

EDWARD SAID, ORIENTALISM, AND THE IDENTIFICATION OF A
NEGLECTED SOURCE BEHIND THE REYNOLDS v. UNITED
STATES ANTI-POLYGAMY DECISION

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Efforts to legalize or at least decriminalize polygamy have not been able to get around the 1878 Supreme Court decision in *Reynolds v. United States*, written by Chief Justice Morrison Remick Waite (1816-1888).¹ Subsequent court decisions have deemphasized various aspects of his ruling,² but his fundamental conclusion—that polygamy is sufficiently

¹ *Reynolds v. United States*, 8 U.S. 145 (1878). The Court heard arguments on November 14 and 15 1878, and delivered its opinion on January 4, 1879. Some scholars, therefore, date the Reynolds decision from 1879 (C. Peter Magrath, *Chief Justice Waite and the 'Twin Relic': Reynolds v. United States*, 18 VAND. L. REV. 507, 523 (1964–65)).

² For example, in an article supportive of the Religious Freedom Restoration Act, Keith Jaasma argued, ‘Reynolds has been criticized for its strict distinction between religious beliefs and motivated actions, [and] historical evidence [that] does not support the Court’s position that the Free Exercise Clause was only intended to protect beliefs, and subsequent decisions have made it clear that conduct can be protected by the First Amendment as well. In addition, the Court failed to fully articulate the state interests involved in prohibiting polygamy . . .’ (Keith Jaasma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 WHITTIER L. REV. 251 (1995)). Among the most cited cases that some consider have modified Reynolds is *Wisconsin v. Yoder*, 406 U.S. 205 (1972)), which allowed the Amish to remove their children from education after middle school in order for them to work in their community. Marci Hamilton argues, “Yoder, however, stands by itself, and is later explained by the Court as a case that is more easily explained in terms of parental rights than in terms of what religious entities owe to the public good. In fact . . . , Yoder was wrongly decided. . . . In any event, if there was any question that the Court did not intend to shield the Amish in particular from the rule of law, 10 years later the Court held that they were required to pay into the social security system for their employees even though they did not believe in doing so” (MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 209–210 (2005)). *Barlow v. Blackburn*, 798 P.2d 1360, 1365 (Ariz. App. 1990): “Although the Court has modified the strict belief/action dichotomy set out in Reynolds for testing whether a burden upon the free exercise of religion is justified . . . , the underlying reasoning of Reynolds remains valid.” *Potter v. Murray City* 585 F. Supp. 1126, 1141 (1984): “I have largely ignored in this analysis the holding of Reynolds and its basic teaching, being persuaded that I should take a fresh look at the problem from the viewpoint of the more current authority and in light of present societal conditions and attitudes. Yet my analysis with due consideration for balance cannot properly

harmful to justify criminalization—remains. As legal scholar Marci Hamilton concluded, Waite’s decision in *Reynolds* “articulated what would eventually become the dominant doctrine for the free exercise of religion: religious belief is absolutely protected, but religious conduct is subject to the rule of law.”³ “[T]he core logic of *Reynolds v. United States*,” concluded political scientist C. Peter Magrath, was “irrefutable.”⁴

I. WAITE’S SOURCES

Scholars, especially critics, of the Chief Justice’s decision have paid careful attention to the sources that he used to reach his decision, identifying them often within attempts to provide interpretations that differ from Waite’s. From Waite’s correspondence we know that, before writing his decision, he contacted the noted historian, educator, diplomat, politician, and cabinet member George Bancroft (1800-1891), who happened to be Chief Justice Waite’s neighbor and friend.⁵ From Bancroft, Waite received two pieces of information. One item was a letter from an eighteenth century libertarian who declined a seat in the Massachusetts Senate because he refused to profess the Christian faith as required by the Massachusetts Constitution.⁶ The letter reinforced the legal concept of a person’s independence of belief, a concept that became part of Waite’s decision. The other document referred to Thomas Jefferson’s response to the Danbury Baptist Association, in which he defended liberty of conscience and spoke about the governmental “wall of separation between church and state.”⁷ Waite receives credit for introducing Jefferson’s document and its now-famous ‘wall of separation’ phrase into legal discourse. After writing his decision, Waite wrote a grateful note to Bancroft, in which he offered his ““thanks for the information given as to the history of the free religion clause in the constitution.””⁸ Note that Waite thanked Bancroft for his

