164</sup>

### 1. Spouses in Polygamous Marriage

Although marriage has been referred to as the central organizing principle of immigration law,<sup>165</sup> the INA does not define the terms "spouse," "husband," "wife," or "marriage."<sup>166</sup> To establish a spousal relationship, a petitioner must submit proof of a "valid marriage for immigration purposes."<sup>167</sup> The adjudicator's analysis requires a two-step process: first, determining whether the marriage was valid when and where contracted, and second, determining whether the marriage qualifies as valid under the INA.<sup>168</sup> As to the first step, the general rule is that the law of the jurisdiction in which the marriage took place governs the marriage's validity.<sup>169</sup> Under immigration law, however, a marriage that is valid in the country in which it was contracted will not be recognized for immigration purposes if it violates the public policy of the United

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163. INA § 203(a)(2)(A)-(B), 8 U.S.C. § 1153(a)(2)(A)-(B) (2008). Section 203(a) provides a hierarchy of family preferences that are subject to numerical limits based on preference category and country of origin. Lawful permanent residents may petition for spouses, children under age twenty-one, and unmarried sons and daughters over age twenty-one in the second preference family categories 2A and 2B. *Id.* Citizens may petition for unmarried sons and daughters over twenty-one as first preference category relatives, for married sons and daughters as third preference category relatives, and brothers and sisters as fourth preference category relatives, but visas in these categories are limited, and the beneficiary family members have to wait varying lengths of time before visas become available. INA §§ 203(a)(1), (3)-(4), 8 U.S.C. §§ 1153(a)(1), (3)-(4) (2008). For example, in April 2009, the wait for an Indian immigrant in the first, third, or fourth family preference category was six and a half, eight and a half and eleven years, respectively, while the wait for a Mexican immigrant in the same preference categories was sixteen and a half, sixteen and a half, and fourteen years, respectively. See U.S. Dep't of State, Visa Bulletin for April 2009, available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4328.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4328.html) (last visited Apr. 20, 2009).

164. Derivative beneficiaries may be added to family-based petitions, employment-based, diversity lottery, and other special immigrant visas, or added as derivative asylees, provided that the derivative beneficiary is accompanying or following the principal beneficiary spouse or parent. See, e.g., INA § 203(d), 8 U.S.C. § 1153(d).

165. Kerry Abrams, *Immigration and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1633 (2007).

166. Section 101(a)(35) does restrict the meaning of the terms by providing that "[the] term 'spouse,' 'wife,' or 'husband' does not include a spouse, wife, or husband by reason of any marriage where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." INA § 101(a)(35), 8 U.S.C. § 1101(a)(35).

167. See, e.g., *Matter of H*, 9 I. & N. Dec. 640 (B.I.A. 1962), *Matter of Darwish*, 14 I. & N. Dec. 307 (B.I.A. 1973); 9 FAM 40.1 N.1 (May 17, 2007).

168. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (describing two-step process and holding that same-sex marriage in Colorado does not qualify as marriage under the INA).

169. See *United States v. Sacco*, 428 F.2d 264, 268 (9th Cir. 1970) (stating the general principle of recognizing the validity of the marriage if valid where celebrated); *Matter of Garcia*, 16 I. & N. Dec. 623 (B.I.A. 1978); *Matter of Kwang*, 15 I. & N. Dec. 312 (B.I.A. 1975); *Matter of Annang*, 14 I. & N. Dec. (B.I.A. 1973).



States.<sup>170</sup>

Case law firmly establishes that a polygamous marriage will not be recognized as a valid marriage for immigration purposes.<sup>171</sup> Relying upon *United States v. Reynolds*,<sup>172</sup> the federal courts and the Board of Immigration Appeals have universally held that polygamy violates the public policy of the United States, with one decision referring to polygamy as “repugnant to...the laws of nature as generally recognized in Christian countries.”<sup>173</sup> The 1996 Defense of Marriage Act (DOMA)<sup>174</sup> provided a federal definition of “marriage” that incorporates this public policy. The principle goal of DOMA was to prohibit the recognition of same-sex marriage throughout federal law.<sup>175</sup> The statute provides, however, that the word marriage “means only a legal union between *one* man and *one* woman as husband and wife,”<sup>176</sup> a definition that clearly does not encompass polygamous marriage. DOMA thus serves to make explicit the public policy exception to the rule that a marriage valid where contracted is valid for immigration purposes, both for same-sex and polygamous marriages.<sup>177</sup>

The most common situation in which the issue of polygamous marriage arises is when a husband petitions on behalf of a second or third wife in a polygamous marriage that was valid in the country in which it was

170. See, e.g., *Matter of Arenas*, 5 I. & N. Dec. 174 (B.I.A. 1975); *Matter of H*, 9 I. & N. Dec. 640, *Matter of Darwish*, 14 I. & N. Dec. 307; 9 FAM 40.1 N.1 (May 17, 2007) (marriages void as contrary to public policy not recognized for immigration purposes).

171. See *Ng Suey Hi v. Weedin*, 21 F.2d 801 (9th Cir. 1927); *Matter of H*, 9 I. & N. Dec. 640, *Matter of Darwish*, 14 I. & N. Dec. 307; 9 FAM 40.1 N.1.1(d) (May 17, 2007).

172. 98 U.S. 145 (1879).

173. See *Ng Suey Hi*, 21 F.2d 801; see also *Matter of H*, 9 I. & N. Dec. 640, *Matter of Darwish*, 14 I. & N. Dec. 307.

174. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 (2008).

175. By enacting DOMA, Congress intended to make it clear that no state is required to recognize a “relationship between persons of the same sex that is treated as a marriage under the law of another state.” 28 U.S.C. § 1783(c) (2008).

176. *Id.* (emphasis added). Section 7 of DOMA states in full: “In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.” 1 U.S.C. § 7.

177. *Abrams*, *supra* note 165, at 1667. The guidelines for U.S. Department of State consular officers and USCIS adjudicators regarding the validity of polygamous marriage have incorporated the DOMA definition. See 9 FAM 40.1 N.1.1(a) (July 20, 2006); USCIS Adjudicators Field Manual § 21.2(a)(1)(A) (2008). In addition to polygamous and same-sex marriages, an incestuous marriage will not be recognized for immigration purposes unless it is valid in the foreign country or state in which it occurred. *Matter of Dela Cruz*, 14 I. & N. Dec. 686 (B.I.A. 1974); see also *Matter of Da Silva*, 15 I. & N. Dec. 798 (B.I.A. 1976) (marriage of uncle and niece in another state that did not violate New York public policy was valid for immigration purposes). Unconsummated proxy marriages and some common law marriages are also invalid for immigration purposes. INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2008).

contracted.<sup>178</sup> Since a polygamous marriage is not valid for immigration purposes, it cannot confer status, and a second or subsequent wife cannot be the beneficiary of a spousal petition,<sup>179</sup> even if the husband later divorces the first wife.<sup>180</sup> In *Matter of Mujahid*, a permanent resident husband from Egypt petitioned for his second wife to come to the United States on a second preference spousal visa. At the time of their marriage in Egypt, he was still married to his first wife, whom he divorced eight months later. The husband argued that it was not his intention to marry until after the divorce, that there had been no ceremony, and that he merely signed the marriage contract while on vacation in Egypt. The BIA held that the second marriage was, in fact, a valid marriage under Egyptian law despite the lack of ceremony, and since it was a polygamous marriage, it was void as against the public policy of the United States.<sup>181</sup> The BIA cited its decision in *Matter of H-*, in which it stated:

The question has been asked whether a marriage contracted in conformity

with the local law, in a country allowing polygamy, would be recognized by the courts of this country. Anglo-American writers generally answer this question emphatically in the negative. They say that such a marriage is not a marriage as understood among the Christian nations and that its recognition would be opposed to sound public policy.\*\*\* [T]he present statute prohibits the admission of aliens who are polygamists or who practice polygamy or advocate the practice of polygamy. In view of this statutory expression of a strong federal public policy against polygamy, it is concluded that the polygamous marriage in the instant case falls within the well-recognized exception to the general rule that the validity of a marriage is determined by the law of the place of celebration. It is concluded that this polygamous marriage cannot be recognized as a valid marriage for immigration purposes... The fact that the prior marriage of the beneficiary was dissolved subsequent to the second polygamous marriage would not appear to affect the nonrecognition of the polygamous marriage.<sup>182</sup>

This rule also applies where the first wife dies after the second marriage

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178. See, e.g., *Matter of Mujahid*, 15 I. & N. Dec. 546 (B.I.A. 1976) (second marriage that was valid in Egypt was not valid for immigration purposes); *Matter of Darwish*, 14 I. & N. Dec. 307 (second marriage in Jerusalem was valid under Jordanian law, but not recognized for immigration purposes); *Matter of H*, 9 I. & N. Dec. 640 (second marriage valid in Jordan was not valid for immigration purposes); *In re Abulrub*, 2006 WL 3485576 (B.I.A. Oct. 31, 2006) (second polygamous marriage in Yemen not valid for immigration purposes); *In re Adomako*, 2006 WL 3712508 (B.I.A. Nov. 20, 2006) (valid polygamous marriage under customary law of Ghana not recognized for immigration purposes).

179. See, e.g., *Matter of Darwish*, 14 I. & N. Dec. 307; *Matter of Mujahid*, 15 I. & N. Dec. 546.

180. See, e.g., *Matter of Mujahid*, 15 I. & N. Dec. 546 (divorce from first wife subsequent to second marriage will not validate the second marriage). The same rule applies if the second wife is the U.S. citizen or lawful permanent resident petitioning on behalf of a husband with a polygamous marriage. See, e.g., *Matter of H*, 9 I. & N. Dec. 640 (husband's divorce of first wife after second marriage to petitioner will not validate polygamous marriage).

181. *Matter of H*, 9 I. & N. Dec. 640.

182. *Id.* at 642.

occurs,<sup>183</sup> on the theory that the pre-existing marriage voids all subsequent marriages.<sup>184</sup>

The first wife of a polygamous marriage, however, *will* be granted spousal status under U.S. immigration law. Immigration officials will permit a citizen or permanent resident husband to petition for one of his wives and will “recognize a polygamist’s first wife without question; he need not end his subsequent marriages for his first spouse to obtain immigration benefits.”<sup>185</sup> The first marriage will be recognized on the theory that it was valid at the time it was contracted and no pre-existing marriage served as an impediment.<sup>186</sup> A husband will not be required to divorce a second, third, or subsequent wife in order to petition successfully on behalf of the first wife.<sup>187</sup> The first marriage will be recognized for all immigration purposes.<sup>188</sup> This includes the determination of who constitutes a child for immigration purposes.

## 2. Children of Polygamous Marriage

The definition of a “child” is central to the determination of family relationships in immigration law, even though a minor child who is a citizen or

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183. See, e.g., *Matter of Arenas*, 5 I. & N. Dec. 174 (death of first wife does not validate second marriage for immigration purposes); *In re Ali*, 2007 WL 4707517 (B.I.A. Oct. 31, 2007) (fact that first wife now deceased does not affect invalidity of polygamous marriage); *In re Abulrub*, 2006 WL 3485576 (invalidity of marriage not altered by death of first wife subsequent to second polygamous marriage).

184. See *Matter of Nwangwu*, 16 I. & N. Dec. 61 (B.I.A. 1976) (preexisting marriage is a bar to recognition of marriage on which visa petition based); *In re Abulrub*, 2006 WL 3485576 (prior marriage is bar to recognition of second polygamous marriage). However, a petitioner may remarry the second spouse to validate the marriage. *Id.*

185. See IGNATIUS AND STICKNEY, 2 IMMIG. L. & FAM. § 4:18 (2008) (citing Senior Immigration Examiner, INS Central Office, Adjudications (Nov. 23, 1993)).

186. A spousal petition requires proof that all previous marriages were terminated by divorce or death, the validity of the divorce to be determined by the law of the jurisdiction in which the divorce occurred. 8 C.F.R. § 204.2(a)(2) (2008); ADJUDICATOR’S FIELD MANUAL, §§ 21.2(b)(1), 21.3(a)(2)(e) (2008).

187. See GALLAGHER, 2 IMMIG. L. SERV. 2d § 7:8 (2008). “If the first-in-time wife of a man with four wives seeks to immigrate based on her marriage, the husband may simply file a visa petition for her. He need not take steps to terminate the three subsequent marriages since the USCIS will consider them to be legally invalid for spousal immigration purposes. However, before his third-in-time wife may immigrate based on their marriage, the man must divorce the two wives that he married before her but need not divorce the fourth wife.” *Id.*

188. Similarly, only the first wife will be recognized if the polygamous husband is a U.S. citizen who dies leaving behind multiple wives. A widow (or widower) of a citizen may self-petition and be classified as an immediate relative if she was married for at least two years to the citizen, and she files the petition within two years of his death (provided they were not separated at the time of his death and she has not remarried at time she filed the petition). INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2008). The petitioner must provide proof of termination of all prior marriages for herself and the deceased; thus, only the first wife will be able to adjust status based on the marriage.

permanent resident cannot petition for his or her parents under the INA.<sup>189</sup> The INA does not define the terms “parent,” “mother,” or “father.”<sup>190</sup> Instead, the existence of these familial ties is determined solely by reason of a relationship with a child.<sup>191</sup> The INA, however, defines a “child” largely on the basis of the parents’ marital relationship. Under the INA, a child is an unmarried person under the age of 21 who is (1) born in wedlock, (2) a step child, (3) a legitimated child, (4) a child born out of wedlock, (5) an adopted child, or (6) an orphan.<sup>192</sup> Of these, the first four categories factor into the analysis of whether a child born in a polygamous marriage is a child for immigration purposes.<sup>193</sup> Unlike the second and third wife of a polygamous marriage, who can neither gain nor confer status as a spouse, a child who is born of any wife in a polygamous marriage is likely to be recognized as the child of both parents for immigration purposes under one of these four categories. However, the fact that the child was born into a polygamous marriage will influence the nature of the analysis.

Prior to 1995, the INA distinguished between legitimate and illegitimate children,<sup>194</sup> a holdover from the common law abandoned by most states during the 1970s and 1980s.<sup>195</sup> Historically, a child born out of a marriage was a bastard, a “filius nulus,” the child and heir of no one.<sup>196</sup> As such, the child was

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189. *Id.* David Thronson critiques this aspect of immigration law as “entirely parent-centered,” since the family-based immigration scheme turns a blind eye to families where only children hold legal immigration status. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 481 (2008).

190. Section 101(b)(2) does define “parent” in the negative, stating that “in the case of a child born out of wedlock described in paragraph (1)(D) (and not described in paragraph (1)(C)), the term ‘parent’ does not include the natural father of a child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.” INA § 101(b)(2), 8 U.S.C. § 1101(b)(2) (2008).

191. *See id.* (“The terms ‘parent’, ‘father’, or ‘mother’ mean a parent, father or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above [defining child]...”).

192. INA § 101(b)(1), 8 U.S.C. 1101(b)(1). A seventh category of “battered child” was created under the Violence Against Women Act, codified in Section 101(a)(51) of the INA and Section 1101(a)(1) of Title 8 of the U.S. Code. A battered child includes the child of a citizen or permanent resident who was battered by or subject to extreme cruelty perpetrated by the child’s parent. INA § 204(a)(1)(A)(iii)-(iv), (B)(ii)-(iii); 8 U.S.C. § 1154(a)(1)(A)(iii)-(iv), (B)(ii)-(iii) (2008).

193. The term “child” is defined at Section 101(c) for purposes of citizenship and naturalization. INA § 101(c), 8 U.S.C. § 1101.

194. When the INA was enacted in 1956, only legitimate, legitimated and step-children were recognized under the statute. Act of June 27, 1952, Pub. L. No. 82-414, ch. 477, 66 Stat. 163, 171. The term illegitimate was added in 1957. Act of Sept. 11, 1957, § 2, Pub. L. No. 85-316, 71 Stat. 639.

195. *See generally* Ralph Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93 (1996) (examining questions relating to the determination of the parent-child relationship). In *Reed v. Campbell*, the Supreme Court held that a statute completely disinheriting a non-marital child from its father’s estate, unless the child is subsequently legitimated by marriage or its parents, is unconstitutional. 476 U.S. 852, 854-55 (1986).

