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Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses

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Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So As to Include De Facto Polygamous Spouses

Michèle Alexandre*

Abstract

While polygamy is illegal in the United States, forms of it are still practiced either overtly, pursuant to religious traditions, or covertly, by the maintenance of two or more family units. As a result, any claims, disputes, or abuses that arise in the context of de facto polygamous unions remain irremediable. My focus, in this Article, is not to advocate that polygamy should be legally recognized. Nor is it my purpose to debate the viability or morality of polygamy. Instead, I am concerned with affording legal remedies for vulnerable individuals living and operating in de facto polygamous unions. In light of the thousands of individuals living in some form of multi-party unions, I propose that it is imperative to construct adequate legal options and remedies for the parties involved in these unions. In this Article, I evaluate how a women-centric interpretation of the Qur'anic treatment of Islamic polygamy might help us assess how to best protect American women involved in de facto polygamous unions. In addition, I advocate that a redefinition of the concept of the surviving spouse in American estate distribution will help to legally protect de facto spouses in the inheritance context. Finally, I further propose that the common law marriage doctrine be used to help prove the existence of de facto polygamous unions.

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I. Introduction

It is reported that President Lincoln responded to a group of congressmen eager to step up the early campaign against polygamy with an anecdote about an old log on his childhood farm: "It was too heavy to move, too hard to chop, and too green to burn. So we just plowed around it."[1] When it comes to de facto polygamy,[2] our jurisprudence has traditionally adopted a policy similar to that enunciated by President Lincoln. Utah has traditionally stood as the symbol for the practice of polygamy in the United States.[3] What is less discussed, however, is that multi-party unions are not only limited to Utah, Church of Jesus Christ of the Latter-day Saints, or Islam.[4]

Although polygamist Mormons and polygamist Muslims are outwardly viewed as the most extreme departures from the traditional idea of the American family, nontraditional families are still to be found in America.[5]

1. G. LARSON, OUTLINE HISTORY OF UTAH 196 (1958).

2. *See infra* note 7 (defining de facto polygamy).

3. *See* Dr. Charles J. Reid, Jr., *And the State Makes Three: Should the State Retain A Role in Recognizing Marriage?*, 27 CARDOZO L. REV. 1277, 1298 (2006) (discussing the unaccepted practice of polygamy in western society while addressing the historical prevalence of polygamy in Utah).

4. *See* D. Marisa Black, Study Note, *Beyond Child Bride Polygamy: Polyamory, Unique Familial Constructions, and the Law*, 8 J.L. & FAM. STUD. 497, 498 (2006) (discussing the growing trend of nontraditional familial structures in America and the ensuing legal debates).

5. *See infra* note 49 and accompanying text (describing the presence of polygamy outside of the Mormon population in the United States).

Explorations into the lives of American families reveal that many Americans participate in multi-party unions either expressly or tacitly.[6] In this Article, this practice is referred to as "de facto polygamy."[7] Arguably, multi-party unions have existed in the United States for some time.[8] These unions are often only exposed, for example, when a spouse discovers that his or her life partner has been carrying out an extra-marital affair with someone else for many years or when a married father reveals the existence of extra-marital children, another household he supports, or a common law marriage with another spouse.[9]

While polygamy is illegal in the United States,[10] forms of it are still practiced either overtly, pursuant to religious traditions,[11] or covertly, by the maintenance of two or more family units.[12] Historically, the prosecution of polygamists has been rare in the United States, and a growing tolerance has been shown towards them.[13] Still, no form of polygamy is recognized in the United States.

The practice of de facto polygamy exists outside of the law. Some of those forms include multi-party common law marriages and marriages coupled with extramarital common law unions.[14] It has been estimated that as many as 60,000 individuals practice polygamy in the United States.[15] This number,

6. *See infra* note 35 and accompanying text (noting the prominence of polygamy among many in the Mormon religion).

7. Henry Mark Holzer, *The True* Reynolds v. United States, 10 HARV. J.L. & PUB. POL'Y 43, 45 (1987) (defining de facto polygamy as "multiple romantic or sexual relationships engaged in simultaneously").

8. *See* Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1029 (2005) (outlining the history of polygamy in America).

9. *See, e.g.*, Whitney v. Whitney, 134 P.2d 357, 359–62 (Okla. 1942) (finding that although a common law marriage may have otherwise existed between the parties, the man's failure to dissolve his first marriage prevented such a marriage).

10. *See* Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 U. MIAMI INTER-AM. L. REV. 615, 620–27 (2006–2007) (discussing the federal and state laws prohibiting polygamy).

11. *See* Black, *supra* note 4, at 500 ("What is generally known as polygamy is in fact polygyny, and its defenders frequently cite religious convictions for such a practice.").

12. *See In re* Estate of Pope, 517 N.W. 2d 281, 282 (Mich. Ct. App. 1994) (involving a decedent who had been secretly married to two women simultaneously and managed to maintain his secret by telling his wives a series of lies about his whereabouts).

13. *See* Berkowitz, *supra* note 10, at 627 (discussing the hesitancy of government officials to fully enforce polygamy statutes, despite the dismissal of every case challenging the constitutionality of such laws).

14. *See* Ryan D. Tenney, *Tom Green, Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 146–47 (2002) (discussing the use of common law marriage statutes to prosecute for polygamy in Utah).

15. *See* Michael G. Myers, *Polygamist Eye for the Monogamist Guy: Homosexual*

however, does not include individuals' secret or underground participation in multi-party unions. As a result, any claims, disputes, or abuses that arise in the context of de facto polygamous unions remain irremediable. For example, when the de facto polygamist unions terminate either by death or separation, individuals who are parties to such unions are not able to benefit from the same legal protections as those provided to "de jure spouses" under inheritance or divorce laws of our jurisprudence.