be closed without reverting to that decision. It still remains the decision of the highest court of the land and even though it were not observed for its authority it must be considered for its reasoning to the extent persuasive and not inconsistent with later rulings of the Supreme Court.”

³ *Id.* at 207.

⁴ C. Peter Magrath, *Chief Justice Waite and the ‘Twin Relic’: Reynolds v United States*, 18 VAND. L. REV. 507, 531 (1964-1965).

⁵ BRUCE. R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 244 (1938).

⁶ Magrath, *supra* note 4, at 526.

⁷ *Reynolds v. U.S.* 98 U.S. 145, 164 (1878); Magrath, *supra* note 4 at 527.

⁸ Magrath, *supra* note 4 at 527.

assistance on constitutional issues, not on the activities or beliefs of Mormonism.

A second major source that Waite depended upon were writings by the political philosopher and professor, Francis Lieber (1798 or 1800 to 1872), who had defended monogamy and specifically opposed Mormonism's polygamy. Professors Carol Weibrod and Pamela Sheingorn concluded that Waite's use of Lieber by name

was an invocation of one of the serious intellectual names of the age in connection with a cause he had long defended, and it is possible that Chief Justice Waite did not detail the dangers of polygamy because he assumed that in relying on the opinion of Professor Lieber, he had done all that was required.⁹

In an 1855 article published in *Putnam's Monthly*, Lieber specifically discussed Mormon polygamy and complex marriage that members of the Oneida community practiced, but condemned both examples as he elevated monogamy to a superior social and legal status.¹⁰ Although he did not mention Oneida specifically in his decision, Waite alluded to it in a section where he specifically named Lieber:

Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.... An exceptional colony of polygamists under exceptional leadership may sometime exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.¹¹

Waite's use of Lieber in the decision has raised the ire of numerous scholars who oppose his decision.

⁹ Carol Weisbrod and Pamela Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 834 (1977-78).

¹⁰ *Id.* at 835.

¹¹ Reynolds, *supra* note 7, at 166.

California lawyer Robert G. Dyer, for example, included Lieber's comments with others critical of Mormonism and polygamy in his conclusion that, "The apparent gist of all of these statements was to characterize polygamy as a religious activity that was subversive of good order so that it could be regulated by Congress."¹² Law librarian James M. Donovan surmised:

Although from our contemporary perspective Lieber may come off as small-minded and even racist, in his own day he was a voice of reason and intellectual seriousness. His work allowed the Court to base its decision on conclusions that had been acknowledged by the academy. In other words, the Court most likely believed what he was saying.¹³

Chief Justice Waite's reliance on Lieber was one of several reasons that led Donovan to conclude, "For over a century we have relied upon Reynolds, but the justification given in that case is no longer valid. The existing legal reason to characterize polygamy as a danger has crumbled, under the weight of cold fact."¹⁴ Probably, too, Waite's reliance on Lieber contributed to author Todd M. Gillett's conclusion, "In retrospect, much of the discussion in Reynolds mirrored the anti-polygamy sentiment prevalent at that time."¹⁵ He continued, "Behind its legal sophistication, the majority opinion in Reynolds displayed a disdain for the Mormon church that bordered on contempt."¹⁶

II. WAITE'S ODD ANALOGIES

For those who opposed Waite's decision, even more disturbing than his use of Lieber was Waite's analogy of polygamy to religiously based human sacrifice and *suttee* (or *sati*, which is an illegal traditional practice of women immolating themselves on their deceased husbands' funeral pyres).¹⁷ Others, who most likely supported Waite's decision, were not

¹² Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, 5 UTAH BAR J. 35, 39 (1977).