196. *See* Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 561

not entitled to support, maintenance, or inheritance from either parent.<sup>197</sup> Most states eventually modified this rule to provide that the mother was the “natural guardian” of an illegitimate child and required to provide support and education.<sup>198</sup> A father could legitimate an illegitimate child by marrying the mother or taking other steps under the law to acknowledge the child as legitimate and entitled to inheritance rights.<sup>199</sup> In response to a series of Supreme Court cases in the 1970s, most states changed their laws to remove the distinction between legitimate and illegitimate children.<sup>200</sup>

The 1995 amendments to the INA changed the terms “legitimate child” and “illegitimate child” to “child born in wedlock” and “child born out of wedlock.”<sup>201</sup> Nevertheless, the concept of legitimation remains in the definition of child in the INA.<sup>202</sup> The statute still distinguishes among children born in wedlock, legitimated children, and children born out of wedlock.<sup>203</sup> All of these definitions stem from the unstated assumption that marriage is per se

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(2000).

197. See, e.g., *Hogan v. Hogan*, 44 S.W. 953, 954 (Ky. 1898) (child born out of wedlock may not inherit from mother). See generally Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495 (1993) (exploring how inheritance law, through its reliance on legitimacy laws, affects the construction of sexuality and procreative power in society).

198. *Wright v. Wright*, 2 Mass. 109, 110 (1806) (Parsons, C.J., concurring). See also Kelly, *supra* note 196, at 563 (discussing the evolution of bastardry law).

199. See Debbie McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADV. 345 (2006) (outlining the history of bastardry and illegitimacy in the U.S. legal system); see also *In re Junior Jose Cabrera*, 21 I. & N. Dec. 589 (B.I.A. 1996) (holding that “legitimation” is the act of putting a child born out of wedlock in the same position as a child born in wedlock).

200. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that a Louisiana statute that denied illegitimate children the right to recover for wrongful death of their mother violated Equal Protection); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that an Illinois law removing children from an unwed parent violated Equal Protection); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (declaring unconstitutional a Louisiana statute that prohibited illegitimate children from receiving worker’s compensation benefits); *Gomez v. Perez*, 409 U.S. 535 (1973) (finding that a Texas law denying the right of parental support to illegitimate children, while granting it to legitimate children, violated Equal Protection); *Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down an Illinois statute that denied inheritance by intestate succession to illegitimate children); *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that a New York law denying unwed fathers but not unwed mothers the right to block adoption violated Equal Protection).

201. INA § 101(b)(A), (D), 8 U.S.C. § 1101(b)(A), (D) (2008). This change was made because many countries did not distinguish between legitimate and illegitimate children, which created difficulties for U.S. citizen parents who were trying to obtain visas for children adopted overseas. See U.S. Dep’t of State Cable, No. 95 State 281038 (Dec. 6, 1995) (discussing amendment to INA in definition of orphan); see also AUSTIN T. FRAGOMEN & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE*, § 3:2.1 (4th ed. 2007). The 1995 amendment to the INA eliminated the need to determine whether a child born out of wedlock was legitimate or illegitimate to establish “orphan” status for adoption purposes.

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

203. INA § 101(b)(A), (C), (D), 8 U.S.C. § 1101(b)(A), (C), (D).

monogamous and that all progeny of a marriage are "legitimate children."<sup>204</sup> Therefore, when children are born within a polygamous marriage, the application of these definitions is more complex.

*a. Child Born in Wedlock*

A child born in wedlock, that is, a child born to a married couple, is a child under Section 101(b)(1)(A) (hereinafter Subsection A).<sup>205</sup> The marriage must be valid for immigration purposes in order for a child to qualify under Subsection A.<sup>206</sup> This provision clearly applies to a child born to a first wife in a polygamous marriage, since the first marriage is recognized as valid for immigration purposes.<sup>207</sup> The only documents required to establish the child's status are a birth certificate and a marriage certificate of the parents' marriage.<sup>208</sup>

A child born to a second or third wife in a polygamous marriage is not, however, born to a marriage that is recognized as valid under immigration law.<sup>209</sup> Nevertheless, immigration adjudicators and the Board of Immigration Appeals (BIA) historically have struggled to avoid harsh application of this rule to children of polygamous marriages (as opposed to second or third wives in polygamous marriages).<sup>210</sup> Under the pre-1995 Subsection A, which defined a child as a "legitimate child," immigration authorities would recognize the polygamous marriage and consider the child legitimate, provided that the marriage was legal and the child recognized as legitimate in the home jurisdiction.<sup>211</sup>

For example, in *Matter of Kwan*,<sup>212</sup> a Chinese permanent resident with two wives and a concubine sought to bring his two minor daughters born of his concubine to the United States. The BIA struggled with which of three possible laws applied to determine the status of the children, who were living with their mother in Hong Kong.<sup>213</sup> It found that under two of these laws, the children would qualify as daughters of the petitioner. First, under the Chinese civil code

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204. The Code of Federal Regulations still uses the term legitimate to describe a child born in wedlock. 8 C.F.R. § 204.2(d)(2)(ii) (2008).

205. See 9 FAM 40.1 N2.1 (Sept. 3, 2008).

206. See 9 FAM 40.1 N1.1(d) (Sept. 3, 2008) and 9 FAM 40.1 N2.1.

207. See discussion *supra* Part III.C.1.

208. 8 C.F.R. § 204.2(d)(2)(1). The regulations also require proof of legal termination of the parents' prior marriages, if any. *Id.*

209. See 9 FAM 40.1 N1.1(d) and 9 FAM 40.1 N2.1.

210. See, e.g., *Matter of Kwan*, 13 I. & N. Dec. 302 (B.I.A. 1969); *Matter of Kwang*, 15 I. & N. Dec. 312 (B.I.A. 1975).

211. See 9 FAM 40.1 N2.1.

212. 13 I. & N. Dec. 302 (B.I.A. 1969).

213. Complex choice of law questions are not uncommon in these cases. See also *Matter of Kwang*, 15 I. & N. Dec. 312.

of 1931, the children were considered “legitimated,” even though the law had abolished formal concubinage, because while born out of wedlock, the children had been acknowledged by their father, who supported them and their mother.<sup>214</sup> Second, under the customary law of China that applied at the time of the children’s birth, a concubine was recognized as a wife, although a secondary and inferior one, and the children were “legitimate” and equal to the children of the first wife.<sup>215</sup> The BIA relied upon this second law to grant the children status as legitimate children, even though they were the children of a third wife, or concubine, in a polygamous marriage.<sup>216</sup> The language of the case confirms the BIA’s determination to recognize the children of the polygamous marriage in order to allow them to immigrate.<sup>217</sup>

With the statutory change in 1995 eliminating the terms “legitimate” and “illegitimate” from the definition of a child, the analysis of *Matter of Kwan* no longer applies. The legitimacy of a child of a second or third wife under the law of the country of birth is no longer the determining factor; since a polygamous marriage is not valid for immigration purposes, the child cannot qualify as a “child born in wedlock.” The Department of State Foreign Affairs Manual specifically notes that with the definitional change, a child who previously qualified as “legitimate” would no longer qualify as a child under Subsection A if the parents’ marriage was not valid for immigration purposes.<sup>218</sup> However, such a child likely would qualify for status as a “legitimated child” or as a “child born out of wedlock” under the statute.<sup>219</sup>

#### *b. Legitimated Child and Child Born Out of Wedlock*

Historically, a child who was “legitimated” was born a bastard (outside of marriage and therefore illegitimate), and the father had to take affirmative steps to provide the child with the status of a legitimate child (for example, a child with the right to support, inheritance, etc.) by legally acknowledging paternity and recognizing the child as his own.<sup>220</sup> As previously noted, modern law has abolished this distinction, and a child is entitled to both support and inheritance rights with or without the father’s consent, provided paternity is established.<sup>221</sup>

214. 13 I. & N. Dec. at 303-04.

215. *Id.* The B.I.A. rejected the argument that because the father kept his three families in three separate households, they were in fact bigamous rather than polygamous, and that the children were therefore illegitimate. *Id.* at 303.

216. At the time of petition, the first wife had died, the second wife had immigrated to U.S., and the concubine lived in Hong Kong with the two daughters. *Id.* at 303.

217. *Id.* See also *Matter of Kwang*, 15 I. & N. Dec. 312 (child of concubine is considered legitimate under Hong Kong law).

218. See 9 FAM 40.1 N1.1(d) (Sept. 3, 2008) and 9 FAM 40.1 N2.3-1 (Sept. 3, 2008).

219. *Id.*

220. Fellows, *supra* note 197, at 520.

221. *Id.*

Section 101(b)(1)(C) (hereinafter Subsection C) still provides, however, that a child legitimated under the law of the child's or father's domicile before the age of 18 is a child for immigration purposes.<sup>222</sup> The BIA has defined "legitimation" as "the act of putting a child born out of wedlock in the same legal position as a child born in wedlock."<sup>223</sup> Under the INA, legitimation occurs primarily in one of two ways: either the father marries the child's mother<sup>224</sup> or the child is legitimated by operation of law pursuant to legislation enacted in the country of birth that abolishes the distinction between legitimate and illegitimate children.<sup>225</sup> The historical process of legitimation by acknowledgment will not suffice under Subsection C unless it confers all the rights of a legitimate child, including inheritance rights.<sup>226</sup>

However, the concept of acknowledgement by a father still applies under the INA in determining whether a child is "born out of wedlock" under Section 101(b)(1)(D) (hereinafter Subsection D). The mother of a child born out of wedlock must merely prove that she is the child's natural, or biological, mother to establish parenthood and to obtain an immigration benefit, status, or privilege through or on behalf of a child.<sup>227</sup> In contrast, the father of a child born outside of marriage must not only prove biological fatherhood, but must also establish his acknowledgment of that relationship by proving that he established "a bona fide parent-child relationship...when the child...was unmarried and under twenty-one years of age."<sup>228</sup> Both the Code of Federal Regulations and the

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222. Section 101(b)(1)(C) also requires that the child be in the legal custody of the legitimating parent or parents at the time of legitimation. INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (2008).

223. See *In re Junior Jose Cabrera*, 21 I. & N. Dec. 589 (B.I.A. 1996). See also *Matter of Goorahoo*, 20 I. & N. Dec. 782 (B.I.A. 1994) (legitimated child includes children illegitimate at birth, who thereafter attain the full legal status of legitimate children through legally recognized means).

224. The marriage, of course, must be valid where contracted, and must have taken place while the child was under the age of eighteen. See, e.g., *Matter of Rodriguez-Cruz*, 18 I. & N. Dec. 72 (B.I.A. 1981) (parents' religious ceremony before child turned eighteen not sufficient to legitimate in jurisdiction where civil marriage was required). See also 8 C.F.R. § 204.2(d)(2)(ii) (2008).

225. Although many legitimation laws have a retroactive effect, the INA requires the act of legitimation to have taken place prior to the child turning eighteen, with the effective date of legitimation being the date the law took effect. *Matter of Clahar*, 18 I. & N. Dec. 1 (B.I.A. 1981). The INA also requires that the child be in the custody of the legitimating parent or parents. INA § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (2008). See also 9 FAM 40.1 N 2.3-1 (Sept. 3, 2008). There is a presumption, however, that fathers and mothers have a natural right to custody. *Matter of Rivers*, 17 I. & N. Dec. 419 (B.I.A. 1980).

226. See, e.g., *De Los Santos v. INS*, 690 F.2d 57 (2d Cir. 1982). Requirements for legitimation vary greatly by jurisdiction; in some jurisdictions, simple acknowledgement will suffice, while others require establishment of paternity or judicial proceedings resulting in a formal declaration of paternity. See generally Thronson, *supra* note 189, at 489.

227. INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D). The natural mother's name on the birth certificate is often sufficient proof of the relationship. 8 C.F.R. § 204(2)(d)(2)(iii) (2008); 9 FAM 40.1 N2.3-2 (Sept. 3, 2008).

228. INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D); 8 C.F.R. § 204(2)(d)(2)(iii); 9 FAM 40.1 N. 2.3-1. It should be noted that both the Code of Federal Regulations and the Foreign Affairs Manual continue to use the terms "legitimate" and "illegitimate" in discussing these provisions of



Foreign Affairs Manual identify multiple factors the father must establish to prove a "bona fide parent-child relationship," including evidence that the father and child actually lived together or that the father held the child out to the community as his own, that the father provided for some or all of the child's needs, or that the father's behavior generally exhibited a genuine concern for the child's support, instruction, and welfare.<sup>229</sup>

Even with the amendments to the INA, changing the terms "legitimate" and "illegitimate" to "child born in wedlock" and "child born out of wedlock," most parent-child relationships arising out of polygamous marriage will be recognized for immigration purposes.<sup>230</sup> In a jurisdiction where polygamy is legal and the child is recognized as legitimate, the father of a child born to a second or subsequent wife who has acknowledged and supported the child as his own will easily establish that the child is "legitimated" under Subsection C. Since the child is, in fact, legitimate under the law of the home country, the child will have all the rights of legitimacy required under U.S. immigration law, including the right of inheritance, and will satisfy the requirements of Subsection C. Alternatively, the same father, having raised and supported the child as his own, could easily establish the bona-fide parent-child relationship required under Subsection D, since the same elements will qualify the child as a "child born out of wedlock."

For a mother who is the second or third wife in a polygamous marriage, proof of a qualifying relationship is quite simple. Although a mother cannot legitimate a child under Subsection C,<sup>231</sup> a woman must merely prove that she is the child's biological mother to satisfy the requirements of Subsection D in order to confer or receive immigration benefits as the child's mother.

### *c. Step Children and Brothers and Sisters*

Given the numerous conditions required to establish the relationship between a biological father and a child born out of wedlock,<sup>232</sup> surprisingly few conditions must be met to establish a stepparent and stepchild relationship. This benefits members of a polygamous family in unexpected ways. Section 101(b)(1)(B) (hereinafter Subsection B) defines a stepchild, whether or not born out of wedlock, as a child for immigration purposes, provided that the child was under the age of eighteen at the time the marriage creating the status of stepchild

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the INA. See, e.g., 8 C.F.R. § 204.2(a)(2)(iii).

229. 8 C.F.R. § 204.2(a)(2)(iii); 9 FAM 40.1 N2.3-3 (Sept. 3, 2008). The Supreme Court upheld an earlier version of the statute that distinguished between unmarried mothers and fathers and legitimate and illegitimate children in *Fiallo v. Bell*, 430 U.S. 787, 797 (1977). The provision prohibited an unmarried father from conferring immigration status to a child born abroad but allowed an unmarried mother to do so. *Id.* at 797-800.

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

231. See discussion *infra* Part III.C2.

232. See 8 C.F.R. § 204.2(d)(2)(iii).

occurred.<sup>233</sup> The marriage creating the status of stepchild must be valid for immigration purposes.<sup>234</sup> As long as the marriage between the natural parent and the stepparent is intact, the stepchild and stepparent need not meet or establish an emotional relationship before the petition is filed.<sup>235</sup> If the marriage has been terminated by death or divorce, however, the stepchild status only continues to qualify for immigration purposes if a familial relationship between the stepparent and stepchild continues to exist as a matter of fact.<sup>236</sup>

Under Subsection B, the relationships created within a polygamous family between wives and children who are not biologically related have been recognized for immigration purposes. For example, in *Matter of Fong*,<sup>237</sup> the son born to a second wife in a polygamous marriage petitioned on behalf of his father's first wife as his stepmother. The BIA upheld the classification of stepchild, even though the son had already successfully petitioned to bring his father's second wife, his own biological mother, to the United States.<sup>238</sup> The BIA relied upon its analysis in *Matter of Stultz*,<sup>239</sup> in which a child born of a relationship between a married man and his paramour filed a visa petition on behalf of the man's wife. The Attorney General affirmed that decision, stating that regardless of whether the illegitimate child was born before or after the marriage, the natural father's wife could be considered the child's stepmother within the meaning of Subsection B.<sup>240</sup>

The BIA distinguished the facts in *Fong* from its previous holding in *Matter of Man*,<sup>241</sup> which involved a visa petition filed by the child of a first wife on behalf of his father's second wife as a stepmother. In *Man*, the BIA held that a secondary wife could neither derive nor bestow immigration benefits through children born to her husband and the principal wife because the sole basis of the relationship was the polygamous marriage.<sup>242</sup> The court stated, "Congress did not intend to accord preference status on the basis of such relationships in view of the clear disfavor it expressed toward polygamy by

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233. INA §101(b)(1)(B), 8 U.S.C. §1101(b)(1)(B) (2008); 9 FAM 40.1 N2.2-1.

234. 9 FAM 40.1 N2.2 (Sept. 3, 2008).

235. *Id.*

236. *Id.*

237. *Matter of Fong*, 17 I. & N. Dec. 212 (B.I.A. 1980).

238. *Id.* at 214. The petitioner merely had to prove that the second wife was his biological mother to establish that he was a child born out of wedlock under subsection D. INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D).

239. *Matter of Stultz*, 15 I. & N. Dec. 362 (B.I.A. 1974), *aff'd*, Att'y Gen. (1975).