My focus, in this Article, is not to advocate that polygamy should be legally recognized. Nor is it my purpose to debate the viability or morality of polygamy. Instead, I am concerned with affording legal remedies for vulnerable individuals living and operating in de facto polygamous unions. In light of the thousands of individuals living in some form of multi-party unions, I propose that it is imperative[16] to construct adequate legal options and remedies for the parties involved in these unions.[17] In this Article, I evaluate how a women-centric interpretation of the Qur'anic treatment of Islamic polygamy might help us assess how to best protect American women involved in de facto polygamous unions. In addition, I advocate that a redefinition of the concept of the surviving spouse in American estate distribution will help to legally protect de facto spouses in the inheritance context.[18]

Sodomy . . . Gay Marriage . . . Is Polygamy Next?, 42 HOUS. L. REV. 1451, 1456 (2006) (noting that there are estimated to be between 30,000 and 60,000 polygamists in the United States); Tenney, *supra* note 14, at 142 (same).

16. *See* Pauline Bartolone, *For These Muslims, Polygamy Is an Option*, S.F. CHRON., Aug. 5, 2007, at E3 (describing the practice of polygamy in the African American community and American Muslim community). In the United States "[w]omen have few protections when entering an Islamic polygamous relationship." *Id.* Although the Qu'ran says the husband must care for his wives equally, "there is no universal Islamic law or accountability mechanism to define or enforce that." *Id.* The rights of the wife in a polygamous relationship are also limited, exemplified by the fact that "the husband need not notify the first wife that he is taking another, and he may even withhold a divorce." *Id.* Professor Debra Mubashir Majeed, Associate Professor and Chairwoman of Philosophy and Religious Studies at Beloit College in Wisconsin, notes that African American Muslims practicing polygamy are a "small but visibly increasing phenomenon." *Id.*

17. *See* Alyssa Rower, *The Legality of Polygamy: Using the Due Process Clause of the Fourteenth Amendment*, 38 FAM. L.Q. 711, 728–30 (2004–2005) (assessing advantages and disadvantages of legalizing polygamous relationships).

18. *See* Berryman v. Thorne, 700 A.2d 181, 185 (D.C. 1997) (upholding the trial court's judgment that a decedent's former husband was a surviving spouse who was allowed to take an elective share in the decedent's estate). In *Berryman*, the decedent entered into a common law marriage with another man, but she never officially divorced her former husband. *Id.* at 183. Because there is no common law divorce, the decedent's former husband was allowed to take an elective share in her estate. *Id.* at 185. Though the second husband predeceased the decedent, if he had not, his right to inherit from his common law wife would have been abrogated by the existence of a former husband. *Id.*

In this Article, I first compare the relatively ignored and underground growth of American de facto polygamy to Islamic polygamy and the women-centric solutions advocated by certain Islamic reformists. Secondly, I investigate the way in which American courts have dealt with disputes involving polygamous parties.[19] Thirdly, I propose that the common law marriage doctrine be used to identify de facto polygamous unions and that we consider a redefinition of the surviving spouse concept so as to provide protections for de facto polygamous spouses. Finally, I address the various policy doctrines that justify the proposed expansion of the surviving spouse concept to include de facto polygamous wives.

II. Transcendental Nature of Values Contained in the Spirit of Islamic Law

Prophet Muhammad, in pre-Islamic Arabia, attempted to rectify the perceived inequities of his time by enacting some rules, which were relatively more equitable than the way polygamy was practiced until then.[20] In pre-Islamic Arabia, for example, it was the custom for men to marry as many women as they liked, regardless of their ability to take care of them.[21] Verse 4.3 of the *Qur'an* was innovative and radical at the time, especially considering the laissez faire state of polygamy before the *Qur'an* was revealed to the Prophet.[22] The Prophet was concerned that, in a time of great wars, wives not be left widowed and destitute and children not be left orphaned and homeless.[23] Consequently, the

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19. *See* Catherine Blake, *I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-affirmation of Anti-polygamy Laws in* Utah v. Green, 7 J.L. & FAM. STUD. 405, 406–12 (2005) (analyzing the decision in *Utah v. Green* and "its importance in reaffirming the state's position against polygamy in light of *Lawrence*").

20. *See* Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 562 (2004–2005) (discussing the Prophet Muhammad's implementation of less "barbaric" rules with respect to women).

21. *See* Yakaré-Oulé Jansen, *Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?* 5 NW. U. J. INT'L HUM. RTS. 181, 182 (2007) ("Under pre-Islamic society, when married, a woman became the property of her husband and so did the children she would bear him. . . . Polygamy was unlimited and divorce did not entail any maintenance obligations.").

22. *See* HOLY QUR'AN 4:3 (Maulana Muhammad Ali trans., 1995) ("And if you fear that you shall not be equitable in the matter of the orphans, then marry women suitable to you, two, three and four. But if you fear that you shall not be able to do justice between the wives, then be content with only one wife."). *See generally* DR. ZEENAT SHAUKAT ALI, MARRIAGE AND DIVORCE IN ISLAM: AN APPRAISAL 117 (1987).

23. *See* Rodgers-Miller, *supra* note 20, at 544 (discussing the Prophet Muhammad's recording of the revelation from Allah to allow plural wives, in response to the loss of husbands

Qur'an contained a series of verses demanding that widows and orphans be protected and treated fairly.[24] This demand changed substantially the practice of polygamy from a system where women and children were often abused and destitute at the death of their husbands and fathers to a system where a minimum burden of care and obligations was placed on husbands in relation to their wives and progeny.[25]

The United States could benefit and learn a great deal from early Islamic law's approach to polygamy. Early Islamic law accepted that the practice of polygamy was a social reality that ideally had to be checked and balanced by the enactment of equitable legal rules.[26] An example of this early manifestation of legal realism is Prophet Muhammad's attempt to reduce the number of neglected orphans and children by advocating responsibility and limitations on polygamy within Islamic law.[27] This is a needed lesson considering that de facto polygamy is a system that exists outside the law in the United States.[28] Consequently, a look at the way different formal Islamic legal systems address issues arising from polygamist lifestyles can help us learn from the mistaken and successful decisions made by Islamic states' approaches to polygamy. I propose that our jurisprudence be inspired by the equitable spirit underlying the enactment of these rules to solve the inequality caused by the practice of de facto polygamy. An application of this spirit of equity to de facto polygamous unions in the United States mandates, I argue, as a first step, that inheritance laws in the United States redefine what we view as a surviving spouse.[29]

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and fathers during the pagan wars).