¹³ James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV., 521, 573 (2002).

¹⁴ *Id.* at 587.

¹⁵ Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL OF RTS. J. 497, 513, (2000).

¹⁶ *Id.* at 514.

¹⁷ Reynolds, *supra* note 7, at 166. For an overview of *suttee/sati* within Indian religion, see the classic work, A.L. BASHAM, *THE WONDER THAT WAS INDIA*,

bothered by it. These likely supporters saw Waite's mention of human sacrifice and sati for precisely what they were: examples of religious behavior that no civil society would allow. For example, University of Arizona Professor of Law, Ray Jay Davis, noted that, after citing Lieber's arguments against polygamy:

Chief Justice Waite provided two illustrations of other religiously motivated actions which would not be protected by the first amendment: suttee and human sacrifice. These illustrations show that there are outer limits to the acts that will be permitted in the name of religion, but that they are not related in any way to plural marriage.¹⁸

Similarly, legal scholar Todd M. Gillett, who opposed the Waite decision, pointed out:

The Court theorized that if all religious activities were tolerated, the government might not have the power to stop religious leaders who wished to commit a ceremonial human sacrifice or widows who wished to commit Suttee, the religious act of throwing oneself on a husband's funeral pyre.¹⁹

This moderate interpretation of Waite's controversial analogy, however, did not stop Gillett from concluding, "All federal and state statutes specifically targeting the practice should be declared void or rewritten so as not to interfere with a polygamist's constitutional right of free exercise of religion."²⁰

Another law professor who was critical of the Reynolds decision was Jeremy M. Miller, who stated matter-of-factly, "Waite also analogized

187-188, 337 (1959). For a detailed examination of sati in Hindu scriptures, see the citations in PANDURANG VAMAN KANE, HISTORY OF DHARMASTRAS VOL. II PART I, 624-636 (1941); and *Id.* at 1338. Indian law forbade the practice beginning in 1829 (*Id.*, Vol II Part I, at 624). For examples of it occurring in more recent times, see SAKUNTALA NARASIMHAN, SATI: WIDOW BURNING IN INDIA (1990); MALA SEN, DEATH BY FIRE: SATI, DOWRY DEATH, AND FEMALE INFANTICIDE IN MODERN INDIA (2002).

¹⁸ Ray Jay Davis, *Plural Marriage and Religious Freedom: The Impact of Reynolds v. United States*, 15 ARIZ. L. REV. 287, 301 (1973).

¹⁹ Gillett, *supra* note 15, at 513.

²⁰ *Id.* at 530.

polygamy to human sacrifice....[W]ith religions that favor polygamy, human sacrifice is not a part.”²¹

A recent law school graduate, Richard A. Vazquez, however, read ominous consequences into Waite’s analogies between polygamy and both human sacrifice and suttee:

The Court thus supported its contempt for the practice of polygamy by appealing to religious views, biases, and opinions on morality commonly held at the time. This section lacked substantive legal reasoning and references to viable public policy justifications. Instead, it cast polygamy in such a prejudicial light as to imbue subsequent, suspect opinions with the appearance of reasoned support

The shock value created by this disingenuous comparison of consensual polygamy to ritual sacrifice and suicide undermined any substantive argument the Court may have put forth.²²

Clearly, Vazquez thought that the analogy was inappropriate.

Somewhat similar conclusions about the negative consequences of introducing sati and human sacrifice within Waite’s anti-polygamy decision appeared a number of years ago by political scientist Orma Linford, who argued:

[T]he first amendment protects freedom of religious belief absolutely, but only those religious practices which are not destructive of peace and good order. This is all very understandable until the attempt is made to the polygamy question: the Court never quite explained why plural marriage was a threat to public well-being. Somehow, this whole question became confused with Suttee and human sacrifice, and the conclusion was that since these practices could not be tolerated in the name of religion, neither could polygamy. The Reynolds opinion was an admirable statement of the test, but it failed to make the mechanics clear, or perhaps more

²¹ Jeremy M. Miller, A Critique of the Reynolds Decision, 11 W. ST. U. L. RKEV. 165, 194 (1983–84).

²² Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion of Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y, 225, 229 (2001–2002).

precisely, it failed to define the requirements for a positive application of it.²³

As law, the *Reynolds* decision has survived all of these criticisms, but it might be instructive to pursue further the issue that Linford raised: just how did polygamy become confused with sati and human sacrifice? Perhaps the answer lies in attempting to identify where the analogy first appeared. Waite almost certainly borrowed it from elsewhere.

III. POSSIBLE SOURCES OF THE ODD ANALOGIES

One possible source for the polygamy/sati and human sacrifice analogy was a congressional debate. Representative Roger Pryor (D-VA) argued that “[s]ome gentlemen understand polygamy to be an institution of the Mormon Church, and, as such, to enjoy impunity under that clause of the Constitution which forbids the enactment of any law in restraint of religious liberty.”²⁴ He continued by stating that “this argument, if sound in principle, will avail to cover any abomination which affects a religious character. It will suffice for the protection of Thugism or Suttee, as well as polygamy. Plainly, then it is an unsound argument and a pernicious philosophy which conducts to such absurd and malicious consequences.”²⁵ Here we have an analogy between polygamy and sati nearly two decades before Waite wrote his decision. Was it, however, the inspiration for Waite?

It probably was not. First, no evidence exists that Waite read old Congressional records about polygamy. Second, Waite did not use the thugees in his analogy as had Representative Pryor—he used religiously based human sacrifice. Third—and I explore this possibility now—both Chief Justice Waite and Representative Pryor were drawing upon a common source, at least regarding mention of sati.²⁶

To explore the possibility of a common source, a comparison between Waite’s comments and a contemporary ‘scholarly’ source is in order. The passage in which Waite mentioned sati occurred as he made the crucial legal distinction between belief and practice:

²³ Orma Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308, 341 (1964).

²⁴ CONG. GLOBE, 36th Cong., 1st Sess., at 1496 (April 2, 1860).

²⁵ *Id.*

²⁶ I cannot find an earlier analogy between the thugees and polygamy than Representative Pryor’s comments. For a contemporary, journalistic account of the thug cult in India, see: KEVIN RUSHBY, CHILDREN OF KALI (2002).

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?²⁷

The contemporary source that seems like the probable inspiration for Waite discusses both sati and human religious sacrifice as examples of religiously justified practices, like polygamy, that governments should oppose.

The ‘scholarly’ source to which I refer is by an ordained Baptist minister, Joseph Belcher (1794-1859), and is entitled *The Religious Denominations in the United States: Their History, Doctrine, Government and Statistics. With a Preliminary Sketch of Judaism, Paganism, and Mohammedanism*. Its first edition was 1854, and its new and revised edition was 1861, published posthumously. In the second edition (comprising 1024 pages), a brief mention of Belcher’s accomplishments indicate that he held a Doctor of Divinity, and was an “Honorary member of the Historical Societies of Pennsylvania and Wisconsin; author of *William Carey; A Biography*; etc.; and editor of *The Complete Works of Andrew Fuller, Works of Robert Hall, etc., etc.*”²⁸ This list of publications, however, was modest: he published at least ten books on religion.²⁹ The book on American religious denominations almost certainly passed for scholarship in its day, but sections have heavy theological overtones.

My assumption is that, after Chief Justice Waite received the *Reynolds* polygamy case on his docket, he did some research about Mormonism, and discovered Belcher’s tome. Toward the end of his sixteen page entry on “Latter Day Saints, or Mormons,” Belcher wrote:

It has been asserted that this whole subject of polygamy is not a civil, but a religious question, and that the United States, which is pledged to tolerate all creeds, is bound to protect the

²⁷ Reynolds, *supra* note 7, at 166.

²⁸ JOSEPH BELCHER, *THE RELIGIOUS DENOMINATIONS IN THE UNITED STATES* (1861).