240. *Id.* Although the B.I.A. required proof of an actual parent-child relationship, the Ninth Circuit rejected this requirement in *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980), and the B.I.A. later accepted it in *Matter of McMillan*, 17 I. & N. Dec. 605 (B.I.A. 1981). Under present law, there is no requirement of proof of a bona fide family relationship as long as the marriage creating the step-parent relationship occurred before the child reached the age of eighteen. See *Matter of Mower*, 17 I. & N. Dec. 613 (B.I.A. 1981). See also 9 FAM 40.1 N2.2-1.

241. 16 I. & N. Dec. 543 (B.I.A. 1978).

242. *Id.* at 544.

excluding polygamists from entry into the United States under section 212(a)(11) of the Act.”<sup>243</sup>

The *Fong* court noted that the previous petitions filed by the son on behalf of his father and mother, his father’s second wife, were not based solely on a relationship created by a polygamous marriage.<sup>244</sup> The petitioner’s biological relationship to his mother qualified him under then-Subsection C as an “illegitimate child,” and he was his father’s legitimate child under then-Subsection A.<sup>245</sup> While this analysis would no longer apply under the current definition of child in Subsection A, the stepparent/stepchild analysis in *Fong* is still valid.<sup>246</sup>

Cases involving siblings in polygamous marriages also illustrate the efforts of immigration officials and the courts to recognize as many relationships created within polygamous marriages as possible, except those with second and subsequent wives. The INA does not define the terms “brother” and “sister,” but a sibling relationship may accord immigration benefits if the petitioner and beneficiary have at least one parent in common.<sup>247</sup> In *Matter of Mahal*,<sup>248</sup> the BIA reversed the denial of visa petitions filed by a naturalized U.S. citizen from Pakistan on behalf of his half-brother and half-sister. The visas were denied on the grounds that the beneficiaries were offspring of a second polygamous marriage that could not be considered valid for immigration purposes and that the children of the second wife did not enjoy a sibling relationship with a child of the first wife.<sup>249</sup> The BIA reversed this decision, however, finding that under applicable Hindu law, the children of the second polygamous marriage were “legitimate in every sense of the word.”<sup>250</sup>

The *Mahal* court relied upon its decision in *Matter of K-W-S*,<sup>251</sup> in which a sister filed a petition on behalf of her half-brother, who was the child of her father’s concubine. Finding that under Chinese law, the child of a concubine who is acknowledged by his father holds the same status as the child of the lawful wife, the Attorney General affirmed the BIA’s decision to grant the visa petition.<sup>252</sup> The Attorney General noted that in enacting the Immigration Act of

243. *Id.*

244. *Matter of Fong*, 17 I. & N. Dec. 212, 213 (B.I.A. 1980).

245. *Id.* at 214 (citing *Matter of Kwong*, 15 I. & N. Dec. 312 (B.I.A. 1975)).

246. The *Fong* court also noted that there are no constraints limiting a child’s ability to petition for both a natural parent and a stepparent as there are for adopted children under the INA. *Id.* Section 101(b)(1)(E) provides that no natural parent of an adopted child may derive immigration benefits from that relationship. INA §101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E) (2008).

247. See *Matter of Bourne*, 16 I. & N. Dec. 367 (B.I.A. 1977).

248. *Matter of Mahal*, 12 I. & N. Dec. 409 (B.I.A. 1967).

249. *Id.* The petitioner sought fourth preference status for brothers and sisters of U.S. citizens over the age of 21. INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (2008).

250. *Matter of Mahal*, 12 I. & N. Dec. at 410.

251. *Matter of K-W-S*, 9 I. & N. Dec. 396, 400 (B.I.A. 1961), *aff’d*, Att’y Gen.

252. *Id.* at 410.

1952, Congress was not expressing approval of concubinage. Rather, Congress deemed it “more in accordance with humanitarian principles to try to keep together those offspring of a common parent who have lived together as a family unit in accordance with the established laws and institutions of their place of residence, regardless of whether or not those laws are in conformity with our own social and family institutions.”<sup>253</sup>

Thus, under the INA, the existence of a polygamous marriage has the greatest negative impact on a second or subsequent wife for purposes of establishing familial relationships. In many cases, the polygamous marriage will be valid under the religious, civil, or customary law in the family’s home country.<sup>254</sup> Nevertheless, only the first marriage will be valid for immigration purposes, and only the first wife will be recognized as a spouse under immigration law. A husband must terminate all preceding marriages and remarry a second or subsequent wife in order for the marriage to be recognized for immigration purposes. On the other hand, the children born into the polygamous marriage will likely be recognized for immigration purposes under a number of theories. This is true whether the qualifying relationship is through the father, the mother, or a stepmother within the polygamous family. Finally, half-siblings, stepparents, and step-siblings may also gain status through a relationship resulting from a polygamous marriage under the INA.

#### *D. Polygamy and Good Moral Character*

##### *1. Origins of the Good Moral Character Requirement*

“Good moral character” is a term of art that has existed in immigration law since 1790, when Congress passed the first naturalization statute requiring, among other things, that an alien be of good moral character and take an oath to support the Constitution in order to become a citizen.<sup>255</sup> Proof of good moral character became an element of suspension of deportation (now cancellation of removal) in 1940.<sup>256</sup> Under present law, a person must establish good moral character for a period of 10 years to be granted protection from deportation through cancellation of removal under Section 240A.<sup>257</sup> A person in removal

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253. *Id.*

254. In Nigeria, for example, marriages are recognized under civil law, customary law, and Islamic law, and polygamy is legal under both customary and Islamic law. *See* discussion *supra* note 21.

255. 4 CHARLES GORDON ET. AL., IMMIGRATION AND PROCEDURE § 94.01[2] (2003). The original naturalization statute also required that the alien be free, white, and a resident of the United States for two years. *Id.*

256. 5 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 64.04[3][b][ii] (1999).

257. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2008). Section 240A(b) cancellation of removal is available to a non-citizen in removal proceedings who is the spouse, parent, or child of a

proceedings requesting voluntary departure must also provide proof of good moral character.<sup>258</sup> Most significantly, since the passage of the Violence Against Women Act (VAWA) in 1994,<sup>259</sup> a person must prove good moral character both to self-petition for permanent residence and to receive the relief of cancellation of removal under VAWA.<sup>260</sup>

Despite the long history of the term “good moral character” in immigration law, the INA does not define it. Generally, it is determined by “the current mores of the community. It [does] not demand moral excellence, but rather adherence to the moral standards of the average person.”<sup>261</sup> The INA does, however, identify certain categories of individuals as statutorily ineligible for consideration as persons of good moral character.<sup>262</sup> These include habitual drunkards, persons engaged in prostitution, smugglers, gamblers, persons convicted of or admitting to crimes of moral turpitude, persons convicted of aggravated felonies, and *persons practicing polygamy*.<sup>263</sup> Thus, Section 101(f) precludes battered immigrant women in polygamous marriages from self-petitioning for permanent resident status or obtaining protection from deportation in removal proceedings through cancellation of removal under VAWA.

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citizen or permanent resident and can establish (1) ten years of continuous physical presence in the U.S., (2) good moral character during the ten-year period, (3) no convictions of crimes of moral turpitude, aggravated felonies, and other crimes under Sections 212(a) and 237(a), and (4) exceptional and extremely unusual hardship to the person’s spouse, parent, or child who is a citizen or permanent resident. *Id.*

258. INA § 240B(b)(1)(B), 8 U.S.C. § 1229c(b)(1)(B) (2008). Voluntary departure allows a person in removal proceedings to leave the country at their own expense within 120 days of the removal hearing and thereby avoid certain bars that would apply if they were deported at the expense of the U.S. A person who requests voluntary departure prior to the commencement of removal proceedings is not required to prove good moral character. INA § 240B(a), 8 U.S.C. § 1229c(a).

259. The Violence Against Women Act was passed as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

260. INA § 204(a)(1)(A)(iii)(II)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (2008); INA § 240A(b)(2)(A)(iii), 8 U.S.C. § 1229b(b)(2)(A)(iii).

261. 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 74.07(5)(d) (2008). *See, e.g.*, *Matter of Sachez-Linn*, 20 I. & N. Dec. 362 (B.I.A. 1991) (holding that good moral character does not mean moral excellence and is not destroyed by a single incident).

262. INA § 101(f), 8 U.S.C. § 1101(f) (2008); 8 C.F.R. § 204.2(c)(2)(v), (e)(1)(vii) (2008).

263. *Id.* Other categories of persons statutorily precluded from proving good moral character include persons who have given false testimony for immigration purposes and persons who have engaged in Nazi persecution, genocide, acts of torture, and severe violations of religious freedom. INA § 101(f)(1)-(9), 8 U.S.C. § 1101(f)(1)-(9). Immigration officials also have the authority under Section 101(f) to make a discretionary finding that a person is not of good moral character even if the person is not within any of the enumerated categories.

## 2. Good Moral Character and the Violence Against Women Act

The Violence Against Women Act of 1994<sup>264</sup> was the first comprehensive federal regulation to address the national epidemic of domestic violence,<sup>265</sup> and it contained numerous provisions addressing the special needs of battered immigrant women.<sup>266</sup> Studies have shown a higher incidence of spousal battery among immigrant women than among the general population.<sup>267</sup> Some scholars have suggested that this is because full control of the immigration process in marriage-based immigration is in the hands of the U.S. citizen or permanent resident spouse.<sup>268</sup> Under the INA, a citizen or permanent resident spouse has unilateral power to petition for immediate relative or second preference category status on behalf of an immigrant spouse<sup>269</sup> and must willingly participate throughout the adjustment of status process.<sup>270</sup> In the hands of an abuser, total control over the victim's immigration status is a powerful weapon in the

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264. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (codified in scattered sections of Titles 8, 18 and 42 of the U.S. Code).

265. A recent U.S. Department of Justice Report indicated that eighty-four percent of spouse abuse victims and eighty-six percent of victims of dating partner abuse are female. See MATTHEW R. DUROSE ET AL., FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 1, 11 (U.S. Dep't of Just. Bureau of Justice Statistics ed., 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf> (last visited Apr. 5, 2009). Therefore, battered immigrants will be referred to as women in this discussion.

266. Battered immigrants experience all of the many forms of violence common in abusive relationships. See Martha R Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow To Support the Substance*, 38 HOW. L.J. 297, 301 (1995). In addition, they are also subjected to abuse directly related to their status as immigrants. Sudha Shetty & Janice Kaguyutan, IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: CULTURAL CHALLENGES AND AVAILABLE LEGAL PROTECTIONS (Feb. 2002), [http://new.vawnet.org/category/Main\\_Doc.php?docid=384](http://new.vawnet.org/category/Main_Doc.php?docid=384). Abusers frequently use their partners' immigration status as one instrument of control in a pattern of physical, sexual, and psychological abuse. The most typical behavior involves threats to report their partners to immigration authorities and have them deported when they are undocumented, have fallen out of status, or are working "under the table." Married abusers who are U.S. citizens or permanent residents often threaten not to file or to withdraw visa petitions or applications necessary for the victim to gain legal status. *Id.*

267. *Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 58, 60 (2000) (statement of Leslye Orloff, Director, Immigrant Women Project, NOW Legal Defense and Education Fund). See also Family Violence Prevention Fund, *The Facts on Immigrant Women and Domestic Violence*, available at <http://endabuse.org/resources/facts/immigrant.pdf> (last visited Apr. 5, 2009). Although causation is difficult to establish, some scholars argue that this is because Congress has given U.S. citizen and permanent resident spouses control over the immigration process. See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 N. ILL. L. REV. 153, 175-76 (2004).

268. See Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 N.W.U. L. REV. 665 (1998) (asserting that many battered immigrant women are reluctant to leave their husbands for fear of losing permanent residency).

269. INA § 204(a)(1)(A)(i), (a)(2)(A), 8 U.S.C. § 1154(a)(1)(A)(i), (a)(2)(A) (2008).

270. *Id.*

common pattern of physical, sexual, and psychological abuse.<sup>271</sup>

Prior to the enactment of VAWA in 1994, many battered immigrant women were trapped in violent marriages by their abusers' refusal to file a visa petition or threats to withdraw a pending petition and the resulting fear of deportation and separation from their children.<sup>272</sup> The Immigrant Marriage Fraud Act of 1986 (IMFA),<sup>273</sup> which was intended to prevent sham marriages to gain immigration status,<sup>274</sup> further complicated the spousal petition process by creating a conditional resident status for immigrant spouses in marriages of less than two years.<sup>275</sup> Under IMFA, the approval of a spousal petition before the second anniversary of the parties' marriage requires the immigrant spouse to wait an additional two years before obtaining permanent residency.<sup>276</sup> At the end of the two-year period, the married couple must file a joint petition to remove the conditions and prove that the marriage was "bona fide" before the immigrant spouse is granted permanent resident status.<sup>277</sup> The requirement that

271. Abusers may also refuse or threaten not to attend necessary interviews with immigration officials or deliberately sabotage the interviews they do attend. Abusers often hide or destroy important documents necessary for the immigration process, such as passports, birth certificates, ID cards, marriage licenses and work authorization documents. See Marry Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 294 (citing H.R. REP. NO. 103-395, at 25-27 (1993)).

272. Kelly, *supra* note 268, at 670-71.

273. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 216(g), 100 Stat. 3537, 3541 (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186(a)) (defining the categories of marriages subject to the conditional residence requirement).

274. No one established how severe the marriage fraud problem was prior to the enactment of IMFA; the preoccupation with marriage fraud that triggered IMFA has been traced to an erroneous INS report that estimated that thirty percent of marriages bringing immigrant spouses to the U.S. were fraudulent. The INS later estimated the number was closer to eight percent. See Joan Fitzpatrick, *The Gender Dimensions of U.S. Immigration Policy*, 9 YALE J.L. FEM. 23, 33 (1997). Marriage fraud is a crime for the U.S. citizen or permanent resident spouse who colludes. 8 U.S.C. § 1325(c) (2008); 18 U.S.C. § 1546 (2008). A non-citizen found guilty of marriage fraud is permanently ineligible for legal immigrant status. INA § 204(c), 8 U.S.C. § 1154(c).

275. INA § 216(a)-(g), 8 U.S.C. § 1186a(a)-(g) (2008). Second preference visas approved in August 2004 are now being admitted, according to the most recent visa bulletin. See U.S. Dep't of State, Visa Bulletin for April 2009, *available at* [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4438.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4438.html) (last visited Apr. 5, 2009).

276. See INA § 216(c)(3)(B), 8 U.S.C. § 1186a(c)(3)(B). A conditional resident has the right to work, to travel abroad, and to reenter the country. See 8 C.F.R. § 216.1 (2008) ("The rights, privileges, responsibilities and duties which apply to all other lawful permanent residents apply equally to conditional permanent residents..."). Throughout the conditional residence period, the immigrant spouse can be deported if DHS determines that the marriage was not bona fide. 8 C.F.R. § 216.3 (2008).

277. INA § 216(c)(1), 8 U.S.C. § 1186a(c)(1). The conditional residency status must be removed by a joint petition filed by both spouses within ninety days before the second anniversary of the grant of conditional status. INA § 216(d)(2), 8 U.S.C. § 1186a(d)(2). Before permanent resident status is granted, the marriage is generally reassessed in an interview with USCIS to determine if it is bona fide, that is, if it was entered into with intention of building a life together. 8 C.F.R. § 1216.4(b) (2008).

an abusive petitioning spouse participate in this multi-step process created additional hurdles for battered immigrant women. The Immigration Act of 1990<sup>278</sup> addressed this problem by creating an exception to the joint petition requirement, allowing the conditional resident spouse to self-petition if she could prove that she entered into the marriage in good faith but that during the marriage, she or her child was subjected to battering or extreme cruelty.<sup>279</sup> The 1990 amendments did nothing, however, to provide relief to the many battered immigrant women who did not have conditional resident status and were being held hostage in an abusive marriage because of their lack of immigration status.

The passage of VAWA in 1994 was the culmination of years of effort by advocates to address the problems inherent in immigration law for battered immigrant women.<sup>280</sup> VAWA has been described as a "significant milestone in immigration history"<sup>281</sup> for its creation of a mechanism by which married battered immigrant women<sup>282</sup> can independently petition for permanent resident status without the participation of their abusers.<sup>283</sup> Under the original provisions of VAWA enacted in 1994, a self-petitioner was required to establish that she or her child had been battered or subjected to extreme cruelty by her spouse during the marriage;<sup>284</sup> that she entered into a good-faith marriage to a U.S. citizen or permanent resident;<sup>285</sup> that she had been a person of good moral character for the three years preceding the filing of the petition;<sup>286</sup> and that she

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278. Pub. L. No. 101-649, 104 Stat. 4978 (1990 Act).