24. *See* HOLY QUR'AN 4:1, 6:98, 7:189, 30:21 (Maulana Muhammad Ali trans., 1995) (describing men and women as similar and as having similar responsibilities); *see also* Azizah Yahia al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & RELIGION 37, 46 (2000–2001) (stating that the *Qur'an* describes all human beings as having been created from the same "nafs").

25. *See* Rodgers-Miller, *supra* note 20, at 544 (discussing the Prophet Muhammad's recording of the revelation from Allah to allow plural wives, in response to the loss of husbands and fathers during the pagan wars).

26. *See* Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & RELIGION 185, 193 (2000–2001) ("The rationales underpinning Islamic rights may be derived from reason, a divine order and public interests.").

27. *See* Rodgers-Miller, *supra* note 20, at 544 (noting the importance placed on the good treatment of orphans by the Prophet Muhammad).

28. *See* David R. Dow & Jose I. Maldonado, Jr., *How Many Spouses Does the Constitution Allow One to Have?*, 20 CONST. COMMENT. 571, 579 (2003–2004) (discussing anti-polygamy statutes in the United States and the constitutional implications of such).

29. *See* Berryman v. Thorne, 700 A.2d 181, 184 (D.C. 1997) (discussing the potential for inequity to polygamous spouses under current anti-polygamy laws).

III. History of American Jurisprudence's Approach to Polygamy

The United States' official history with polygamous practices dates back to the nineteenth century with the emergence of the Church of Jesus Christ of the Latter-day Saints led by Joseph Smith.[30] In 1843, Joseph Smith received a revelation that led him to declare polygamy as the will of God.[31] In 1852, Brigham Young, then leader of the Mormon Church, publicly declared the practice permissible and godly.[32] The Church of Jesus Christ of the Latter-day Saints grew rapidly and eventually settled in Utah.[33] While the Mormon Church rescinded its position on polygamy after great pressure from Congress in 1890,[34] the practice of polygamy has been maintained in some segments of the Mormon population.[35] In fact, there now exist various women's interest groups and websites that extol the virtues of polygamy.[36]

Anti-polygamist feelings in the United States increased as the Church of Jesus Christ of the Latter-day Saints grew larger, and soon polygamy became equated with abject immorality.[37] In the mid-1800s, public outrage at the practice of polygamy escalated.[38] Abolitionists such as Harriet Beecher Stowe

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30. *See* Calhoun, *supra* note 8, at 1029 ("Polygamy has had an especially significant place in U.S. social life after Joseph Smith's 1843 revelation that members of the Church of Jesus Christ of the Latter-day Saints . . . should begin practicing what they called 'plural marriages' . . . .").

31. *See* Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739, 741–43 (2003) (discussing "the Revelation on Celestial Marriage received by [Joseph] Smith in 1843" as the beginning of "[t]he official association of polygamy and Mormonism").

32. *Id.* at 744–45.

33. *See* James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1515 (1997) (describing the migration of Mormonism from the northeastern United States to Utah).

34. *See id.* at 1526–27 (discussing the rejection of polygamy as a prerequisite for the federal government's approval of Utah's statehood).

35. *See* Elizabeth Harmer-Dionee, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1334 (1998) (discussing the persistence of the practice of polygamy even in the immediate aftermath of the Church denouncing polygamy).

36. *See* Jeffrey Michael Hayes, *Polygamy Comes Out of the Closet: The New Strategy of Polygamy Activists*, 3 STAN. J. C.R. & C.L. 99, 108–09 (2007) (discussing the use of female "spokes-wives" and female interest groups in the pro-polygamy movement).

37. *See* Harmer-Dionee, *supra* note 35, at 1322–23 (noting the connection between the Church's public approval of polygamy in 1852 and efforts to curtail the practice); Hayes, *supra* note 36, at 116 ("Ninety-two percent of Americans believe that the practice of polygamy is immoral, according to a Gallup poll conducted in 2003.").

38. *See* Harmer-Dionee, *supra* note 35, at 1322–27 (discussing the plea in the mid-1800s for national leaders to eradicate polygamy in response to Mormon acceptance of the practice).

compared polygamy to slavery and argued that both were barbarous practices that needed eradication.[39] Such was the context within which the first cases and legislation addressing polygamy arose.[40] In response to growing demand, Congress passed the Morrill Act[41] in 1862 and an amendment, the Edmunds Act,[42] in 1882. This legislation revoked many rights of any person who had lived with a wife or husband married to any other person in a "territory of the United States."[43] In addition, Congress took measures to circumvent the great amount of influence exerted by Mormons in Utah's state governance.[44] The Poland Act[45] implemented a procedure whereby jury lists were to be compiled by federal rather than local authorities.[46] The Poland Act also limited the power of a probate court to "the settlement of estates and decedents, and in matters of guardianship and . . . suits of divorce,"[47] doing away with the Probate Court's previous general jurisdiction over criminal and civil cases.[48]

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39. *See* Gordon, *supra* note 31, at 764–71 (discussing the parallel drawn between slavery and polygamy after the publication of Harriet Beecher Stowe's *Uncle Tom's Cabin* and similar works of the period).

40. *See* Harmer-Dionne, *supra* note 35, at 1325–27 (discussing the 1878 case of *Reynolds v. United States*, 98 U.S. 145 (1879), in which the Supreme Court upheld the Morrill Act).

41. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862) (codified as amended at U.S. Rev. Stat. § 5352) (repealed prior to codification in the U.S.C.).

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

43. Morrill Anti-Bigamy Act § 1, 12 Stat. at 501.

44. *See* Donald L. Drakeman, Reynolds v. United States: *The Historical Construction of Constitutional Reality*, 21 CONST. COMMENT. 697, 700 (2004) (stating that in passing the Morrill Act and Poland Act, the federal government's underlying desire was to divest the Mormon Church of its power).