²⁹ THE ONLINE BOOKS PAGE,

<http://onlinebooks.library.upenn.edu/webbin/book/lookupname?key=Belcher%2C%20Joseph%2C%201794-18591859> (last visited on May 18, 2013).

Mormons in the exercise of polygamy, because it is a tenet of the Mormon faith. But, if this opinion were correct, a Brahminical colony might erect a Juggernaut here, and immolate victims, without power in Congress to prevent it. They might hold a suttee in the very grounds of the capitol, and burn their shrieking victims within sight of the senators and representatives. They might expose the aged to be carried off by the tide of the Potomac, as they do to be washed down the Ganges. The priests of Baal used to sacrifice children, by casting them alive into red hot furnaces. If this doctrine were correct, men would have but to call themselves priests of Baal, and they might roast innocent babes tomorrow with impunity.... There can be no question that, if they submitted in other things, their adherence to their idolatry would be no excuse for their exclusion. But there can be as little question, that, if they insisted on retaining child-murder, or preserved any of their grossly immoral religious practices, on the pretense that their faith authorized them, their petition would be rejected. For the constitution, though it tolerates all religions, tolerates them only in their religious aspects. No sect, or members of a sect, Christian or otherwise, can make their creed the excuse for unbridled license.... There are some things too preposterous to discuss at length, and the assumption that Mormon polygamy must be permitted because it is part of the Mormon creed, is one of the most ridiculous of these preposterous things. It is always important to remember that freedom requires us to guard the rights of others, as well as our own; and that we cannot be rightfully at liberty to injure society.³⁰

Here we have the same sentiments, and similar analogies, that Waite used in his decision.

Both Belcher and Waite made a distinction between religious beliefs—in which the government did not interfere—and practices—which were within the government's purview to exclude. Waite gave the example of human sacrifices as action against which a government had the right to act; Belcher used examples of religious human sacrifices as actions that were unacceptable to society. Both writers specifically identified suttee as one such unacceptable action against which society had the right to intervene. We cannot be certain, but it seems likely that Belcher's book

³⁰ Belcher, *supra* note 28, at 855-856.

would have been a source to which Chief Justice Waite would have turned in order to obtain background information on Mormonism and possibly polygamy. The sati analogy is so counterintuitive that its appearance in two documents from roughly the same period pushes the limits of coincidence. Borrowing from Belcher to Waite makes far more sense.

IV. UNINTENDED SUPPORT FOR WAITE

My conclusion that Belcher's chapter on Mormonism was a likely source for Waite only will add tinder to those jurists already fired up about the Reynolds decision. Political science professor C. Peter Magrath indicated that Waite characteristically sought assistance from any possibly useful source,³¹ but one must wonder about how many sources on Mormonism from that period were theological or moral rather than objective. Interestingly, however, a few of the more objective studies about polygamy might reduce the controversies over Waite's sati and human sacrifice analogies. Waite probably was unaware that human sacrifices had taken place within Hinduism. As Hinduism's great commentator, A. L. Basham, recorded: "South Indian kings were often accompanied in death not only by their wives, but also by their ministers and palace servants. There are numerous records of royal officers giving their lives in sacrifice to a god for the prosperity of a king and his kingdom."³²

Certainly human sacrifice within modern Hinduism is exceedingly rare, but it does occur. In January 2012, for example, two men in central India admitted to ritualistically cutting out the liver of a seven-year-old girl as a sacrifice for a good harvest.³³ In the contemporary period, no one would argue that political underlings must sacrifice themselves for their kingdom or its ruler, nor that recently widowed wives or polygamist women must sacrifice themselves upon the death of their husbands. Evidence, however, suggests that polygamy likely takes a mortality toll on some women. One of the current objections to polygamy is the widespread practice of girls who are fifteen-years-old or younger entering polygamous marriages, which often leads to their early pregnancies.³⁴ Medically, we know that birth complications in pregnancies to girls in their early-to-mid-teens occur at a much higher rate than to somewhat older women, which

³¹ Magrath, *supra* note 4, at 531.