279. *Id.* The Immigration Act of 1990 modified the grounds on which a conditional resident spouse could obtain a waiver of the requirement that the spouses file a joint petition to remove the conditions. The amendments allowed the conditional resident spouse to self-petition in three circumstances: (1) if she entered the marriage in good faith, but she or her child was battered or subjected to extreme cruelty; (2) if she entered into the marriage in good faith but it was terminated by death or divorce through no fault of her own; and (3) if she would suffer extreme hardship if deported. INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B).

280. See Calvo, *supra* note 267, for a detailed history of the legislative efforts that preceded passage of the VAWA.

281. Kelly, *supra* note 196, at 574.

282. The only relief currently available for immigrant women whose spouses are undocumented is a petition for a U Visa, adopted as part of VAWA 2000. See discussion *infra* Part III.D.3.

283. VAWA also created federal civil remedies for gender-based acts of violence, provided funding for survivors, and created federal penalties for sex crimes and new federal rules of evidence regarding sexual history in both the criminal and civil context. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 64 (2002). The civil remedies for gender violence were struck down as unconstitutional by the Supreme Court in *United States v. Morrison*, 529 U.S. 598, 607-19, 627 (2000), which held that the federal civil remedies provisions were beyond the scope of Congress' power under the Commerce Clause.

284. INA § 204(a)(1)(A)(iii), (a)(1)(B)(ii), 8 U.S.C. § 1154 (a)(1)(A)(iii), (a)(1)(B)(ii) (2008); 8 C.F.R. § 204.2(c)(1)(i)(E), (c)(1)(vii), (c)(2)(iv) (2008). Battered children may also self-petition under the statute. INA § 204(a)(1)(A)(iv), (a)(1)(B)(iii), 8 U.S.C. § 1154(a)(1)(A)(iv), (a)(1)(B)(iii); 8 C.F.R. § 204.2(e)(1)(i)(E).

285. INA § 204(a)(1)(A)(iii)(I)(aa), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa).

286. INA § 204(a)(1)(A)(iii)(II)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb). See also 8 C.F.R. §



or her child would suffer extreme hardship if deported.<sup>287</sup> VAWA also created a new category for cancellation of removal (then suspension of deportation) that allowed a battered immigrant woman in removal proceedings to obtain relief from deportation and receive permanent resident status.<sup>288</sup> Despite these welcome improvements, the provisions of VAWA contained numerous shortcomings and other immigration laws adopted in the late 1990s created new problems for battered immigrant women,<sup>289</sup> which advocates continued to work to address.<sup>290</sup>

Those efforts led to the enactment of the Battered Immigrant Woman Act of 2000 (VAWA 2000) as part of the Victims of Trafficking and Violence Protection Act of 2000.<sup>291</sup> VAWA 2000 greatly expanded the categories of battered immigrant women who could self-petition for permanent resident

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204.2(c)(1)(i)(F), (c)(1)(vii), (c)(2)(v), (e)(1)(i)(F), and (e)(2)(v) (requiring that good moral character be established for a period of three years). A self-petitioning child must also establish good moral character. INA § 204(a)(1)(A)(iv), (a)(1)(B)(iii), 8 U.S.C. § 1154(a)(1)(A)(iv), (a)(1)(B)(iii).

287. INA § 204(a)(1)(A)(iii)(II), (a)(1)(B)(ii), 8 U.S.C. § 1154(a)(1)(A)(iii)(II), (a)(1)(B)(ii); 8 C.F.R. § 204.2(c)(1)(i)(G), (c)(1)(viii), (c)(2)(vi). As with good moral character, the extreme hardship provision also applies to self-petitioning children. INA § 204(a)(1)(A)(iv)(II), (a)(1)(B)(iii)(II), 8 U.S.C. § 1154 (a)(1)(A)(iv)(ii), (a)(1)(B)(iii)(II); 8 C.F.R. § 204.2(c)(1)(I)(G), (e)(1)(viii), (e)(2)(vi). Advocates soon discovered that the extreme hardship requirement was a difficult hurdle to overcome. Kelly, *supra* note 268, at 684-86.

288. Section 240A(b)(2) of the INA provides that cancellation of removal may be granted if the petitioner establishes the following criteria: (1) abuse perpetrated by a spouse or intended spouse who was a U.S. citizen or lawful permanent resident; (2) three years of continuous physical presence in the United States immediately preceding the filing of the petition; (3) three years of good moral character; (4) that she was not deportable on certain grounds including criminal offenses and document fraud; and (5) that deportation would result in extreme hardship to herself or her child. 8 U.S.C. § 1229b(b)(2)(A) (2008).

289. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1997), sharply limited the discretionary relief available for deportable aliens, expedited their removal, and created a three-year or ten-year bar to applicants for admission for those who had previously lived in the United States unlawfully, depending on the length of their unlawful presence. IIRAIRA § 301(b)(1), codified at INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182 (a)(9)(B)(i)(I) (2008). It did, however, waive these provisions for battered spouses and children under VAWA, INA § 212(a)(9)(B)(iii)(IV), 8 U.S.C. § 1182 (a)(9)(B)(iii)(IV), provided that there was a "substantial connection" between the unlawful entry or overstay and the abuse. INA § 212(a)(6)(A)(ii)(III), 8 U.S.C. § 1182(a)(6)(A)(ii)(III). The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), eliminated most public benefits for many non-citizen immigrants. 8 U.S.C. §§ 1601, 1611-13 (2008). IIRAIRA restored some of these benefits for battered immigrants, provided they could establish a substantial connection between the abuse and the need for the benefit. 8 U.S.C. § 1641(c) (2008).

290. See, e.g., Cecilia M. Espenosa, *No Rest for the Weary: VAWA Relief Denied for Battered Immigrants Left in the Intersections*, 83 MARQ. L. REV. 163 (1999); Kelly, *supra* note 268, at 695; Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIG. L.J. 303 (1997).

291. Battered Immigrant Woman Act of 2000 (VAWA 2000), Pub. L. No. 106-386, §§ 1501-1513, 114 Stat. 1464. The goal of VAWA 2000 was to reauthorize the funding and programs established in the 1994 Act, as well as to address the gaps in and unintended consequences of VAWA 1994 and the immigration statutes that followed it. VAWA 2000 § 1502(a), (b).

status. It provided that a divorced woman may petition within two years of the divorce if the divorce was connected to the abuse.<sup>292</sup> It eliminated the requirement that a battered immigrant woman prove extreme hardship to self-petition, and it permitted her to self-petition within two years if her abusive spouse lost citizenship or permanent resident status due to an incident of abuse.<sup>293</sup>

It also added a provision explicitly permitting a battered spouse to self-petition if she believed her marriage to a citizen or permanent resident was valid, even if the marriage was not legitimate because of the bigamy of the abusive spouse.<sup>294</sup> In addition, VAWA 2000 modified the INA to permit a finding of good moral character even if the battered spouse was convicted of a crime that would normally prohibit such a finding, provided that the crime was related to the abuse.<sup>295</sup> VAWA 2000 also extended some of these benefits to battered immigrant spouses in cancellation of removal proceedings.<sup>296</sup> Finally, VAWA 2000 created a new "U" nonimmigrant visa category for victims of criminal activity (including domestic violence) who help law enforcement agencies to investigate and prosecute those crimes.<sup>297</sup>

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292. INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(ccc), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(ccc); INA § 204(a)(1)(B)(ii)(II)(CC)(bbb), 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(CC)(bbb).

293. INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(bbb), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(bbb); INA § 204(a)(1)(B)(ii)(II)(CC)(aaa), 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(CC)(aaa). Widows were permitted to self-petition within two years of the death of an abusive spouse. INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(aa)(CC)(aaa). The statute also protected "intended spouses" who had resided with an abuser. INA § 204(a)(1)(A)(iii)(I)(aa)(bb), 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(aa)(bb); INA § 204(a)(1)(B)(ii)(I)(aa)(bb), 8 U.S.C. § 1154(a)(1)(B)(ii)(I)(aa)(bb). Certain spouses, intended spouses, and children living abroad who were abused by a U.S. citizen or permanent resident in the United States or abroad also became eligible to self-petition. INA § 204(a)(1)(A)(v)(I)(aa)-(cc), 8 U.S.C. § 1154(a)(1)(A)(v)(I)(aa)-(cc); INA § 204(a)(1)(B)(iv)(I)(aa)-(cc), 8 U.S.C. § 1154(a)(1)(B)(iv)(I)(aa)-(cc). These include those abused by a U.S. citizen or permanent resident abroad, if the abuser was employed by the U.S. government or was a member of the U.S. uniformed services. *Id.*

294. This removed the previous evidentiary requirement that a battered woman submit proof that her husband had terminated all prior marriages in order to prove a good faith marriage. INA § 204(a)(1)(A)(iii)(II)(BB), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(BB); INA § 204(a)(1)(B)(ii)(II)(aa)(BB), 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(BB).

295. INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C).

296. *See, e.g.*, INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (2008) (conviction of crime may be waived provided battered spouse was not the "primary perpetrator," acted in self-defense, did not violate a protective order designed to protect her, the crime did not result in serious bodily injury, and there was a connection between the crime and the abuse). VAWA 2000 eliminated the application of the "stop-time rule" adopted in IIRAIRA, which stopped the calculation of the ten years of continuous physical presence in the United States (three years for VAWA cancellation petitioners) the moment DHS instituted removal proceedings. VAWA 2000 § 1506. Absences connected to the abuse do not toll the calculation of time for continuous presence under VAWA. VAWA 2000 § 1504(a)(2)(B). VAWA 2000 also permits a VAWA-eligible petitioner to file a motion to reopen removal proceedings within one year of the entry of the order of removal. VAWA 2000 § 1506.

297. INA § 101(a)(15)(U)(i)-(iii), 8 U.S.C. § 1101(a)(15)(U)(i)-(iii) (2008).

The reauthorization of VAWA in 2005 (VAWA 2005)<sup>298</sup> provided additional assistance to victims of domestic violence.<sup>299</sup> However, none of the amendments to the original VAWA statute in VAWA 2000 or VAWA 2005 addressed the twin hurdles that prevent a battered woman in a polygamous marriage from obtaining relief under VAWA.<sup>300</sup> First, a battered immigrant woman in a polygamous marriage may not self-petition under Section 204(a) or obtain cancellation of removal under Section 237(a)(7) because she cannot establish that she is a spouse in a bona fide marriage that is valid for immigration purposes.<sup>301</sup> The bigamy exception to the requirement of proof of a bona fide marriage, which applies to a battered spouse if the marriage was not valid “solely because of the bigamy of [the abusive spouse],”<sup>302</sup> was intended to protect the innocent spouse who believed he or she entered into a monogamous marriage, only to discover that his or her spouse did not terminate a prior marriage.<sup>303</sup> This exception would not apply to a woman who consented to a polygamous marriage, whether as a first or subsequent wife.

Second, a battered woman in a polygamous marriage is statutorily ineligible to prove good moral character under Section 101(f)(3), which bars “practicing polygamists” from establishing good moral character.<sup>304</sup> It may be possible, however, for a battered immigrant woman to establish facts proving that she was forced into the polygamous marriage and that the polygamy itself was an aspect of the abuse. Section 204(a)(1)(C) provides that a self-petitioner who would be barred from a finding of good moral character as a result of an act or conviction encompassed in the Section 101(f) statutory bars will not be precluded from a finding of good moral character if she establishes that the act or conviction was connected to the abuse she suffered.<sup>305</sup> However, Section

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298. Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

299. VAWA 2005 included greater confidentiality provisions, employment authorization for battered spouses of certain non-immigrant employment visas, a prohibition against DHS arresting immigrant victims at shelters or rape crisis centers based on information provided by abusers, motions to reopen removal proceedings on the basis of VAWA-eligibility, and exemption from sanctions for failure to voluntarily depart. *Id.* §§ 811-17. It also incorporated the International Marriage Broker Regulation Act to protect prospective spouses of U.S. citizens and permanent residents who come to the United States as “mail order brides.” *Id.* §§ 831-34.

300. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (precluding a finding of good moral character for any person who is a member of certain classes of people enumerated in 8 U.S.C. § 1182(a), including practicing polygamists).

301. INA § 204(a)(1)(A)-(B), 8 U.S.C. § 1154(a)(1)(A)-(B) (2008); INA § 237(a)(7), 8 U.S.C. § 1227(a)(7).

302. INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii); INA § 204(a)(1)(B)(ii), 8 U.S.C. 1154(a)(1)(B)(ii).

303. The provision was also intended to reduce the evidentiary burden on battered women who had great difficulty proving that their abuser had terminated all prior marriages. *See Calvo, supra* note 267, at 185.

304. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).

305. INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C); *see SARAH IGNATIUS & ELIZABETH*

204(a)(1)(C) applies only to a statutory bar under Section 101(f) that would be waivable if classified as a ground of inadmissibility or deportability.<sup>306</sup> There is presently no waiver to the Section 212(a)(10)(A) polygamy bar applicable to an immigrant woman in a polygamous marriage seeking to self-petition under VAWA.<sup>307</sup> Nevertheless, it should be noted that the regulations promulgated under Section 204(a)(1)(C) provide:

Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was *subjected to forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under section 212(a)* of the Act would not be precluded from being found to be a person of good moral character.... A self-petitioner's claim of good moral character will be evaluated on a *case by case basis*, taking into account the provisions of section 101(f) and the standards of the average citizen in the community.<sup>308</sup>

The regulations recognize the need to identify situations where the acts which constitute a bar to a finding of good moral character were forced or coerced as a part of the abuse, and to permit a finding of good moral character despite those acts.<sup>309</sup> This reasoning should be applied to forced polygamous marriages to permit a waiver of the Section 212(a)(10)(A) polygamy bar and allow a case by case analysis of good moral character for VAWA petitioners in such marriages.<sup>310</sup> Even if this change were adopted, however, a battered immigrant woman in a forced polygamous marriage still would not qualify for relief under VAWA, because she would be unable to establish the existence of a

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STICKNEY, IMMIGRATION LAW & FAMILY § 4:35 (2008).

306. INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C); INA § 212(a), 8 U.S.C. § 1182(a); INA § 237(a), 8 U.S.C. § 1227(a) (2008).

307. VAWA 2000 amended several of the waivers applicable to certain criminal grounds of inadmissibility and deportability to make them available to persons who are eligible to self-petition based on abuse. IGNATIUS & STICKNEY, *supra* note 305. See, e.g., INA § 212(h)(1)(C), 8 U.S.C. § 1182(h)(1)(C); INA § 237(a)(1)(h)(ii), 8 U.S.C. § 1227(a)(1)(h)(ii) (2008). However, these waivers do not apply to persons practicing polygamy under Section 212(a)(10)(A). The INA does provide that Section 212(a)(10)(A) may be waived for refugees and asylees for humanitarian purposes, to assure family unity, or when it is in the public interest under Section 209(c), and there is a discretionary waiver of Section 212(a)(10)(A) for victims of crime, including victims of domestic violence, who cooperate with law enforcement officials and are eligible for a U visa under Section 101(a)(15)(U)(i)(III). See discussion *infra* notes 313-29 and accompanying text.

308. 8 C.F.R. § 204.2(c)(1)(vii) (2008) (emphasis added).

309. *Id.* It should be noted, however, that good moral character has been found lacking based on failure to pay income taxes, adultery, having a child out of wedlock, and a myriad of other factors under the discretionary denial of good moral character permitted by Section 101(f) of the INA. IGNATIUS & STICKNEY, *supra* note 305.

310. This could be accomplished by amending Section 212(d) to add a discretionary waiver of Section 212(a)(10)(A) for VAWA self-petitioners. See discussion *infra* notes 476-81 and accompanying text (arguing that INA § 212(d) should be amended to add a discretionary waiver applicable generally to VAWA self-petitioners in polygamous marriages and not limited to forced polygamous marriages).

bona fide marriage as currently required under the statute.<sup>311</sup> In contrast, neither of these hurdles exists for a battered immigrant woman in a polygamous marriage who is eligible for a “U” Visa as a result of the abuse she suffered in her marriage.<sup>312</sup>

### 3. Good Moral Character and the U Visa

VAWA 2000 created the “U” nonimmigrant status visa (“U” visa)<sup>313</sup> to provide immigration relief to victims of domestic violence and many other forms of criminal activity who have been, are, or could be helpful to the investigation of the criminal activity.<sup>314</sup> Eligibility for a “U” visa requires a battered immigrant woman to establish that she suffered substantial physical or mental abuse as a result of having been a victim of the criminal activity.<sup>315</sup> She must possess information<sup>316</sup> about crimes or criminal activity<sup>317</sup> that occurred in the United States or violated the laws of the United States,<sup>318</sup> and she must

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311. INA § 204(a)(1)(A)(iii), (B)(ii), 8 U.S.C. § 1154(a)(1)(A)(iii), (B)(ii). See discussion *infra* note 475 and accompanying text (arguing that INA § 204(a) should be amended to create an exception to the bona fide marriage requirement for women in polygamous marriages).

312. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2008).

313. Although the U visa was created under VAWA 2000, regulations were not published until the fall of 2007 and became effective on October 17, 2007, eleven days shy of the seven-year anniversary of the creation of the U visa. See Julie Dinnerstein, *The “New” and Exciting U: No Longer Just My Imaginary Friend*, in AILA IMMIGRATION & NATIONALITY HANDBOOK 451, 451-52 (2008) (discussing the fact that no U visas had been issued between 2000 and 2007 due to lack of implementing regulations).

314. INA § 101(a)(15)(U)(i)(III), 8 U.S.C. § 1101(a)(15)(U)(i)(III). The criminal activity enumerated in the statute includes rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy, or solicitation to commit any of these crimes. *Id.*

315. INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I); 8 C.F.R. § 214.14(b)(1) (2008). If the direct victim is deceased or incapacitated as a result of the crime, such as in the case of murder or manslaughter, indirect victims may apply for a U visa as a principal petitioner. Indirect victims are limited to a direct victim’s spouse or unmarried children under twenty-one years of age and, if the direct victim is a child under twenty-one years of age, parents or unmarried siblings under eighteen years of age. 8 C.F.R. § 214.14(a)(14)(i).

316. INA § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I). The regulations require that the information be “credible and reliable” and that the petitioner have “knowledge of the details” of “specific facts” related to the criminal activity. 8 C.F.R. § 214.14(b)(2).

317. The use of the term “criminal activity” throughout the statute and regulations suggests that the U visa covers a wider scope of bad acts than simply those prosecuted as crimes. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U); 8 C.F.R. § 214.14(a)(9). See also Dinnerstein, *supra* note 313, at 454. The statute and regulations provide that criminal activity includes any other activity in violation of federal, state, or local criminal law, if similar in nature to and with the elements of those crimes enumerated in the statute. *Id.*

318. INA § 101(a)(15)(U)(i)(IV), 8 U.S.C. § 1101(a)(15)(U)(i)(IV); 8 C.F.R. § 214.14(a)(9). These laws include any state, local, tribal, or territorial authorities of the United States. 8 C.F.R. §

help local, state or federal law enforcement officials investigating or prosecuting the crime or criminal activity.<sup>319</sup> In addition, she must obtain certification from local state or federal authorities attesting to her past, present, or future helpfulness in the investigation.<sup>320</sup>

While a petitioner for a “U” visa must be admissible, the statute provides a broad discretionary waiver of the grounds of inadmissibility, including the Section 212(a)(10)(A) ground of practicing polygamy.<sup>321</sup> The only grounds of inadmissibility not waivable for a “U” visa petitioner are those for participation in Nazi persecution, genocide, torture, or extrajudicial killing,<sup>322</sup> indicating Congress’ intent to “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized and abused [noncitizens] who are not in lawful immigration status.”<sup>323</sup> Significantly, there is no requirement that a “U” Visa petitioner establish good moral character.<sup>324</sup>

The recipient of a “U” visa receives “lawful temporary resident status,”<sup>325</sup> which provides employment authorization and lawful status for up to four years.<sup>326</sup> After three years of continuous presence in the United States in “U” visa status, the recipient may apply to adjust status to permanent resident if DHS determines that the recipient’s presence in the United States is justified on humanitarian grounds or to ensure family unity or is otherwise in the public interest.<sup>327</sup> The same broad waiver of the grounds of inadmissibility described above applies to the adjustment of status process for a “U” visa recipient, permitting a waiver of the polygamy bar at the discretion of DHS.<sup>328</sup> Thus, a battered immigrant woman in a polygamous marriage who participates in the investigation or prosecution of her abuser could be eligible for a “U” visa and ultimately become a permanent resident despite the fact she was or is a practicing polygamist.<sup>329</sup>

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214.14(b)(4).

319. INA § 214(p)(1), 8 U.S.C. § 1184(p)(1) (2008); 8 C.F.R. § 214.14(c)(2)(i).

320. 8 C.F.R. § 214.14(c)(2)(i).

321. INA § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2008).

322. *Id.* Thus, in addition to polygamy grounds, other grounds that are normally bars, such as entry without inspection and false claims of citizenship, may be waived.

323. Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1465, 1534 (2000). Ten thousand U visas are available annually. INA § 214(p)(2)(A), 8 U.S.C. § 1184(p)(2)(A).

324. INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i) (2008). In VAWA 2005, Congress expressed its intent that the U visa be given particular consideration in cases brought under the Violence Against Women Act of 1994. *See* INA § 101(a)(15)(U), n.12.

325. INA § 214(p)(3)(B), 8 U.S.C. § 1184(p)(3)(B).

326. INA § 214(p)(6), 8 U.S.C. § 1184(p)(6), 8 C.F.R. 214.14(g)(2). Lawful status may be extended upon request of law enforcement officials if the U visa recipient’s presence is required to assist in the investigation or criminal prosecution. *Id.*

327. INA § 245(m), 8 U.S.C. § 1255(m) (2008).

328. INA § 245(m)(1), 8 U.S.C. § 1255(m)(1).

329. Because the relief available under VAWA to the battered spouse of a citizen or permanent

#### 4. Good Moral Character and Naturalization

As it was 200 years ago,<sup>330</sup> proof of good moral character remains a key element of naturalization today. Persons seeking to acquire citizenship through naturalization must satisfy a long list of requirements to prove eligibility. First, only a person lawfully admitted for permanent residence<sup>331</sup> who is over the age of 18<sup>332</sup> may apply for naturalization. They must have resided in the United States with permanent resident status for five years,<sup>333</sup> have been physically present for at least half of that period,<sup>334</sup> and establish that they have been and still are “a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”<sup>335</sup> In addition, they must pass an English language proficiency test,<sup>336</sup> as well as an oral exam on the history and government of the United States.<sup>337</sup> Certain classes of individuals, including anarchists, communists, and persons who advocate the violent overthrow of the United States government, are barred from naturalizing.<sup>338</sup>

A person seeking to naturalize must demonstrate good moral character for five years preceding the date of filing the application,<sup>339</sup> or three years if the person is married to a United States citizen<sup>340</sup> or has adjusted status under

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resident is not available to a battered immigrant whose spouse is undocumented, or to an unmarried immigrant who is battered by a boyfriend, girlfriend, or gay or lesbian partner, the only immigration relief available to these individuals is the U visa.

330. See *supra* text accompanying note 255. A person may acquire citizenship in two ways: (1) by operation of law through birth in the U.S., *jus soli*, or abroad to U.S. citizen parents, *jus sanguinis*; or (2) through the process of naturalization.

331. INA § 318, 8 U.S.C. § 1429 (2008). Having been granted permanent resident status is not sufficient; the grant of permanent residence will be reviewed to determine if it was lawful. See, e.g., *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984) (applicant excludable as a homosexual at time permanent residence acquired; therefore, he was not lawfully admitted and his naturalization was denied).

332. INA § 334(b), 8 U.S.C. § 1445(b) (2008). However, minors with at least one citizen parent may be naturalized upon the application of the parent. INA § 322(a)(1), 8 U.S.C. § 1433(a)(1) (2008). In addition, a person who served honorably in the military during times of war may naturalize at any age. INA § 329(b)(1), 8 U.S.C. § 1440(b)(1) (2008).

333. INA § 316(a), 8 U.S.C. § 1427 (2008). The residency requirement is three years for the spouse of a U.S. citizen and for persons who obtained permanent resident status under VAWA. INA § 319(a), 8 U.S.C. § 1430 (2008).

334. INA § 316(a), 8 U.S.C. § 1427(a). They must also have resided for three months in the district in which they are filing the application. *Id.*

335. *Id.*

336. INA § 312(a)(1), 8 U.S.C. § 1423(a)(1) (2008).

337. INA § 312(a)(2), 8 U.S.C. § 1423(a)(2).

338. INA § 313(a), 8 U.S.C. § 1424 (2008).

339. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3).

340. *Id.* The applicant must live in marital union during the entire three-year period. 8 C.F.R. § 319.1 (2008). The termination of the marriage by death or divorce or the expatriation of the citizen spouse renders the applicant ineligible under this provision. 8 C.F.R. § 319.1(b)(2). Good moral character must only be established during the three-year period. *Id.*

VAWA.<sup>341</sup> Good moral character must last through the naturalization process up to administration of the oath of allegiance.<sup>342</sup> As previously discussed, the INA does not define good moral character,<sup>343</sup> but instead sets forth a list of categories of persons statutorily ineligible for a finding of good moral character.<sup>344</sup> This list of acts and crimes that preclude a finding of good moral character is not exclusive, and a person can be found to lack good moral character for a reason not set forth in Section 101(f).<sup>345</sup> For naturalization purposes, the determination of good moral character is not limited to the five or three year period preceding the application, but may take into consideration the applicant's conduct and acts at any time prior to that period as well.<sup>346</sup> In addition, a previous finding that the applicant is not deportable is not conclusive evidence of good moral character.<sup>347</sup>

The practice of polygamy is listed at Section 101(f)(3) as a statutory bar to a finding of good moral character. This applies for naturalization purposes whether or not the person was actually found inadmissible on that basis.<sup>348</sup> Further, the regulations promulgated pursuant to Section 316 require a finding that a naturalization applicant lacks good moral character if the applicant "has practiced or is practicing polygamy."<sup>349</sup> Therefore, a person who previously

341. INA § 319(a), 8 U.S.C. § 1430(a) (2008).

342. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3); 8 C.F.R. § 316.10(a)(1) (2008). See also Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 GEO. IMMIGR. L. J. 479, 509 (1999).

343. See *supra* notes 261-64 and accompanying text.

344. INA § 101(f), 8 U.S.C. § 1101(f) (2008).

345. *Id.* The regulations to Section 316 of the INA list additional grounds for a finding that a person lacks good moral character, including willfully failing to support dependants and extramarital affairs that tended to destroy an existing marriage. See 8 C.F.R. § 316.10 (2008).

346. INA § 316(e), 8 U.S.C. § 1427(e) (2008). However, a finding of lack of good moral character cannot be based solely on an act outside of the statutory time period. See *Gatcliffe v. Reno*, 23 F.Supp. 2d 581, 585 (D.V.I. 1998) (holding that the Attorney General may consider acts outside the statutory period in making a determination of the applicant's character but may not deny naturalization on the basis of such acts alone).

347. INA § 316(d), 8 U.S.C. § 1427(d).

348. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3). The other classes of persons listed in Section 101(f)(3) include persons who engaged in prostitution within ten years, smugglers who aided or abetted a non-citizen to enter into the United States, persons who have committed crimes of moral turpitude, persons who were drug traffickers, and persons who violated controlled substances laws. *Id.* In addition, persons who have at any time committed aggravated felonies as defined in Section 101(a)(43) may be deemed to lack good moral character under Section 101(f)(8) for crimes committed years before the statutory period that were not aggravated felonies at the time. See generally John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds To Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 706, n.89 (2003) (discussing the consequences of retroactive immigration laws on criminal convictions for immigrants); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 154-55 (1998) (noting that the deportation provisions of the 1996 immigration law amendments are applied retroactively to immigrants who could not or would not have been deported under the law in place at the time the immigrants were convicted for their offenses).

349. 8 C.F.R. § 316.10. The list of mandatory ineligibility for good moral character under the



practiced polygamy, whether in the United States or abroad, is ineligible to naturalize even if he or she no longer practices polygamy and did not “come to the United States to practice polygamy,” as required under Section 212(a)(10)(A).<sup>350</sup> A person who obtains a “U” visa with a waiver of the polygamy ground of inadmissibility is precluded from naturalizing as well.<sup>351</sup> The public policy against the practice of polygamy thus makes it impossible for any foreign-born person who has ever voluntarily practiced polygamy to become a citizen of the United States through naturalization.<sup>352</sup>

### *E. Polygamy, Bigamy and Crimes of Moral Turpitude*

Polygamy is not a crime under federal law,<sup>353</sup> nor is it an enumerated crime in most states.<sup>354</sup> While only nine states criminalize polygamy in their penal codes,<sup>355</sup> bigamy is a crime in 49 states and the District of Columbia.<sup>356</sup> In all but nine of the states in which bigamy is a crime, persons prosecuted for polygamy are charged under the bigamy statute. Bigamy is a crime of moral turpitude under immigration law, and conviction of a crime of moral turpitude is a ground of inadmissibility under Section 212(a)(2), as well a ground for deportation under Section 237(a)(2)(A).<sup>357</sup>

The INA does not define “crime of moral turpitude,” and immigration officials and the courts have struggled with little success to develop a common

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regulation includes habitual drunkards, gamblers, persons earning income principally from illegal gambling activities, prostitutes, murderers, aggravated felons, persons who have committed crimes of moral turpitude or controlled substances offenses, persons incarcerated for an aggregate of 180 days, persons giving false testimony to gain a benefit under the INA, and any person who “admits committing any criminal act [enumerated in the regulation] for which there was never a formal charge, indictment, arrest, or conviction, whether committed in the United States or any other country.” *Id.*

350. See discussion *supra* Part III.B.

351. See discussion *supra* Part III.D.3.

352. If a VAWA applicant obtained a waiver by establishing that the polygamy was involuntary and a part of the abuse, it is possible she could establish good moral character and naturalize.

353. See Laura Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy under the Mann Act*, 39 MCGEORGE L. REV. 267, 297 (2008) (arguing that polygamy could be prosecuted under the Mann Act).

354. As previously discussed, polygamy is the religious or cultural practice of plural marriage, whereas bigamy is the act of marrying for a second time when still a party to a valid marriage. See discussion *supra* Part III.C.1.

355. These states are: Michigan, MICH. COMP. LAWS ANN. § 750.441; Mississippi, MISS. CODE ANN. § 97-27-43; Massachusetts, MASS. GEN. LAWS ch. 272, § 13; Arizona, ARIZ. CONST. art. 20, ¶ 2; Utah, UTAH CODE ANN. 1953 § 76-7-101; Virginia, VA. CODE ANN. § 18.2-363; Maine, ME. REV. STAT. ANN. tit. 17-A, § 551; New Mexico, N.M. CONST. art. 21, § 1; Oklahoma, OK CONST. art. 1.

356. See, e.g., New York, N.Y. PENAL LAW § 255.15; Texas, TEX. PENAL CODE ANN. § 25.01; Illinois, 720 ILL. COMP. STAT. 5/11-12; Florida, FLA. STAT. § 826.02. Massachusetts is the only state that criminalizes polygamy and has no separate bigamy statute. See MASS. GEN. LAWS ch. 272, § 13.

357. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2008); INA § 237(A)(2)(a)(i), 8 U.S.C. § 1227(A)(2)(a)(i) (2008).

understanding of the term over the years.<sup>358</sup> The Fourth Circuit recently defined moral turpitude as conduct “that shocks the public conscience as being inherently base, vile or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general.”<sup>359</sup> Other, simpler definitions define moral turpitude as “conduct which is inherently base, vile, or depraved and contrary to accepted rules of morality” or “conduct that is contrary to justice, honesty, or morality.”<sup>360</sup>

Crimes of moral turpitude include crimes against individuals, crimes against property, crimes committed against governmental authority, and crimes against the family or sexual morality.<sup>361</sup> Literally hundreds of crimes, state and federal, have been identified as constituting crimes of moral turpitude.<sup>362</sup> A person who has been convicted of a crime of moral turpitude, or who admits to DHS or a consular officer overseas that he or she has committed such crimes or committed acts that constitute the essential elements of such crimes, is inadmissible.<sup>363</sup> The BIA has set forth a three-pronged test to determine when the acknowledgment of certain behavior to an immigration official is sufficient to justify a finding of inadmissibility: 1) the admitted conduct must constitute the essential elements of the crime; 2) the applicant must have been provided with a definition and the essential elements of the crime prior to his admission; and 3) the admission must be voluntary.<sup>364</sup>

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358. As a leading immigration treatise reports, “[a]ttempts to arrive at a workable definition of moral turpitude never have yielded entire satisfaction.” GORDON ET AL., *supra* note 261, at § 71.05(1)(d)(1).

359. *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001). Most often the definition used by the courts is taken from Black’s Law Dictionary. *See, e.g.*, *United States v. Smith*, 420 F.2d 428, 431 (5th Cir. 1970) (citing BLACK’S LAW DICTIONARY 1160 (Rev. 4th ed. 1957) (“Moral turpitude is defined as: ‘An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.’”)).