45. Poland Act, ch. 469, 18 Stat. 253 (1874) (repealed prior to the codification of the U.S.C.). *See* JESSIE L. EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 9 (1987) (providing a brief context of the passage of the Poland Act). *See generally* B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE (1991); KIMBALL YOUNG, ISN'T ONE WIFE ENOUGH? (1954); Daniel W. Bachman, *New Light on an Old Hypothesis: The Ohio Origins of the Revelation on Eternal Marriage*, 2 J. MORMON HIST. 27 (1978); Lowell "Ben" Bennion, *The Incidence of Mormon Polygamy in 1880: "Dixie" versus Davis Stake*, 11 J. MORMON HIST. 27 (1984); Larry Logue, *A Time of Marriage: Monogamy and Polygamy in a Utah Town*, 11 J. MORMON HIST. 3 (1984); D. Michael Quinn, *LDS Church Authority and New Plural Marriages, 1890–1904*, 18 DIALOGUE: J. MORMON THOUGHT, Spring 1985, at 9.

46. *See* Drakeman, *supra* note 44, at 700 (noting that the Poland Act supplemented the Morrill Act by adding prosecutorial mechanisms that assigned jurisdiction of polygamy trials to federal territorial courts and appellate jurisdiction to the United States Supreme Court).

47. Poland Act § 3, 18 Stat. at 253–54.

48. *See* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 121 (2006) ("[T]he Poland Act . . . revoked the jurisdiction of the Utah county courts in all civil, criminal, and chancery affairs other than divorce.").

As discussed earlier, the practice of polygamy in the United States, however, is not only limited to the Mormon population.[49] When discussing polygamy, we often feel more comfortable conceptualizing it as practiced only in remote countries or solely in Utah's isolated Mormon communities. The practice of de facto polygamy in the United States transcends class lines and culture lines.[50]

De facto polygamy has, for example, been prevalent in the African American community.[51] Informal marriages began in African American communities as a result of the instability of slavery.[52] Due to the perceived shortage of black men and the fact that families were often dismantled when sold to various owners, it was not uncommon for African Americans to enter into more than one informal union.[53] Remnants of this practice still exist today.

While some people belonging to the Islamic faith practice some form of de facto polygamy, more particularly those identifying with the Nation of Islam or Hebrew Israelites, a number of the de facto polygamist unions are not based on any religious tenets. Certain reports have shown that a number of African American women, including those belonging to the middle or professional classes, have begun to adhere to the philosophy that informal polygamy might be their only option if they are to have a family.[54] One of the reasons provided for this phenomenon is that black women are incessantly reminded that "[a] disproportionate number of [African American] men are unavailable for

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49. *See* Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives:* Lawrence v. Texas *and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 140 (2004) (noting Elizabeth Smart's kidnapping and Tom Green's polygamy prosecution brought national attention to polygamy and caused people to question whether polygamy had been effectively eradicated from the United States).

50. *See* Adrien K. 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, 813 (2001) (noting that polygamy does not occur "only among breakaway Mormon sects" and that "various forms of polygamy" exist in the United States); *see also* David O. Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 59 (1997) (observing that "many Americans engage in de facto serial polygamy"); Elisa Soukup, *Polygamists Unite! They Used to Live Quietly, but Now They're Making Noise*, NEWSWEEK, Mar. 20 2006, at 52 (noting the total of evangelical Christian and Muslim polygamists within the United States may in fact outnumber Mormon polygamists).

51. *See* Wing, *supra* note 50, at 857–59 (describing the history of and impetus behind de facto polygamy practices among African Americans).

52. *See id.* at 857–58 (describing how slavery contributed to the practice of polygamy among African Americans).

53. *See id.* (discussing informal marriages, entitled "jumping the broom" ceremonies, which were a common practice among African slaves).

54. *Id.* at 858 ("Today, some lonely women remain ready to have a much smaller piece than three-fifths of a man.").

marriage—due to early death, imprisonment, high unemployment, and intermarriage[] [and] [m]ore . . . young women have obtained higher educations than the young men."[55] The result, then, is that a large number of educated black women "seek a small pool of 'suitable' men."[56] Faced with the surplus of women, these men often choose to become de facto polygamists.[57] According to the marriage statistics, as between black women and their white counterparts, "only 39% of black women are married compared to 60% of white women and 67% of black children are born out of wedlock compared to 25% of white babies."[58]

Despite this covert practice, polygamy has been legally outlawed for over a century in the United States.[59] The *coup de grâce* to polygamy, however, came in *Reynolds v. United States*.[60] In *Reynolds*, a prominent member of Salt Lake City's Mormon community was indicted by a federal jury for bigamy under the Morrill Act.[61] The jury convicted Reynolds on the testimony of his second wife.[62] The issue centered around whether the Morrill Act impeded Reynolds' religious freedom.[63] The Court in *Reynolds* declared that polygamy threatened the foundation of marriage and was a precursor to anarchy.[64] It

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55. *See id.* (noting that the disproportionately low number of successful black men has caused successful black women to consider sharing a man).

56. *Id.*

57. *Id.* (noting that black men "can be either de facto polygamists or womanizers").

58. *Id.*

59. *See* ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY 89 (2006) ("In 1862, Congress finally responded to anti-polygamy sentiment by enacting the Morrill Act, which prohibited polygamy within any territory of the United States.").

60. *See* Reynolds v. United States, 98 U.S. 145, 165–67 (1878) (finding that laws restricting polygamy do not violate the Constitution's protection of religious freedom).

61. *See id.* at 146 (stating that the indictment against George Reynolds charged him with bigamy); Morrill Anti-Bigamy Act, ch. 126, § 1, 12 Stat. 501, 501 (1862) (codified as amended at U.S. Rev. Stat. § 5352) (repealed prior to codification in the U.S.C.) (punishing and preventing the practice of polygamy in the territories of the United States).

62. *See Reynolds*, 98 U.S. at 150 (stating that the testimony of the defendant's second wife was offered into evidence at trial).

63. *See id.* at 162 ("[T]he question is raised, whether religious belief can be accepted as justification of an overt act made criminal by the law of the land.").