³² Basham, *supra* note 17, at 190.

³³ *Police: Indian Child Killed as Human Sacrifice*, CBSNEWS (Jan. 2, 2012, 8:49 AM), <http://www.cbsnews.com/news/police-indian-child-killed-as-human-sacrifice/>.

³⁴ Stephen A. Kent, *A Matter of Principle: Fundamentalist Mormon Polygamy, Children, and Human Rights Debates*, 10 NOVA RELIGIO, 10-16 (2006).

can threaten their lives and the lives of their babies.³⁵ Likewise, birthing is a medically complicated procedure, and women who experience multiple pregnancies (as do many polygamous women) increase the possibility of harm with each pregnancy.³⁶ Consequently, for many women within traditional India (and apparently still some today), risks to their own lives took place at their husbands' deaths. In polygamist groups, risks to women (and especially teenaged girls) increases during their reproductive years.

Regarding human sacrifice, nothing like this practice transpires in most contemporary polygamous communities, but a practice called "blood atonement" did exist in early Mormonism, well into the era of Brigham Young's reign in Utah (beginning in 1847). This practice was a ritualized form of murder (preferably throat-slitting) in which "the victim's blood must be spilled into the earth for his spirit to ascend into heaven...."³⁷ A "secret group of loyalists" to Mormonism and its founder, Joseph Smith, called the Danites or Avenging Angels, applied this doctrine against Mormon dissenters, "Gentiles" (i.e. non-Mormons), and anti-Mormon militias.³⁸ During the period of Brigham Young's leadership, a number of murders took place in Utah, although the Danites' activities ended with the death of a prominent member in 1856.³⁹ In 1859, however, devout Danite,

³⁵ Stephen A. Kent, *Mormonism: Harm, Human Rights, and the Criminalization of Fundamentalist Mormon Polygamy*, FUNDAMENTALISM, POLITICS, AND THE LAW 161, 163-164 (Marci A. Hamilton and Mark J. Rozell, eds., 2011). Also see: Ramos S., *Interventions for preventing unintended pregnancies among adolescents: RHL commentary*, THE WHO REPRODUCTIVE HEALTH LIBRARY; GENEVA: WORLD HEALTH ORGANIZATION, (last revised 1 August 2011), available at http://apps.who.int/rhl/adolescent/cd005215_ramoss_com/en/. This report points out that "Unintended pregnancy (both unplanned and unwanted) among adolescents is a common public health problem worldwide. Repeat pregnancies in this group also occur frequently and are related to increased risks of adverse outcomes for adolescent mothers and their babies. Pregnancy and childbirth-related deaths are the number one killers of 15–19-year-old girls worldwide (1), with nearly 70,000 annual deaths (2). At least 2 million more young women are left with a chronic illness or disability, which may bring them lifelong suffering, shame, or abandonment."

³⁶ In 2005, the World Health Organization estimated that, in rich countries, the lifetime risk of maternal death was about 1 in 2800. WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT 11, available at <http://www.who.int/whr/2005/en/>. We have no idea, however, what the figures are for various polygamist communities.

³⁷ SALLY DENTON, AMERICAN MASSACRE: THE TRAGEDY AT MOUNTAIN MEADOWS, SEPTEMBER 1857 198 (2003).

³⁸ *Id.*

³⁹ *Id.* at 106-107.

John D. Lee, was a leading figure in the Mountain Meadows massacre, during which Mormons attacked a wagon train headed for California and murdered about 150 non-Mormons.⁴⁰ In the modern period (around 1975), schismatic polygamist Ervil LeBaron inspired his closest followers to enact blood atonements against perceived rivals and defectors, resulting in approximately twenty-five to thirty murders in the American Southwest and Mexico.⁴¹ Chief Justice Waite almost certainly did not know of the practice, but during his immediate period the practice had ceased, and it would be decades before it resurfaced against in the schismatic LeBaron leadership wars.