360. *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994), *aff’d*, *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). *See also* *Hamdan v. INS*, 98 F.2d 183, 186 (5th Cir. 1996) (setting forth definition and test developed from B.I.A. cases); Brian C. Harms, *Redefining “Crimes of Moral Turpitude”: A Proposal for Congress*, 15 GEO. IMMIGR. L.J. 259, 267-70 (2001) (identifying numerous offenses constituting crimes of moral turpitude).

361. *See, e.g.*, THE U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS FIELD MANUAL, 9 FAM 40.21(A) N2.3 (dividing crimes of moral turpitude into these categories and listing numerous crimes under each category).

362. Crimes involving moral turpitude include, *inter alia*, murder, rape, kidnapping, crimes of domestic violence, child abuse, incest, arson, blackmail, embezzlement, forgery, fraud, bribery, mail fraud, counterfeiting and perjury. *See generally* DAN KESSELBRENNER ET AL., IMMIGRATION LAW AND CRIMES §§ 6:1-:6 (2008).

363. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2008). This includes an attempt or conspiracy to commit such a crime. *Id.* Further, a permanent resident who remains outside of the United States for more than 180 days must establish admissibility before being permitted to reenter. Therefore, conviction of a crime of moral turpitude could result in the permanent resident being placed in removal proceedings. INA § 101(a)(13)(C)(ii); 8 U.S.C. § 1101(a)(13)(C)(ii) (2008).

364. *See, e.g.*, *Matter of K*, 7 I. & N. Dec. 594, 598 (B.I.A. 1957); *Braun v. INS*, 992 F.2d 1016, 1019 (9th Cir. 1993). *See also* 22 C.F.R. § 40.21(a)(1) (2008).

In addition to being a ground of inadmissibility, conviction of a crime of moral turpitude is also a ground for deportation.<sup>365</sup> All noncitizens, including permanent residents, are subject to removal for conviction of a crime of moral turpitude within five years of admission to the United States, provided that the crime is one for which a sentence of one year or longer may be imposed.<sup>366</sup> Further, the term “conviction” has a much broader meaning under immigration law than state or federal law. It includes not only a formal judgment of guilt entered by a court, but also a disposition where an adjudication of guilt has been withheld, although a judge or jury has found the defendant guilty.<sup>367</sup> It also includes a guilty plea, a plea of *nolo contendere*, or the admission of sufficient facts to warrant a finding of guilt where the judge has ordered some form of punishment, penalty, or restraint on the defendant’s liberty.<sup>368</sup> Thus, a criminal disposition that does not and has never constituted a conviction under federal or state law may be a conviction for immigration purposes.<sup>369</sup>

In order to constitute a crime of moral turpitude, the offense must involve the criminal intent or mens rea necessary to be “[c]onduct that is contrary to justice, honesty or morality.”<sup>370</sup> However, not all state bigamy statutes include the criminal intent necessary for a bigamy conviction to constitute a crime of moral turpitude for immigration purposes.<sup>371</sup> Therefore, the laws of the state or country in which the crime was committed must be considered in each case to determine whether the violation of such law involves moral turpitude.<sup>372</sup>

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365. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2008). A non-citizen is also deportable if convicted of an aggravated felony. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). There are currently over fifty general classes of crimes specifically enumerated as aggravated felonies under Section 101(a)(43); classification of a conviction as a misdemeanor under state law does not automatically exclude it from consideration as an aggravated felony. See, e.g., *Matter of Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008) (finding that state misdemeanor for conspiracy to distribute marijuana constituted aggravated felony).

366. *Id.* This provision was changed in 1996 by AEDPA § 435(b) to apply to individuals who receive a sentence of less than one year, as long as the offense carries a potential sentence of one year or more. Previously, the statute required a sentence or actual confinement of one year or more. Conviction of more than one crime of moral turpitude is a basis for removal at any time, provided the convictions did not arise out of a single scheme of criminal misconduct. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). This applies to convictions for two or more crimes involving moral turpitude not arising out of a single scheme of criminal conduct, regardless of whether the offender was confined therefore and regardless of whether the convictions were in a single trial. *Id.*

367. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

368. *Id.*

369. *Id.* Even the dismissal of a case after successful completion of probation may be considered a conviction if there was a guilty plea, *nolo contendere*, or an admission of facts sufficient to warrant a finding of guilt.

370. *Da Rosa Silva v. I.N.S.*, 263 F.Supp. 2d 1005, 1011 (2003) (internal citation omitted).

371. Approximately twenty-one of the bigamy statutes in the United States require the criminal intent necessary to qualify as a crime of moral turpitude. See, e.g., ARIZ. REV. STAT. ANN. § 13-3606(A) (2007); GA. CODE ANN. § 16-6-20-21 (2005); VA. CODE ANN. § 18.2-362-364 (2004); WASH. REV. CODE § 9A.64.010 (2005).

372. *Whitty v. Weedon*, 68 F.2d 127 (9th Cir. 1933) (holding that conviction for bigamy under

For example, in *Braun v. INS*,<sup>373</sup> the Ninth Circuit overruled the BIA's decision that the appellant, Braun, was inadmissible<sup>374</sup> for having admitted to the essential elements of the crime of bigamy.<sup>375</sup> Braun had acknowledged that he married a second wife in Mexico, believing that his first marriage in Mexico was invalid; he later divorced the second wife and remarried the first wife in the United States.<sup>376</sup> The Ninth Circuit reversed, holding that the BIA erred in finding that Braun admitted to the essential elements of bigamy.<sup>377</sup> The court held that although Braun admitted to marrying a second time while still in a valid marriage, his belief that the first marriage was invalid meant that he did not have the necessary intent for a bigamy conviction in Arizona, and thus he had not admitted to all the elements of the crime, as required to establish a crime of moral turpitude under the INA.<sup>378</sup>

Likewise, in *Matter of S*,<sup>379</sup> the respondent pled guilty to the crime of polygamy/bigamy<sup>380</sup> under the Massachusetts statute, even though he had a bona fide and reasonable belief at the time of his second marriage that his first wife was dead.<sup>381</sup> The Massachusetts statute did not require intent as an element of the crime.<sup>382</sup> The BIA held that violation of the statute in such a case could not be "so shocking to the moral sensibilities of the community as to involve moral turpitude, ...as the statute includes within its scope types of cases in which no moral turpitude was involved."<sup>383</sup> Therefore, the defendant had not committed a crime of moral turpitude, despite his conviction.<sup>384</sup> Thus, where

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Canadian law was a crime of moral turpitude.); see also *Smalley v. Ashcroft*, 354 F.3d 332, 337 (5th Cir. 2003) (stating general rule that courts must analyze the elements of a crime that the government must prove for conviction, in order to determine if it is a crime of moral turpitude).

373. *Braun v. INS*, 992 F.2d 1016 (9th Cir. 1993).

374. *Id.* at 1018. The appropriate terminology at the time was "excludable."

375. *Id.* At issue was whether the immigration judge had appropriately granted a hardship waiver under Section 241(f); the INS argued that Braun was statutorily ineligible for the waiver because he was inadmissible under Section 212(a)(9) for having admitted to the crime of bigamy.

376. *Id.* at 1017. Braun testified that before he married the second wife, he consulted an attorney in Mexico, who erroneously informed him that his first marriage was invalid because he was underage and did not obtain parental consent.

377. *Id.* at 1016.

378. *Id.* at 1018. The court found that while the Arizona bigamy statute was silent as to intent, case law had established that the state must prove the defendant intended to marry two spouses to secure a conviction. *Id.* (citing *Ford v. State*, 192 P. 1117, 1119 (1920)).

379. *Matter of S*, 1 I. & N. Dec. 314 (B.I.A. 1942).

380. Massachusetts is one of only nine states to criminalize polygamy; the statute clearly addresses bigamy and not the religious practice of plural wives, however. MASS. ANN. LAWS ch. 272, § 15 (2008).

381. *Matter of S*, 1 I. & N. Dec. at 315.

382. *Id.* (citing *Commonwealth v. Mash*, 7 Met. 472 (1844) (holding that "it is not the intention of the law to make the legality of a second marriage, whilst the former husband or wife is in fact living, depend upon ignorance of such absent person's death")).

383. *Id.*

384. *Cf. Gonzalez-Martinez v. Landon*, 203 F.2d 196 (9th Cir. 1953) (upholding finding of

the statute does not include criminal intent as an element and permits a conviction based on a bigamous marriage arising from an honest mistake of fact, there can be no finding of a crime of moral turpitude.<sup>385</sup>

In reality, bigamy convictions in the United States are uncommon in contemporary times.<sup>386</sup> For noncitizens in a polygamous marriage, the issue of bigamy as a crime of moral turpitude is most likely to come up in the context of an admission of facts that constitute the elements of the crime of bigamy during interactions with immigration officials. Such statements could result in a finding of inadmissibility under Section 212(a)(2)(A) or deportability under Section 237(A)(2). However, determining whether the admissions constitute the elements of the crime of bigamy depends upon the law of the state in which the crime occurred.<sup>387</sup> If the state bigamy statute requires criminal intent, noncitizens in a polygamous marriage clearly have the requisite intent if they knowingly consented to the husband taking multiple wives. Whether the statute applies to the husband only or to all wives in the marriage depends upon the breadth of the statute.<sup>388</sup> On the other hand, if the polygamous marriage occurred in a state where intent is not an element of the crime, admission of facts proving the bigamy would not constitute admission of a crime of moral

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deportability where defendant admitted to crime of bigamy under California law); *Matter of F- M-*, 7 I. & N. Dec. 420 (B.I.A. 1957) (visa application concealing a prior marriage that had not been terminated constituted either valid admission of bigamy or admission of essential elements of bigamy, making visa invalid). The Department of State Foreign Affairs Manual provides that the discovery that an alien is a bigamist would not preclude issuance of an immigrant visa under INA § 212(a)(2)(i)(I), although a conviction for or admission of bigamy might preclude issuance under INA § 212 (a)(2)(i)(I) for a crime involving moral turpitude. See 9 FAM 40.101 N1 (Aug. 26, 1991) (citing *Matter of G--*, 6 I. & N. Dec. 9 (B.I.A. 1953)).

385. See *Forbes v. Brownwell*, 149 F.Supp. 848 (D.D.C. 1957) (conviction for bigamous marriage based on honest mistake of fact as to validity of divorce or annulment does not involve moral turpitude). In general, if a statute encompasses both acts that do and do not involve moral turpitude, a finding of deportability cannot be sustained. See *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9th Cir. 2003), *reh'g denied*, 343 F.3d 1075 (2003) (finding Arizona drunk driving law not a crime of moral turpitude where statute is divisible and permits conviction for merely sitting in car with open beer can). Courts have described this as the categorical approach, requiring an analysis of the elements of the crime rather than the individual's conduct. See, e.g., *Vusanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (relying on categorical approach to find second-degree arson under Florida law a crime of moral turpitude). A court may also apply a "modified categorical approach," whereby it conducts a limited examination of the documents of conviction to determine if specific elements of a generically defined crime were proven. See, e.g., *In re Ajami*, 22 I. & N. Dec. 949, 950 (B.I.A. 1991) (looking to indictment, plea, verdict, and sentence to determine if offense of aggravated stalking was a crime of moral turpitude).

386. There has, however, been an increase in some states as a result of enforcement efforts against fundamentalist Mormon polygamists such as Warren Jeffs. See Joseph Bozzuti, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas*, 43 CATH. LAW 409, 419 (2004) (noting the infrequency of convictions for polygamy in the past fifty years).

387. The admission must also be voluntary and with knowledge of elements of crime. See, e.g., *Braun*, 992 F.2d at 1019.

388. See, e.g., MD. CODE ANN., CRIM. LAW § 10-502 (bigamy statute applies only to the person who married a second spouse); cf. 18 PA. CONS. STAT. ANN. § 4301 (bigamy statute covers a person who knowingly marries another who is already married).

turpitude, even though the parties knowingly entered into the polygamous marriage and the husband had multiple wives.<sup>389</sup>

### F. Polygamy and the Law of Asylum

The polygamy bar is an issue in asylum law in three distinct contexts. First is the question of whether the polygamy ground of inadmissibility in Section 212(a) bars an asylum seeker from receiving asylum or from adjusting status to become a permanent resident after being granted asylum. Second, polygamy affects the determination of who constitutes a spouse or a child when an asylee seeks to bring his or her family to the United States as derivative asylees. The third question is whether a forced polygamous marriage constitutes gender-based persecution and may serve as the basis for a grant of asylum, an important topic that is beyond the scope of this article.<sup>390</sup>

#### 1. Asylum and Grounds of Inadmissibility

To qualify for asylum, a person must satisfy each element of the definition of “refugee” set forth in the INA.<sup>391</sup> Under the INA, a refugee is a person who, due to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return to his or her home country.<sup>392</sup> A person seeking asylum requests protection from persecution either upon their arrival at a port-of-entry or once they are physically present in the United States.<sup>393</sup> A person in

389. See, e.g., N.C. GEN. STAT. § 14-183; R.I. GEN. LAWS § 11-6-1 (1956).

390. For a discussion of forced polygamous marriage as a ground of gender-based persecution, see, e.g., Stephen Knight and Karen Musalo, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 03-12 IMMIGR. BRIEFINGS (Dec. 2003)

391. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2008).

392. *Id.* The INA defines “refugee” as “any person who is outside of any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.”

393. INA § 208, 8 U.S.C. § 1158 (2008); 8 C.F.R. § 208 (2008). In contrast, a refugee is a person outside of the United States who obtains the status of “refugee” under INA § 101(a)(42)(A) through a separate process administered by the United States Bureau of Population, Refugees and Migration. See U.S. Dep’t of State, Bureau of Population, Refugees and Migration, <http://www.state.gov/g/prm/> (last visited Apr. 5, 2009); see also 1 FAM 520-29 (Sept. 12, 2006). The Bureau of Population, Refugees and Migration works in conjunction with the United Nations High Commission for Refugees (UNHCR), see UNHCR – Basic Facts, <http://www.unhcr.org/basics.html> (last visited Apr. 5, 2009), to resettle refugees who are of special humanitarian concern to the United States. INA § 207, 8 U.S.C. § 1157 (2008). Each year the United States gives highest priority to refugees whom UNHCR or a United States embassy refers for resettlement due to “urgent humanitarian concerns.” See Marisa Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post- September 11 World*, 17 YALE J. L. & FEMINISM 459, 472 (2005) (describing the U.S. refugee resettlement program and the

the United States may apply for asylum affirmatively, by making the request for asylum directly to DHS,<sup>394</sup> or defensively, when the applicant is in removal proceedings and requests asylum before an immigration judge.<sup>395</sup>

An award of asylum is discretionary; even an applicant who qualifies as a refugee still has the burden of proving that they merit a favorable exercise of discretion.<sup>396</sup> Asylum must be denied if an individual has participated in terrorist activities or in the persecution of others or has been convicted in the United States of a "particularly serious crime," which includes an aggravated felony.<sup>397</sup> Denial of asylum is also mandatory if an individual is found to be a danger to the security of the United States<sup>398</sup> or has committed a serious non-political crime outside of the United States.<sup>399</sup> An applicant who previously filed for asylum and was denied<sup>400</sup> or who was firmly resettled in another country<sup>401</sup> is also barred from a grant of asylum.<sup>402</sup> In addition, an asylum

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process for refugee resettlement). The issue of polygamy among refugees can be a particular problem for the UNHCR, which must try to relocate refugees to countries that recognize polygamous marriage. Nora Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law's Conflicted Answers* 32 HOFSTRA L. REV. 273, 279 (2003) (describing an unusual and officially unacknowledged exception to the U.S. prohibition against polygamy granted to certain Iraqi refugees who collaborated with the U.S. government during and after the first Gulf War).

394. INA § 208(b)(1)(a), 8 U.S.C. § 1158(b)(1)(a).

395. *Id.*

396. See *Perkovic v. INS*, 33 F.3d 615, 620-21 (6th Cir. 1994) (burden is on the applicant to establish that a favorable exercise of discretion is justified); see also *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (B.I.A. 1987) (an alien's manner of entry or attempted entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications).