64. *See id.* at 166–67 (criticizing polygamy). The Court states:

> Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id.

further ruled that Congress could proscribe polygamy and other religious actions offensive to society.[65]

After *Reynolds*, courts and legislative bodies continued to wage war against polygamy and the Mormon Church. Congress subsequently enacted the Edmunds Act[66] in response to *Miles v. United States*.[67] In *Miles*, the Supreme Court reversed the conviction of a polygamist because it relied on the testimony of his second wife (at the time wives could not testify against their husbands).[68] In 1887, the Edmunds-Tucker Act removed this evidentiary obstacle to the prosecution of polygamists.[69] Another component of the Edmunds Act was the addition of the offense of cohabitation.[70] The Act allowed a person to be convicted of a misdemeanor for living with more than one woman.[71] The Edmunds-Tucker Act further restricted the power of the probate court[72] and required that marriages be certified by territorial probate courts with the name of the presiding officer and the marital status of parties.[73]

To further deter polygamy, the Edmunds-Tucker Act required all prospective male voters to swear that they did not practice, nor required others to practice, polygamy;[74] invalidated the Corporation of the Church of Jesus Christ of the Latter-day Saints;[75] and authorized all buildings not used exclusively for

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65. *See id.* at 166 (stating that Congress cannot pass laws that regulate "mere religious belief and opinions," but it can pass laws that regulate religious actions or practices).

66. *See* Edmunds Act, ch. 47, 22 Stat. 30 (1882) (repealed 1983) (placing additional restrictions on the practice of bigamy).

67. *See* Miles v. United States, 101 U.S. 304, 314–15 (1880) (finding that a defendant's wife is incompetent to testify against him in a polygamy prosecution).

68. *See id.* at 315 (reversing the defendant's conviction because the trial court erred in permitting his second wife to testify against him when her "competency" to testify could not be established).

69. *See* Edmunds-Tucker Act, ch. 396, § 1, 24 Stat. 635, 635 (1887) (repealed 1978) ("[I]n any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness . . . .")..

70. *See* Edmunds Act § 3, 22 Stat. at 31 ("[I]f any male person . . . cohabits with more than one woman, he shall be deemed guilty of a misdemeanor").

71. *Id.*

72. *See* Edmunds-Tucker Act § 12, 24 Stat. at 637 (limiting the power of Utah probate courts to estate and guardianship matters).

73. *See id.* § 9, 24 Stat. at 636 (noting "that every ceremony of marriage . . . shall be certified by a certificate stating . . . the full names of each of the parties concerned, and the full name of every officer priest and person . . . in any way taking part in the performance of such ceremony"). The certificate had to be filled out regardless of whether the parties were "competent to be the subjects of such marriage . . . ." *Id.*

74. *Id.* § 24, 24 Stat. at 639–40.

75. *Id.* § 17, 24 Stat. at 638.

church purposes to be escheated to the United States.[76] Congress authorized the dissolution of the Perpetual Emigrating Fund Company, which gave aid to needy Mormons who desired to immigrate to Utah, and required that funds, property, and assets escheat to the federal government.[77] Under this tremendous pressure, the Mormon Church capitulated on September 25, 1890 and issued a manifesto forbidding plural marriages.[78]

Even as late as 1955, the courts' view of polygamy as evil is evident in the legal opinions of the time. In *In re State ex rel. Black*,[79] Arizona law enforcement raided Short Creek, an isolated community of 200 to 300 inhabitants on the Utah-Arizona state line.[80] Leonard Black, husband of three women and father of twenty-six children, was arrested.[81] Subsequent to the raid, a juvenile court terminated Black's parental rights and that of one of his wives.[82] The Utah Supreme Court dismissed Black's claim predicated on religious freedom,[83] evoking moral consideration as a basis for its ruling.[84] The *Black* decision is full of moral pronouncements and is viewed as having limited application.[85]

Almost forty years later, however, the Utah Supreme Court broke the pattern of vilifying polygamists. In 1991, the Supreme Court held in *In re Adoption of W.A.T.*[86] that polygamists could not be disqualified automatically

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76. *See id.* § 13, 24 Stat. at 637 ("[N]o building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith . . . shall be forfeited.").

77. *Id.* § 15, 24 Stat. at 637.

78. FLOYD CURRIE MCELVEEN, THE MORMON ILLUSION: WHAT THE BIBLE SAYS ABOUT THE LATTER-DAY SAINTS 107 (1997).

79. *See In re* State *ex rel.* Black, 283 P.2d 887, 913 (Utah 1955) (affirming a lower court's judgment that children living in a polygamous household were neglected).

80. *Id.* at 888.

81. *See id.* (describing Leonard Black's family structure).

82. *See id.* at 891–92 (describing the practice of polygamy as one of the bases for the lower court's decision to terminate the Black's parental rights).

83. *See id.* at 905 (describing the court's decision based on Article III of the Utah Constitution). Article III states: "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." UTAH CONST. art. III.

84. *See id.* at 904 ("'To extend exemption from punishment for [polygamy] would be to shock the moral judgment of the community.'" (quoting Davis v. Beason, 133 U.S. 333, 341 (1890))).

85. *See generally In re* State *ex rel.* Black, 283 P.2d 887 (Utah 1955).

86. *See In re* Adoption of W.A.T., 808 P.2d 1083, 1086 (Utah 1991) (concluding that the fact that persons petitioning to adopt children had organized their family according to their religious belief in plural marriage was one factor the court could consider in determining

as adoptive parents.[87] Petitioners Vaughn and Sharene Fisher were legally married with four children, but Vaughn also maintained a polygamous relationship with Katrina Stubbs with whom he had two children.[88] He then married a third wife, Brenda Thornton, who had six previous children.[89] Vaughn and Sharene began proceedings to adopt Brenda's children upon finding out that Brenda was dying of cancer.[90] Brenda's father and family intervened.[91] The issue in the case was whether the Fishers' teaching and practice of polygamy disqualified them as adoptive parents.[92] The court held that "[t]he fact that our constitution requires the state to prohibit polygamy does not necessarily mean that the state must deny any or all civil rights and privileges to polygamists."[93] The court rejected disqualification of polygamists from adoption as a matter of law without considering all factors bearing upon the adoptee's best interests.[94] *In re Adoption of W.A.T.* illustrates the Utah court's realization that the rights of individuals within polygamous systems are still worthy of protections despite the illegality of polygamy.

Similarly, in *Sanderson v. Tryon*[95] in 1987, the Utah Supreme Court held that a parent's polygamous lifestyle, standing alone, is insufficient to deny a child custody award.[96] By then, the legislature had also deleted some of the

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whether specific placement would promote the interests of children to be adopted).