I do not stretch the meaning of human sacrifice too far by insisting that the polygamist residents of Hildale, Utah and Colorado City, Arizona practice a form of it by their insistence of continuing to arrange marriage between members of two clans, whom together sometimes produce children with fumarase deficiency. For children afflicted with fumarase, it was an early death sentence after a painfully short and debilitated life:

The effects of this deficiency are tragic—seizures, water replacing large areas of brain matter, mental retardation, severe mobility problems (including the inability to sit), severe speech impediments, frequently early deaths, etc. ‘By the late 1990s . . . fumarase deficiency was occurring in the greatest concentrations in the world among the fundamentalist Mormon polygamists of northern Arizona and southern Utah. Of even greater concern was the fact that the recessive gene that triggers the disease was rapidly spreading to thousands of individuals living in the community because of decades of inbreeding.’⁴²

⁴⁰ *Id.* at 162.

⁴¹ Gary Abrams, *A Family's Legacy of Death: Ervil LeBaron said God Told Him to Kill Anyone Who Strayed from his Polygamist Cult. A Tenacious Salt Lake Investigator Tracked the LeBarons for 15 years. Now, an Anonymous Tip May Have Helped Him Close a Case that Claimed as Many as 30 Lives*, L.A. TIMES, (September 20, 1992), http://articles.latimes.com/1992-09-20/news/vw-1753_1_utah-prison-cult-lebaron-family ; BEN BRADLEE, JR & DALE VAN ATTA, *PROPHET OF BLOOD: THE UNTOLD STORY OF ERVIL LEBARON AND THE LAMBS OF GOD* 195 (1981).

⁴² Kent, *supra* note 35, at 165; quoting John Dougherty, *Forbidden Fruit: Inbreeding Among Polygamists Along the Arizona Utah Border is Producing a Caste of Severely Retarded and Deformed Children*, PHOENIX NEW TIMES, (Dec. 29, 2005), <http://www.phoenixnewtimes.com/content/printVersion/178037>. See also Kent *supra* note 35, at 28 n.80, citing Greg Barton, *When Incest Becomes a Religious Tenet: Practice Sets 1,000 Members Kingston Clan Apart from Other*

Polygamist leaders could prevent the appearance of this deficiency by prohibiting marriages between people within certain blood lines, but they have shown no interest in doing so.⁴³ I see these tragic lives as a form of human sacrifice, where ideological indifference overrides a respect for normal human life.

Perhaps if a challenge to *Reynolds* were to go before the Supreme Court, some of the examples that I provided would play a role in a re-evaluative decision. Until recently, such a re-evaluation seemed highly unlikely, partly because a recent, exhaustive legal examination of polygamy has identified it as a social harm, using the kind of social scientific and legal research that was unavailable to Waite in his era. The legal examination, however, did not take place in the United States, but in Canada. In Canada, polygamy appears in the Criminal Code as a federal offence,⁴⁴ and a debate had raged about whether that criminal designation conflicted with Canadians' right to practice their religion.⁴⁵ Canada has two fundamentalist Mormon polygamous groups in British Columbia, and occasionally small pockets of them appear outside of that province.⁴⁶ In addition, Canada receives immigrants from countries that allow polygamy, and immigration officials occasionally have to make rulings about people whom they suspected are polygamists. Moreover, some people already in the country want to engage in polygamous marriages. To determine whether the Attorney General's office of the province of British Columbia could attempt prosecution of polygamy without fear of a Charter of Rights challenge, the office proposed a 'reference case'—a query—to the British Columbia Supreme Court. The query asked if the Court would allow such prosecution, or would dismiss such a case by asserting polygamy's protection as religious practice—a practice that also involved free association with family members?⁴⁷ The Honorable Chief Justice Bauman determined "that this case is essentially about harm: more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the

Utah Polygamous Groups, S. L. TRIBUNE, (April 25, 1999), available at http://nl.newsbank.com/nl-search/we/Archives?p_action=print.