397. INA § 208(b)(2)(A)(i)-(vi), (B)(i), 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

398. INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(vi).

399. INA § 208(b)(2)(A)(iii), 8 U.S.C. § 1158(b)(2)(A)(iii).

400. INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C).

401. INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.15 (2008).

402. CFR § 208.13(c) (2008). If an asylum applicant is found to be ineligible for asylum under either Section 208(a)(2) or 208(b)(2) of the Act, there are still forms of relief available. The immigration court must consider whether the applicant is eligible for withholding of removal under Section 241(b)(3) of the Act or for relief under the Convention Against Torture. An applicant who is seeking withholding of removal must show that her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. See INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2008). In order to make this showing, the applicant has the burden of proving that it is more likely than not that she will be persecuted on account of a protected ground. See *INS v. Stevic*, 467 U.S. 407, 413 (1984); 8 C.F.R. § 1208.16(b)(2) (2008). As with asylum, an applicant's showing of past persecution in the proposed country of removal gives rise to a presumption that her life or freedom would be threatened there in the future. See 8 C.F.R. § 1208.16(b)(1). The immigration court must also consider whether the applicant is eligible for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the applicant indicates that the applicant may be tortured in the country of removal. In order to qualify for protection under the Convention Against Torture, an applicant must establish that if she is removed, it is more likely than not that she will be subject to torture, as it is defined by regulation. See 8 C.F.R. §§ 1208.16(c), 1208.18(a) (2008); see also C.F.R. § 208.16 (2008).

applicant must demonstrate by clear and convincing evidence that they filed the asylum application within one year of arriving in the United States.<sup>403</sup>

Asylum seekers need not, however, establish that they are admissible. The grounds of inadmissibility under Section 212(a) do not apply in asylum cases.<sup>404</sup> Thus, the fact that an asylum seeker is a husband or wife in an ongoing polygamous marriage or that he or she acknowledges a plan to practice polygamy in the United States would not statutorily bar a grant of asylum.<sup>405</sup>

A grant of asylum provides significant benefits to the recipient. An asylee receives work authorization and is permitted to bring his or her spouse and unmarried children under age 21 to the United States as derivative asylees.<sup>406</sup> Although asylum status is not permanent, an asylee cannot be removed from the United States unless the government can establish a fundamental change in circumstances in the home country that proves the asylee will no longer be in danger upon return.<sup>407</sup> Most importantly, an asylee may apply to adjust his or her status to lawful permanent resident one year after the grant of asylum.<sup>408</sup>

Inadmissibility, and therefore the practice of polygamy, does become an issue if an asylee chooses to adjust status.<sup>409</sup> Like all applicants who adjust status, asylees must prove they are admissible and that none of the grounds in Section 212(a) apply. However, Section 209(c) permits a broad waiver of the 212(a) grounds of admissibility for asylees who are seeking to become

403. INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(5) (2008). Proof of extraordinary circumstances relating to the delay in filing the application may permit its consideration. INA § 208(a)(2)(D), 8 U.S.C. § 1158 (a)(2)(D). An applicant who previously applied for asylum and was denied is also barred from receiving asylum, INA § 208(a)(2)(C), 8 U.S.C. § 1158(a)(2)(C); 8 C.F.R. § 208.4(a)(3), unless they can establish the existence of changed circumstances that materially affect their eligibility for asylum. INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(4). However, once in the United States, a person may apply for asylum regardless of their immigration status.

404. 8 C.F.R. § 209.2(a)(v) (2008). In contrast, refugees must establish that they are admissible before receiving refugee status. 8 C.F.R. § 207.3(a)-(b) (2008). A broad range of waivers applies to refugees at the time of admission, *see* INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (2008), as well as to refugees and asylees seeking to adjust status to permanent resident. INA § 209(c), 8 U.S.C. § 1159(c) (2008).

405. It should be noted, however, that asylum remains a grant of discretion. However, if the immigration court finds that the applicant qualifies as a refugee but denies asylum as a matter of discretion, the court must grant withholding of removal if it finds that it is more likely than not that the applicant will be persecuted if returned to their home country. 8 C.F.R. § 208.16(b)(2).

406. 8 C.F.R. § 208.12 (2008).

407. 8 C.F.R. § 208.24 (2008).

408. 8 C.F.R. § 209.2.

409. There is no requirement that an asylee adjust status. In contrast, a refugee must adjust status within one year of arriving in the U.S. 8 C.F.R. § 209.1(a)(1) (2008). An asylee is eligible for adjustment of status, provided that the asylee applies for adjustment, continues to be a refugee or is the spouse or child of a refugee, has been physically present in the U.S. for at least one year, has not been firmly resettled in a foreign country, is admissible in the U.S. as an immigrant under the Act, and has a refugee number available under Section 201(a) of the Act. 8 C.F.R. § 209.2(a)(1)(i)-(vi).



permanent residents.<sup>410</sup> These waivers may be granted for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.<sup>411</sup> All grounds that may cause the asylee to be inadmissible under Section 212(a) may be waived, except those barring persons involved in trafficking, espionage, terrorist activities, the Nazi persecution, genocide, torture, or extrajudicial killing.<sup>412</sup> Therefore, it is possible for a person to receive a waiver of the Section 212(a) polygamy bar on humanitarian or family unity grounds that would permit him or her to become a permanent resident despite an ongoing polygamous marriage or a plan to practice polygamy in the United States.

## 2. Polygamy and Derivative Asylees

A person who is granted asylum may file to have his or her spouse and each child granted the same asylum status as derivative asylees.<sup>413</sup> The spouse and child must establish that they are not ineligible for asylum for the same reasons applied to the principal asylee (for example, they must not have participated in persecution, been convicted of a particularly heinous crime, etc.).<sup>414</sup> As with the principal asylee, a derivative asylee need not prove admissibility. Polygamy is still an issue, however, because a spouse must prove that he or she qualified as a spouse under the INA at the time the principal asylee was granted asylum.<sup>415</sup> This requires proof of a valid marriage for immigration purposes, and of course, a polygamous marriage is not valid for immigration purposes.<sup>416</sup> Only the first marriage will be recognized as valid for immigration purposes, which means that the husband in a polygamous marriage may bring his first wife as a derivative asylee, but not his second or third wife. Since the marital relationship must have existed at the time asylum was granted, a husband cannot manipulate the rule by divorcing the first wife and remarrying a second or later wife.<sup>417</sup>

Likewise, a second or subsequent wife who is the principal asylee is unable to petition on behalf of her polygamous husband since their marriage would not

410. 8 C.F.R. § 209.2(b).

411. INA § 209(c), 8 U.S.C. § 1159(c) (2008); 8 CFR § 209.2(b). A few grounds are statutorily inapplicable to asylees. INA § 212(a)(4)-(5), (7), 8 U.S.C. § 1182(a)(4)-(5), (7) (2008).

412. INA § 209(c), 8 U.S.C. § 1159(c); 8 C.F.R. § 209.2(b). Waivers may be granted provided that the asylee continues to be a refugee, has been physically present in the U.S. for at least one year, and has not been firmly resettled in a foreign country. 8 C.F.R. § 209.2(a)(i)-(vi). Waivers are also not allowed if the admission of the person would have potentially serious adverse foreign policy consequences. See INA §§ 209(c), 212(a)(3)(C), 8 U.S.C. §§ 1159(c), 1182(a)(3)(C).

413. INA § 208(c)(2)(B)(3), 8 U.S.C. § 1158(c)(2)(B)(3) (2008); 8 C.F.R. § 208.21(a) (2008). An asylee may also file for derivative status of a spouse and children even if they are already present in the U.S., regardless of their immigration status. 8 C.F.R. § 208.21(c).

414. INA § 208(b)(2)(A)(i)-(v), 8 U.S.C. § 1158(b)(2)(A)(i)-(v); 8 C.F.R. § 208.21(a).

415. 8 C.F.R. § 208.21(b).

416. See discussion *supra* Part III.C.I.

417. See 8 C.F.R. § 208.21(b).

be recognized as valid for immigration purposes.<sup>418</sup> Of course, if the husband and each of the wives are independently eligible for asylum, it is possible that all spouses could obtain asylee status in the United States. Polygamy would be an issue, however, if the husband and any of the wives sought to adjust to permanent resident status, since they would each need to obtain a waiver of the polygamy bar under Section 209(c) in order to successfully adjust status.<sup>419</sup>

The impact of a polygamous marriage on the ability to qualify the children as derivative asylees is less restrictive. The children born to the husband and the first wife would qualify under the statute as children born in wedlock if either the husband or the first wife is the principal asylee.<sup>420</sup> The husband as the principal asylee could qualify a child of his second or subsequent wives as a legitimated child or a child born out of wedlock, assuming he could establish a bona fide parent-child relationship.<sup>421</sup> If the first wife is the principal asylee, she could qualify the children of a second or subsequent wife for derivative asylum as her stepchildren.<sup>422</sup> If a second or subsequent wife is the principal asylee, she could qualify her own biological children.<sup>423</sup> However, she would be unable to confer status as a stepparent to the other children in the family, since the marriage creating the stepparent relationship would not be valid for immigration purposes.<sup>424</sup>

Thus, in asylum law, the impact of the polygamy bar falls most harshly on the second and subsequent wives in the polygamous marriage, since they cannot qualify as derivative asylees nor confer stepchild status to children in the family who are not their own biological children.

#### IV.

##### THE GENDERED IMPACT OF THE POLYGAMY BAR IN U.S. IMMIGRATION LAW

###### *A. Introduction*

Mapping the polygamy bar of Section 212(a) throughout the INA demonstrates that polygamy as a ground of inadmissibility is a factor in the application of numerous provisions of the statute. It also reveals that the impact of the polygamy bar is gendered: that is, the various provisions of the INA through which the polygamy bar is imposed affect women and men differently. The disparity of treatment based on gender is most significant in three contexts.

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418. This is true even if the husband divorced the first wife in the home country, since the relationship of spouse must have existed at the time that asylum was granted. *Id.*

419. INA § 209(C), 8 U.S.C. § 1159(C) (2008).

420. INA § 208(b)(3), 8 U.S.C. § 1158(b)(3) (2008).

421. *Id.*; INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2008).

422. See 8 C.F.R. § 208.21(b). They would qualify as children born out of wedlock. See INA § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B) (2008).

423. See 8 C.F.R. § 208.21(b).

424. See discussion *supra* Part III C.2.c.

First, the operation of U.S. immigration policy for spouse-based categories empowers a husband in a polygamous marriage to choose which wife he will sponsor for immigration status;<sup>425</sup> in contrast, a second or subsequent wife cannot confer or receive status for any family category based on a relationship created solely by the polygamous marriage.<sup>426</sup> Second, gendered disparities are apparent in the analysis of whether a child born to a second or subsequent wife in a polygamous marriage qualifies as a “child” of the father under the definitions of “legitimated child” and “child born out of wedlock.”<sup>427</sup> And third, gender stereotypes arise from the requirement that a battered immigrant woman prove good moral character to receive relief under the Violence against Women Act, something that a wife in a polygamous marriage is statutorily barred from doing.<sup>428</sup>

Only in recent years have legal scholars begun to analyze the gendered nature of immigration law. Their analyses, particularly in the areas of citizenship and family-based immigration law, have revealed a pervasive gender bias.<sup>429</sup> Professor Linda Kelly has argued that the silence regarding the gender bias in immigration law corroborates how deeply engrained the gender stereotypes have become.<sup>430</sup> Supreme Court Justice Ruth Bader Ginsberg, in describing a historical law denying women the right to transmit citizenship to children born abroad, noted that it was only “one among many gender-based distinctions drawn in our immigration and nationality laws.”<sup>431</sup>

Much of the gender bias in immigration law is a legacy of the centuries-old doctrine of coverture, under which a woman’s legal existence merged with that of her husband upon marriage.<sup>432</sup> At common law, a husband had ownership

425. See discussion *supra* Part III C.1.

426. See discussion *supra* Part III C.1-2.

427. See discussion *supra* Part III C.2.b.

428. See discussion *supra* Part III D.2.

429. See, e.g., Abrams, *supra* note 1 (tracing history of discrimination against Chinese immigrant women based on gender stereotypes); Volpp, *supra* note 1 (analyzing early immigration laws stripping women of citizenship for marrying a noncitizen); Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991) (analyzing legacy of coverture and gender disparities in spouse-based immigration laws); Calvo, *supra* note 267 (reviewing ten years of legislation and failure to address the roots of coverture in VAWA); Kelly, *supra* note 196 (analyzing Supreme Court’s decision in *Miller v. Albright* upholding disparate treatment of unwed fathers in immigration law).

430. Kelly, *supra* note 196, at 560.

431. *Miller v. Albright*, 532 U.S. 420, 463 (Ginsburg, J. dissenting) (upholding INA provision imposing burdens to confer citizenship on unwed fathers, but not on mothers, based on outdated gender stereotypes).

432. The law of coverture derives from Blackstone’s Commentaries, which stated: “By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called . . . a feme-covert, . . . under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.” 1 WILLIAM BLACKSTONE,

rights over his wife and was legally entitled to control her income and property.<sup>433</sup> A husband also had property rights over the children of the marriage, who were under his control; a wife had no right to custody of her own children.<sup>434</sup> This headship of the husband in the family permitted him to control where the wife and family resided and all aspects of their existence.<sup>435</sup>

The earliest laws governing immigration and nationality incorporated the doctrine of coverture.<sup>436</sup> The very structure of the spouse-based immigration scheme grew out of this doctrine.<sup>437</sup> The first laws establishing the right of a citizen or resident alien to petition on behalf of a spouse were gender-specific – only male citizens and male resident aliens could sponsor their spouses; female citizens or resident aliens enjoyed no reciprocal rights to sponsor their husbands.<sup>438</sup> This disparity was based on the presumption under coverture that a woman would relocate to her husband's home, rather than the reverse,<sup>439</sup> and was also the basis for a law in existence from 1907 to 1922 that stripped American women of their citizenship if they married a foreign national.<sup>440</sup> This unequal treatment of men and women in immigration law was pervasive throughout the nineteenth and twentieth centuries; immigration statutes created rights and benefits for male citizens and permanent residents who sought to sponsor their wives for immigration, but denied them to female citizens or permanent residents seeking to sponsor their husbands.<sup>441</sup> The discrimination

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COMMENTARIES \*442.

433. *Id.* at \*442-43. Under the doctrine of coverture, a married woman had no right to enter into contracts, sue or be sued, or own property under her own name. *Id.* The husband's rights over the wife included the right of chastisement and sexual access. *Id.* at \*444. See also Calvo, *supra* note 267, at 160; Kristin Collins, *When Father's Rights are Mother's Duties: The Failure of Equal Protection* in Miller v. Albright, 109 YALE L. J. 1669, 1682 (2000) (explaining the legal and political roots of coverture in American history).

434. Kelly, *supra* note 196, at 561.

435. *Id.*

436. A congressional report in 1951 found that early immigration laws were "a legislative enactment of the common law theory that the husband is the head of the household." S. REP. NO. 81-1515, at 414 (1951).

437. Calvo, *supra* note 429, at 605-06.

438. *Id.* at 600.

439. See Demleitner, *supra* note 393, at 278.

440. Act of Mar. 2, 1907 (Expatriation Act of 1907), Pub. L. No. 193, ch. 2534, § 3, 34 Stat. 1228. This harsh rule was repealed by the Act of Sept. 22, 1922 (Cable Act), Pub. L. No. 346, ch. 411, § 3, 42 Stat. 1022. The United States Supreme Court relied upon the doctrine of coverture to uphold the expatriation of a female citizen under this statute in Mackenzie v. Hare, 239 U.S. 299, 307-08 (1915).

441. The early immigration laws excluded certain categories of persons, such as those who had contagious diseases or were illiterate, but made exceptions for the wives of male citizens and alien residents. No such exceptions were made for the husbands of female citizens or residents. See Act of March 3, 1903, Pub. L. No. 162, 32 Stat. 1213, 1221 (wives and children of resident aliens with contagious diseases shall not be deported if readily curable); Act of Feb. 5, 1917, Pub. L. No. 301, 39 Stat. 874, 877 (wife of citizen or resident alien not excluded for inability to read). A 1924 statute granted the wives of U.S. citizen husbands exemption from the newly adopted numerical limitations

was blatant; the language of the statutes throughout this period specifically referred to “husbands” and “wives” in setting forth various rights and benefits.<sup>442</sup>

The 1952 Immigration and Nationality Act adopted gender-neutral language, replacing the terms “husband” and “wife” with “spouse” and applying the relevant provisions equally to both the husband and the wife of a citizen or permanent resident.<sup>443</sup> Nevertheless, remnants of the gender discrimination flowing from the doctrine of coverture still remain in immigration law today.<sup>444</sup> They can be seen quite clearly in the application of the polygamy bar.