87. *See id.* at 1086 (reversing the trial court's dismissal of an adoption petition because "[t]he result of the trial court's decision . . . is that no children may ever be adopted by any people who associate themselves with [polygamy], regardless of the particular circumstances surrounding the adoption issue").

88. *See id.* at 1083 (describing Vaughn Fisher's family structure).

89. *See id.* at 1083–84 (describing petitioners' adoption efforts and the medical condition of Brenda Thornton).

90. *See id.* (describing Brenda Thornton's consent to have her children adopted by the petitioners' plural family upon her death).

91. *See id.* at 1084 (describing the efforts of Brenda Thornton's family to have the adoption petition dismissed).

92. *See id.* ("The only issue before us is whether petitioners, who are legally married, may be denied a hearing and specific factual findings on their adoption petition on the sole ground that they believe in and practice plural marriage . . . .").

93. *Id.* at 1085.

94. *See id.* at 1086 (raising the following factors for consideration: alternatives available to adoptees, nature and content of adopter's lifestyle, relationship between child and adopter, and special needs of the child).

95. *See* Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987) (holding that "finding parent practices polygamy is alone insufficient to support custody award or to permit meaningful review award on appeal").

96. *Id.* at 625 (agreeing with appellant that "the finding that she practices polygamy is alone insufficient to support the custody award . . .").

statutes relied on in *Black*.[97] The court further found that moral character was "only one of a myriad of factors the court may properly consider in determining a child's best interests."[98] Thus, absent a finding that a polygamist lifestyle affected her children's best interests, the denial of custody would be flawed.[99] This decision marked a sharp departure from *Black*'s "preoccupation with terminating parental rights on the sole basis of polygamous activity."[100]

IV. Methods for Implementing the Egalitarian Spirit of Early Islam in Polygamy

To address the inheritance issues raised by de facto polygamy in the United States, I advise that we award legal standing to de facto polygamous spouses by availing ourselves of the "common law marriage" doctrine. The common law marriage doctrine has been used in the past to prosecute polygamists. By analogy, I believe it should be used to rectify the inequities caused by the practice of de facto polygamy.

Common law marriage is a doctrine that recognizes the existence of a legal union even when the requisites for a valid marriage have not been met.[101] It is still applied in ten states.[102] Under most applications of the common law marriage doctrine, strict requirements exist for the legal recognition of a de facto marriage. In order for a union to receive marital legal status, most common law marriage statutes require the party seeking recognition to prove: (1) capacity; (2) present, mutual agreement to permanently enter the marriage relationship to the exclusion of all other relationships; and (3) public recognition of the relationship as a marriage, as well as public assumption of

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97. *See id.* at 626–27 (stating that the ruling in *Black* no longer applied because the statute relied on in *Black*, Utah Code Ann. § 55-10-32 (1953), was repealed in 1965). The new version of the repealed statute, Utah Code Ann. § 78-3a-48 (1986), deleted any reference to morals as grounds for terminating parental rights. *Id.* at 627.

98. *Id.* at 627.

99. *See id.* (finding that the trial court should consider polygamy as one of many factors influencing a child's best interests, not as the sole determinative factor).

100. R. Michael Otto, *"Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents*, 1991 UTAH L. REV. 881, 905 (1991).

101. *See* Tenney, *supra* note 14, at 146 (describing Utah's common law marriage statute as allowing, "[l]ike most such statutes, . . . for the solemnization as marriages of relationships that have not passed through the typical marriage process under the laws of the state").

102. *See* Kelley v. Kelley, 9 P.3d 171, 183 (Utah Ct. App. 2000) (enumerating the ten states that maintain the common law marriage doctrine); *see also* Hon. John B. Crawley, *Is The Honeymoon over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 403 (1999) (same).

marital duties and cohabitation.[103] Although the application of the common law marriage doctrine has become limited, it has served, in selected jurisdictions, as an instrumental tool to rectify inequity.[104]

A similar standard like the one historically used to determine legitimate common law marital partners should be applied in order to identify a de facto polygamist spouse. Elements considered should include: (1) length of relationship; (2) support provided and contribution made by each spouse to a particular household; (3) length of cohabitation; and (4) whether children were born to the relationship. Tom Green's prosecutors, for example, in July 2000, validated the use of this proposal by equating common law marriage to de jure marriages in the context of polygamy.[105] Tom Green was described by many as "the prototype of the twenty-first century American polygamist."[106] "Like most of America's estimated 30,000 to 60,000 polygamists, Green's decision to live the illegal polygamist lifestyle forced him to move . . . into an isolated enclave in rural Utah."[107] After Green and several of his wives began to appear on television, he became a target of prosecution.[108] As the case evolved, the prosecutors discovered that Tom Green never had more than one legal wife at any time.[109] Green did this by marrying each of his five wives in Utah and subsequently obtaining a divorce decree for those marriages in Nevada.[110] Thus, Green separated the government's definition of marriage from his definition.

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103. *See* Salzman v. Bachrach, 996 P.2d 1263, 1269 n.8 (Colo. 2000) (stating the requirements for marital legal status); Mesa v. United States, 875 A.2d 79, 93 (D.C. 2005) (same); Conklin v. MacMillan Oil Co., 557 N.W.2d 102, 105 (Iowa Ct. App. 1996) (same); *In re* Adoption of X.J.A., 166 P.3d 396, 410 (Kan. 2007) (same); Perrotti v. Meredith, 868 A.2d 1240, 1243 (Pa. Super. Ct. 2005) (same); DeMelo v. Zompa, 844 A.2d 174, 178 (R.I. 2004) (same); Callen v. Callen, 620 S.E.2d 59, 62 (S.C. 2005); *Kelley*, 9 P.3d at 177 n.5 (same).

104. *See* Tenney, *supra* note 14, at 148–51 (discussing the purpose of Utah's common law marriage statute and concluding the intention was to prevent individuals living in and benefiting from a marriage-like partnership from receiving benefits intended for single mothers).

105. *See id.* at 146 (stating that the prosecutorial team sought to prove that common law marriages existed under Utah law and thus Green's divorcing of wives prior to officially marrying another was invalid as a defense).

106. *Id.* at 142.

107. *Id.*

108. *See id.* at 144 ("Perhaps convinced by the increasingly loud publicity generated by Green's repeated television appearances . . . an official investigation was launched, ultimately resulting in the decision to prosecute Tom Green on charges of bigamy.").

109. *See id.* ("[I]t quickly became apparent that Tom Green himself *did not* in fact have more than one legal wife.").

110. *See id.* at 144–45 (explaining Green's argument that he was legally a monogamist).

In order to convict Green, the prosecutors filed a court order asking for the recognition of common law marriages between Green and two or more of his wives.[111] The motion was successful, and the judge issued a retroactive order.[112] This order allowed the prosecutors to indict Green for bigamy.[113] In order to prosecute Green for bigamy, the prosecutors honed in on the fact that Green's relationships with his de facto wives were, in fact, the same as legal marriages.[114] The prosecution

> realized that, based on the unique, ongoing, and ultimately marriage-like relationships that Tom Green continued to enjoy with each of his wives, it would therefore be possible to establish that a state of legal marriage had continued to exist under the terms of the common-law marriage statute—Nevada divorce decrees notwithstanding. If such a marriage could be established and solemnized with one of the wives, it would, then, be possible to obtain a conviction for bigamy based on Tom Green's relationships with the other four wives.[115]

Green was eventually convicted of four counts of bigamy and a count of nonsupport.[116] The use of Utah's common law statute in the prosecution of Tom Green demonstrates how the common law statutes, despite their limited use and strict standards, can be used to prevent unfair outcomes.

The failure of our judicial system to address the potential inequities inherent in the practice of de facto polygamy in the United States will result in the perpetuation of inequity. Vulnerable individuals often enter into these de facto unions with little bargaining power and find themselves without any recourse when the de facto polygamous union terminates either by the death of a de facto spouse or by the unilateral termination by one of the parties. De facto spouses with the greatest bargaining power are able to enter into as many of these de facto unions as they want without shouldering any of the statutory

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111. *See id.* at 145–47 (discussing Utah prosecutors' use of common law marriage statutes to overcome Green's practice of marrying, divorcing, and continuing to cohabitate with wives to circumvent polygamy statutes).

112. *See id.* at 147 (discussing the *Green* court's retroactive order "declaring that a valid common-law marriage had existed between Tom Green and Linda Kunz . . . ," Green's first wife).

113. *See id.* ("With the now solemnized marriage to Linda Kunz as a foundation, Judge Eyre then found probable cause to bind over Tom Green on charges that his relationships to his other four 'wives' were in violation of Utah's anti-bigamy statute.").

114. *See id.* at 146 (discussing the prosecutors' strategy to legally convict Green for bigamy).

115. *Id.*

116. *See id.* (discussing the outcome of Tom Green's trial).

marital responsibilities imposed by their particular jurisdiction on de jure spouses.

The original intent behind the creation of the common law marriage statutes renders this doctrine ideal for rectifying the inequities that often result from the practice of de facto polygamy. This legislative intent is evidenced in the legislative history of Utah's common law marriage statute:

> [A]s explained by Senator Stephen Rees (the bill's senate sponsor) in its introduction on the floor of the Utah State Senate, the bill was designed to combat a very specific type of welfare fraud. Specifically, the state had become concerned about the large number of cases in which a man and a woman would live together in a quasi-marital relationship. In these cases, the couple would share a home, raise a family, and hold themselves out to the community as man and wife, yet never actually solemnize their relationship as a legally ratified marriage. By doing so, the woman could claim that she was a single mother and qualify for the accordant welfare benefits, all the while enjoying the benefits of living with her income-earning partner in the unofficial, quasi-marital relationship.[117]

Furthermore, other common law marriage statutes enacted in the nineteenth century removed unnecessary legal obstacles to individuals who, in effect, had entered into marital unions.[118] The equitable concerns underlying common law marriage acts demand that individuals may not inequitably benefit from the jurisprudence's silence on de facto polygamy. In instances where it is clear that individuals participate or have participated in de facto polygamous unions, courts must apply the common law marriage doctrine by analogy to determine if marital responsibilities should be attributed to them.

In order to solve problems raised by de facto polygamous unions, courts must first establish whether or not such unions exist. To do so, courts should borrow from the standards often used to determine the existence of a common law marriage. Courts that have applied the common law marriage doctrine have often looked to evidence of intent to enter into a union, evidence of cohabitation, proof of length of time of the union, and evidence of the parties' capacity.[119] Similarly, courts that are called to decide on issues raised by de facto polygamous practices should use the same standard to prove the existence of such unions. The intent element should include "express" as well as

117. *Id.* at 148.

118. *See id.* at 150 ("[T]he typical nineteenth century common-law marriage statute was constructed to make it easier for distance and procedure-precluded frontier couples to obtain the benefits of marriage.").

119. *See supra* note 103 and accompanying text (explaining the requirements of most common law marriage statutes).

"inferred" analysis. Although intent to enter into a polygamist union might not often be expressed in a legal instrument, courts can infer intent from the specific acts of the parties. Factors to consider in determining intent to enter a de facto polygamous union should include: whether the parties shared a roof regularly two or three days of the week, whether the parties shared bills and utilities in a particular lodging, and whether they had children. The common law marriage doctrine's utility in this arena demonstrates that its use is still very relevant to today's society.[120]

V. A New Redefinition of Surviving Spouse in Estate Distribution

One of the legal contexts in which de facto polygamous spouses are most vulnerable is in the area of estate distribution. A de facto polygamous spouse who was not legally married to a decedent has no standing to petition for a share in the decedent's estate.[121] This is especially so when the deceased was already legally married to a de jure spouse.[122] Consequently, after the death of a de facto polygamous spouse, surviving de facto spouses might find themselves deprived of the support once provided by the deceased de facto polygamous spouse and without any means of obtaining compensation for the contributions made by the de facto surviving spouse during their time together.[123] As women commonly survive their spouses, this lack of protection affects women in a more disproportionate manner than men.