### *B. Polygamy, Second Wives, and the Gendered Structure of Spouse-based Immigration*

The most direct correlation between the doctrine of coverture and the impact of polygamy in current immigration law is the fact that the husband in a polygamous marriage has the ability to choose which wife he will sponsor in a spousal petition.<sup>445</sup> As previously discussed, immigration policy permits the husband in a polygamous marriage to sponsor a first wife without terminating subsequent marriages.<sup>446</sup> A husband may sponsor a second or subsequent wife, provided he terminates all previous marriages and then remarries the beneficiary spouse to satisfy the requirement that the marriage is valid for immigration purposes.<sup>447</sup> Numerous legal scholars have noted that gender inequality is inherent in polygamy in that the husband controls the number of wives in the marriage<sup>448</sup> and, under some legal regimes, also has the unilateral power of

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as “non-quota” immigrants. Act of May 26, 1924, Pub. L. No. 139, § 11, 43 Stat. 153, 159. The same benefit was not applied to the husbands of female citizens, who were instead subject to the numerical quotas and accorded a preference category if the wife was over twenty-one years old. See Calvo, *supra* note 429, at 600-04 (providing detailed analysis of the evolution of the spousal based petition process throughout the twentieth century).

442. Calvo, *supra* note 429, at 604. See, e.g., Immigration Act of 1924, § 4 (“When used in this Act the term ‘non-quota immigrant’ means- (a) An immigrant who is the unmarried child under eighteen years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9.”); Act of May 26, 1924, Pub. L. No. 139, § 4, 43 Stat. 153, 155 (limiting the migration of aliens into the United States).

443. The Immigration and Nationality Act of 1952 follows the use of the term “spouse,” which continues today. See Act of June 27, 1952, Pub. L. No. 414, 66 Stat. 163.

444. The Supreme Court has held that the doctrine of plenary power gives the federal government virtually unfettered control over immigration, and some have argued that this is in part to blame for the failure to scrutinize what would clearly be unconstitutional gender discrimination in other contexts. See, e.g., Kelly, *supra* note 196, at 558 (discussing Supreme Court’s decision in *Miller v. Albright* to permit different standards for unwed fathers and unwed mothers to convey citizenship).

445. See discussion *supra* Part III.C.1.

446. *Id.*

447. *Id.*

448. See Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN’S L.J. 3, 13-14 (2007) (analyzing the practice of Muslim

divorce.<sup>449</sup> This power imbalance is identical to that historically granted to husbands under the doctrine of coverture. The structure of the current spouse-based immigration scheme, which gives unilateral control of the immigration status of a noncitizen spouse to the citizen or permanent resident, enhances the power of a husband in a polygamous marriage who is a citizen or permanent resident by giving him the power to petition. This allows the husband to determine not only the immigration status of each wife, but also where each wife will live, whether that wife can live with and have custody of her children, and whether that wife can work if she is in the United States.<sup>450</sup> These are the very powers bestowed upon a husband under the doctrine of coverture.<sup>451</sup>

In contrast, a second or subsequent wife in a polygamous marriage cannot confer or receive any benefit or status under immigration law.<sup>452</sup> Julie Dinnerstein, senior attorney with Sanctuary for Families in New York City, a non-profit that provides legal services to immigrant communities, described the plight of immigrant wives in polygamous marriages:

Legally, they're invisible. If you are the second or third or fourth wife, that marital relationship is not going to be recognized for immigration purposes. It means if your husband is a citizen or green card holder, he can't sponsor you. It means if your husband gets asylum, you don't get asylum at the same time. The man is always going to be in a position of greater power.<sup>453</sup>

This unequal power dynamic echoes precisely that of a husband and wife at common law under the doctrine of coverture. Unfortunately, immigration law and policy operate to support and reinforce that gender inequity.

### C. Polygamy, Fathers' Rights, and Children Born out of Wedlock

The legacy of coverture in immigration law is also revealed when analyzing whether a child born to a second or third wife in a polygamous marriage qualifies as a "child" of the father under INA Section 101(b)(1).<sup>454</sup> The two applicable definitions of child, "legitimated child" under Subsection C

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polygamy and the oppressive consequences for women in polygamous marriages governed under the Shari'a); Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541 (2005) (discussing the history of systematic oppression of women in Islamic countries); Brenda Oppermann, *The Impact of Legal Pluralism On Women's Status: An Examination of Marriage Laws in Egypt, South Africa and the United States*, 17 HASTING WOMEN'S L.J. 65, 72 (2005) (discussing the inherent inequality in Egyptian polygamous marriages and divorce). See also Gen. Rec. No. 21, *supra* note 35.

449. For example, under Islamic law a husband has the right to unilateral divorce known as *talaaq*. WELCHMAN, *supra* note 23, at 107-08.

450. See Calvo, *supra* note 267.

451. See discussion *supra* Part IV.A.

452. See discussion *supra* Part III.C.1.

453. Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NAT'L PUB. RADIO, May 28, 2008, <http://www.npr.org/templates/story/story.php?storyId=90857818> (last visited Apr. 5, 2009).

454. INA § 101(b)(1), 8 USC § 1101(b)(1) (2008).

and "child born out of wedlock" under Subsection D, each have gendered implications that derive from the principles of coverture.<sup>455</sup> The concept of a "legitimated child" arises directly from coverture. At common law, a child's legal status was based solely on the relationship with the father;<sup>456</sup> a child born of a valid marriage was legitimate because the child was, as a matter of law, placed under the headship of the father and inherited both status and property through the father.<sup>457</sup> In contrast, a father had no responsibility for his illegitimate children unless he chose to take the affirmative steps necessary to legitimate them.<sup>458</sup> Thus, under the doctrine of coverture, a father had the sole power to determine the legal status of his biological children born outside of marriage by choosing whether or not to legitimate them, the same process of legitimation incorporated into immigration law in Subsection C.

Likewise, the different requirements set forth in Subsection D for a father or mother to establish a qualifying relationship with a "child born out of wedlock" also have roots in coverture. While an unwed mother must only prove her biological relationship to the child, an unwed father must prove biological paternity and the existence of a bona fide parent child relationship, which includes proof of acknowledgment of the child as his own, financial support, and concern for the child's welfare.<sup>459</sup> These are all steps necessary to legitimate a child. Thus, the notion that a father must legally create a relationship with his biological child is consistent with the concept of legitimation under coverture.<sup>460</sup> A number of legal scholars have criticized the gendered stereotypes underlying this provision of the statute, pointing out that the distinctions derive from the assumption that unwed mothers are "natural nurturers while presuming that fathers are insignificant, if not absent, figures."<sup>461</sup> Such gender stereotypes are, as Justice Ginsburg has noted, "fixed

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455. With the change in terminology from "legitimate child" to "child born in wedlock," the analysis in *Matter of Kwan* no longer applies, and proof that the child is legitimate under the law of the jurisdiction in which the child was born will not suffice. See discussion *supra* Part III.C.2.

456. See, e.g., BLACKSTONE, *supra* note 432, at \*445 (pursuant to coverture's core principle that status and property passed patrilineally through fathers within marriage).

457. This assured that property passed through "legitimate" channels of inheritance controlled by the father, and that nonmarital ("illegitimate") children would have no legal claim to family property or status. See Collins, *supra* note 433, at 1683 (citing 1 BLACKSTONE at \*435).

458. See discussion *supra* Part III.C.1. This permitted men to control inheritance while at the same time remain sexually active outside of marriage with no responsibility to the children born as a consequence. See Collins, *supra* note 433, at 1680 (analyzing *Miller v. Albright* in light of the historical roots of coverture).

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

460. Kelly, *supra* note 196, at 573-74.

461. *Id.* at 574. See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (discussing images of women in the domestic violence context); Jane Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688 (1998) (discussing the treatment of motherhood in welfare, criminal and family law); Amy Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in Jones v. Clinton*, 31 U.C. DAVIS L. REV. 123 (1997)

notions concerning the roles and abilities of males and females,”<sup>462</sup> used to shape government policy “to fit and reinforce the historic pattern.”<sup>463</sup>

While these sex-based distinctions impact negatively upon unwed fathers under the INA, in the context of polygamous marriage, they will not prevent a husband from sponsoring the children of a second or subsequent wife. A father of a child born to a second or third wife in a polygamous marriage will have no difficulty proving the necessary relationship where the marriage is valid in the home country and the father has supported the child as his legitimate child, whether he establishes the qualifying relationship under the definition of “legitimated child” or the definition of a “child born out of wedlock.”<sup>464</sup> This enables a father to sponsor the children of all of his polygamous wives, potentially causing the separation of the mother from her children, since only one wife can qualify as a spouse for immigration purposes. Once again, the application of immigration law and policy reinforces the power of the polygamous husband to control the family, to determine where and with whom the children will reside, and to separate the children from their mothers.

#### *D. Gender, VAWA, and the Good Moral Character Requirement*

An analysis of the relief available under VAWA for a woman in a polygamous marriage also reveals the gendered assumptions underlying immigration law. A battered immigrant woman must prove good moral character to self-petition for permanent residence or obtain cancellation of removal under VAWA.<sup>465</sup> Critics of this requirement for self-petitioners<sup>466</sup> have noted that no other immigrant seeking to adjust status through a family-based petition must prove good moral character<sup>467</sup> and have tied this additional burden to the historical treatment of battered women within the legal system, whereby only a “good victim” is deemed worthy of the law’s protection.<sup>468</sup> As Professor Linda Kelly has noted:

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(discussing biases against females in harassment law).

462. *Miller v. Albright*, 523 U.S. 420, 469 (1998) (Ginsburg, J., dissenting).

463. *Id.* at 460 (criticizing similar provisions regarding the ability of an unwed mother to confer citizenship under INA § 1409).

464. See discussion *supra* Part III.C.2.b.

465. See discussion *supra* Part III.D.2.

466. All applicants for cancellation of removal must prove good moral character. INA § 240A(b)(1)(B), 8 U.S.C. § 1229(b)(1)(B) (2008). The requirement is not specific to battered women seeking relief under VAWA.

467. INA § 245(a), 8 U.S.C. § 1255(a) (2008).

468. Kelly, *supra* note 196, at 580. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 308-09 (2005) (describing the “good victim” as deferential, submissive to authority, and compliant to the demands of others including the will of the state if she wishes to be defended). See also KRISTIN A. KELLY, DOMESTIC VIOLENCE AND PRIVACY 152-53 (2003) (describing the reluctance to sympathize with victims of domestic violence who are not “good victims” or women who evoke compassion and the desire to assist).



By requiring proof of good moral character, VAWA awards relief only to those women who have legally redeemed themselves as "good victims." Such a demand is in keeping with U.S. jurisprudential tradition of only awarding relief to female litigants who personify the image of feminine goodness. In U.S. domestic laws governing not only domestic violence but other forms of gender violence such as rape and sexual harassment, the successful victim is helpless, virginal and completely without fault. ... Statutorily defined, the good moral character prong is *prima facie* evidence that the law insists successful VAWA applicants be scrupulous individuals.<sup>469</sup>

Given the historical treatment of battered women in the legal system, the good moral character requirement seems part of the common willingness to blame and discredit the battered woman, a phenomenon that is well-documented in legal scholarship.<sup>470</sup> The gendered stereotypes about victims of abuse, immigrant women, and women litigants come together to place this additional burden on battered immigrant women.

By definition, a battered wife in a polygamous marriage is not a "good victim," since "persons practicing polygamy," along with habitual drunkards, prostitutes, smugglers, and gamblers, are statutorily barred from a finding of good moral character.<sup>471</sup> Further, the exception under the statute permitting an innocent spouse in a bigamist marriage to establish that the marriage is "bona fide"<sup>472</sup> is inapplicable to a woman who knowingly entered a polygamist marriage, a marriage which is neither bona fide nor valid for immigration purposes.<sup>473</sup> Thus, by virtue of being a wife in a polygamous marriage, a battered immigrant woman loses all the protections and benefits available under VAWA.

In light of the inequities involved in denying battered immigrant women in polygamous marriages relief under VAWA, this author suggests a modest policy proposal. The reauthorization of VAWA in 2010<sup>474</sup> provides Congress with an opportunity to address the hurdles that prevent a battered immigrant woman in a polygamous marriage from obtaining VAWA relief. Congress should amend the INA to create an exception to the bona fide marriage requirement of Section 204, modeled on the current bigamy exception of that section,<sup>475</sup> and allow a battered immigrant woman in a polygamous marriage to

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469. Kelly, *supra* note 196, at 580-81.

470. See, e.g., Murphy, *supra* note 461, at 741-45; Mahoney, *supra* note 461, at 24-35; Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence Child Custody Decisions*, 14 VAND. L. REV. 1041, 1083 (1991); Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991).

471. The list also includes persons convicted of or admitting to crimes of moral turpitude and aggravated felons. INA § 101(f), 8 U.S.C. § 1101(f).

472. INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2008).

473. See discussion *supra* Part III.D.2.

474. Violence Against Women Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, §§ 1101-04 (2006).

475. INA § 204(a)(1)(A)(iii)(II)(BB), 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(BB); INA § 204(a)(1)(B)(ii)(II)(aa)(BB), 8 U.S.C. § 1154(a)(1)(B)(ii)(II)(aa)(BB).

self-petition for permanent resident status if she can establish that polygamous marriage is practiced under the civil, religious, or customary law of her country of origin, and that the marriage upon which she bases the petition would constitute a valid marriage under the law of that country.

Likewise, Congress should provide a waiver for the polygamy ground of inadmissibility in Section 212(a)(10)(A), available solely for VAWA self-petitioners who can establish that polygamous marriage is practiced under the civil, religious, or customary law of their country of origin, and that the marriage upon which the petition is based would constitute a valid marriage under the law of that country.<sup>476</sup> This waiver would remove the statutory bar of Section 101(f)(3) prohibiting a finding of good moral character for “practicing polygamists,”<sup>477</sup> and would enable immigration officials to assess good moral character for VAWA self-petitioners who are in polygamous marriages on a case-by-case basis.<sup>478</sup> A battered immigrant woman who could prove she was forced into the polygamous marriage as part of the abuse<sup>479</sup> would easily satisfy the requirement of Section 204(a)(1)(C) that the waivable act “was connected to the alien’s having been battered or subjected to extreme cruelty.”<sup>480</sup> However, the new waiver also would permit a finding of good moral character for a self-petitioner who, although entering the polygamous marriage voluntarily, could establish that the polygamous marriage was related to the abuse she thereafter suffered.<sup>481</sup>

The proposed exception and waiver should be available not only to self-petitioners under VAWA, but also to those seeking cancellation of removal proceedings under VAWA.<sup>482</sup> Permitting battered immigrant women in polygamous marriages to obtain relief under VAWA would further the purpose and intent of VAWA to “remove immigration law as a barrier that [keeps] battered immigrant women and children locked in abusive relations.” It would also expand the protection of VAWA to a woman who, while not in a traditional monogamous marriage, was living in good faith in a marriage with a U.S. citizen or permanent resident when she became the victim of abuse.

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476. Section 212(d) could be amended to add the proposed waiver of the Section 212(a)(10)(A) polygamy ground of inadmissibility for persons seeking relief under VAWA. See INA § 212(d), 8 U.S.C. § 1182(d) (2008).

477. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (2008).

478. 8 C.F.R. § 204.2(c)(1)(vii) (2008).

479. See discussion *supra* notes 304-11 and accompanying text.

480. INA § 204(a)(1)(C), 8 U.S.C. § 1154(a)(1)(C).

481. *Id.*

482. INA § 240A(b)(2), 8 U.S.C. § 1229(b)(2) (2008). It should be noted that no permanent resident who has practiced polygamy is eligible to naturalize to become a citizen. 8 C.F.R. § 316.10 (2008). See discussion *supra* Part III.D.4.

## V. CONCLUSION

Mapping the polygamy bar of Section 212(a) throughout the INA reveals that family-sponsored immigration is the area of immigration law most affected by the practice of polygamy, since the determination of who qualifies as a spouse, parent, child, or sibling is affected if the relationship was created by a polygamous marriage. The fact that a polygamous marriage will not be recognized as valid for immigration purposes has a broader application, however, since these same definitions also apply when determining family status for derivative beneficiaries of employment-based, diversity lottery, and special immigrant visas. The impact of the polygamy bar outside of family-based immigration is broad as well, since the Section 212(a)(10)(A) ground of inadmissibility is a factor in the application of numerous provisions of the statute. While the polygamy bar affects all members of a polygamous family, the greatest negative impact is on the second and subsequent wives in a polygamous marriage, who can neither gain nor confer status for immigration purposes based on familial relationships arising solely out of the polygamist marriage. Most significantly, the bona fide marriage and good moral character requirements of the Violence Against Women Act bar all wives in a polygamist marriage from obtaining relief available to immigrant victims of domestic violence under VAWA, a problem that should be addressed when Congress reauthorizes VAWA in 2010.

With the growing number of immigrants arriving in the United States from countries in which polygamy is practiced legally, as well as the rising incidence of polygamous marriage within immigrant communities in the United States, immigration officials will be applying with increasing frequency the provisions of the INA in which polygamy plays a role. It is imperative, therefore, that the consequences and policy implications of the polygamy bar in immigration law be recognized and addressed.