The inequity that results from applying "surviving spouse" status to de jure spouses alone can be remedied by extending the definition of surviving spouse's to include "de facto polygamous partners." Many jurisdictions give

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120. *See* Crawley, *supra* note 102, at 400 (arguing for the continued vitality of common law marriage). Crawley writes:

> Having studied the history of common-law marriage, its development in Alabama, and its supposed "demise" in other jurisdictions, however, I am convinced that common-law marriage is a realistic and workable concept and that any additional burden on the factfinder is a small price to pay for the comparative certainty with which the doctrine can be applied. My research also persuades me that many of the jurisdictions that claim to have abolished *common-law* marriage have, in fact, resurrected the doctrine under another name. Those jurisdictions have not achieved any savings in "fact-finding time" or furthered judicial economy by abolishing *common-law* marriage.

Id. (emphasis added).

121. *See generally* Berryman v. Thorne, 700 A.2d 181 (D.C. 1997) (discussing the inequitable treatment of the surviving spouse in a de facto polygamous relationship).

122. *See generally id.*

123. *Id.*

surviving spouses, in addition to social security, private pension plans, a homestead, and a share in the decedent's property.[124] The underlying justification is that because the surviving spouse contributed to the accumulation of the decedents' assets during the decedent's life, the surviving spouse deserves a portion of the estate after the decedent's death.[125] The surviving spouse can, therefore, elect to take a fractional share of the decedent's estate. In some states, the elective share is as great as fifty percent of the estate.[126] This is so even when it is clear that the decedent spouse did not intend to provide for the surviving spouse.[127] The Uniform Probate Code provides a sliding scale percentage based on the duration of the marriage until the fifteenth year of marriage, at which time the surviving spouse is entitled to a fifty percent forced share.[128]

A redefinition of the surviving spouse in the manner that I propose would allow for the prevention of inequity and unjust enrichment on the part of the deceased de facto partners while in no way recognizing polygamy as a legal endeavor. This approach would be consistent with the equity principal that states that the law considers to be done what ought to be done.[129] Equitable

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124. *See, e.g.*, Mary F. Radford & F. Skip Sugarman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605, 652–54 (1997) (surveying various methods of supporting a spouse after divorce).

125. *See* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 568 (1995) (describing the marital partnership theory).

126. *See id.* at 652–54 (describing the typical framework of the elective share system and examining the elective share systems in Georgia's neighboring states and as outlined in the Uniform Probate Code of 1969); *id.* at 578 (describing the traditional elective share statute as giving the surviving spouse one-third of the probate estate, and noting that many, but not all, elective share statutes continue to adhere to this traditional formula). *See generally* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987); Ronald R. Volkmer, *Spousal Property Rights at Death: Re-evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Rights*, 17 CREIGHTON L. REV. 95 (1983).

127. *See* Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (explaining that in future cases the court will treat assets of an "inter vivos trust created during the marriage by the deceased spouse" as part of the estate of the decedent that can be reached by the surviving spouse, regardless of the intent of the decedent).

128. UNIF. PROBATE CODE § 2-202(a) (amended 1993) ("The surviving spouse of a decedent who dies domiciled in this State has a right of election . . . to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate determined by the length of time the spouse and the decedent were married to each other.").

129. *See* John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN'S L. REV. 997, 1000 (1991) ("Equity looks on that as done which ought to be done.").

contract doctrines, like promissory estoppel, quasi-contract, and unjust enrichment, are all examples of courts regularly finding ways to achieve justice while not disrupting the letter of the law.[130] My proposal is consistent with such widely accepted equitable principles.[131] Extending the elective share to include de facto polygamous spouses would also be consistent with the partnership theory of marriage that underlies the enactment of most elective share statues.[132]

An inclusion of de facto polygamous spouses as spouses under elective share statutes would entail a computation of the extent to which these extraneous spouses should share in the decedent's estate. I propose that the surviving spouse share, which is now allocated to the de jure surviving spouse, should be shared equally among both de facto and de jure spouses. In jurisdictions where the surviving spouse's share varies depending on the length of marriage, the same principle can still apply by awarding the appropriate share to each spouse upon a determination of the length of marriage. Awards to de facto polygamous spouses would, of course, necessitate that the de facto spouses submit evidentiary support of the existence of their de facto polygamous union with the deceased. Evidence of financial support in the form of bank receipts, bill payments, pictures, or videotapes reflecting cohabitation for an extended period of time should be admitted.

VI. Conclusion

Many other countries have been confronted with the issue of de facto polygamy.[133] The resilience and pervasiveness of the de facto polygamous structures as seen by the ineffectiveness of measures taken to combat polygamous practices internationally.[134] The suggested legal approach that the

130. *See* Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 376–77 (2002) (summarizing the development of modern courts' use of equitable contract doctrines).

131. I am not excluding from consideration other possible legal avenues such as contractual theories that mandate that the deceased spouse reimburse the de facto polygamous spouse in exchange for domestic services such as child rearing and housekeeping.

132. *See* Gary, *supra* note 125, at 577 (explaining that one theory that serves as the rationale for elective-share statutes "is based on the surviving spouse's right to a share of the marital property under a view of marriage as an economic partnership").

133. *See, e.g.*, Paul Belien, *Dutch Minister Not to Prevent Polygamy*, BRUSSELS J. (Nov. 1, 2005), *available at* http://www.brusselsjournal.com/node/421 (describing a recent polygamy case in Belgium).

134. *See, e.g.*, Genevieve Oger, *France's Polygamy Problem*, DW-WORLD.DE DEUTSCHE WELL (July 31, 2005), http://www.dwworld.de/dw/article/0,1564,1664241,00.html (describing

common law marriage doctrine be applied to identify and address inequity resulting from de facto polygamy is consistent with measures already adopted by courts in the prosecution of polygamists, as seen in the case against Tom Green. This extension would not signify recognition of polygamy. Instead, it would simply facilitate the prevention of inequity by allowing courts to afford legal protections, such as those accorded to surviving spouses, to de facto polygamous spouses. Vulnerable participants of de facto polygamous unions should be able to turn to the courts for relief. Similarly, individuals who establish more than one de facto family unit should not remain immune from legal accountability.

the prevalence of polygamy in France despite a 1993 ban on the practice and efforts to reduce polygamy through "de-cohabitation"). De-cohabitation is a process by which French authorities provide housing and incentives for women who promise to terminate their polygamous relationships. *Id.* The reality, however, has been that these women often remain in contact with their polygamous families and continue to practice polygamy subversively, even after making the promise to renounce polygamy. *Id.*