⁴³ Kent, *Mormonism: Harm, Human Rights*, *supra* note 35, at 177–178.

⁴⁴ Criminal Code of Canada, R.S.C. 1984, §293 C–46

⁴⁵ These rights are laid out in Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁴⁶ DAPHNE BRAMHAM, *THE SECRET LIVES OF THE SAINTS: CHILD BRIDES AND LOST BOYS IN CANADA'S POLYGAMOUS MORMON SECT* (2008).

⁴⁷ Criminal Code of Canada, R.S.C. 2011, §293 1588.

institution of monogamous marriage.”⁴⁸ These would be the same issues as a reconsideration of *Reynolds* would have to consider, albeit in an American context.

The Court gathered evidence from a wide variety of sources—persons representing eleven different groups (some pro, some con) presented written briefs and often sat for cross-examination in court, expert witness affidavits from disciplines that included “anthropology, psychology, sociology, law, economics, family demography, history, and theology.”⁴⁹ Current and former polygamists also gave evidence.

In a 277-page ruling, complete with bibliography, Honourable Chief Justice Bauman concluded that the section of the criminal code outlawing polygamy:

. . . has as its objective the prevention of harm to women, to children, and to society. The prevention of these collective harms associated with polygamy is clearly an objective that is pressing and substantial.

[1332] The positive side of the prohibition which I have discussed—the preservation of monogamous marriage—similarly represents a pressing and substantial objective for all of the reasons that have seen the ascendance of monogamous marriage as a norm in the West.⁵⁰

Broadly speaking, Bauman reached conclusions similar to Waite’s but did so without making inflammatory analogies to unrelated, extremist religious practices and by using a level of social science and jurisprudence that simply was not available in the late 1870s. If, consequently, a challenge to *Reynolds* were to land before the American Supreme Court, then parties arguing for the continued criminalization of polygamy would use much of the same evidence that convinced the Honourable Chief Justice Bauman of polygamy’s harms, and the Justices would reach the same conclusion in the face of overwhelming evidence. Consequently, I predict that Waite’s ruling in the *Reynolds* case is likely to remain good law for a long, long time.

V. EDWARD SAID’S ORIENTALISM AS THE CURRENT CHALLENGE TO WAITE’S DECISION

The most recent attempt, however, to reject the Waite decision appears in a District Court of Utah Memorandum Decision, written by

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Judge Clark Waddoups, in a case involving polygamists and television personalities Kody Brown and his family.⁵¹ Judge Waddoups granted Kody Brown and the other Plaintiffs Motion for Summary Judgment and declared unconstitutional the phrase “or cohabits with another person” in Utah’s bigamy statute. He also argued for narrowing the meaning of the terms, “marry” and “purports to marry,” in the statute itself.⁵² Specifically regarding Waite’s decision to outlaw polygamy, Waddoups argued, “[b]ecause the United States Supreme Court’s 1879 decision in *Reynolds v. United States* displays ‘the essence of Orientalism’ through its explicit ‘distinction between Western superiority and Oriental inferiority,’ this is a relevant interpretive framework for evaluating the ‘crusade’ of nineteenth-century American society against Mormon polygamy and the merits of the *Reynolds* decision today.”⁵³ Quoting the work of English and Comparative Literature professor, Edward Said (1935-2003), Waddoups asserted, “‘so far as the West was concerned during the nineteenth and twentieth centuries, an assumption had been made that the Orient and everything in it was, if not patently inferior to, then in need of corrective study by the West.’”⁵⁴ Westerners always have included “India and the Bible lands” within its Orientalist framework.⁵⁵

The passages that Judge Waddoups identified as Orientalist are the ones that one would expect. First, he quoted the passage, “‘Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of Asiatic and of African people.’ *Reynolds*, 98 U.S. at 164.”⁵⁶ Judge Waddoups added, “‘Though Professor Said did not cite *Reynolds* in his text on Orientalism, this expression of the social harm identified in the Mormon practice of polygamy aptly exemplifies the concept.’”⁵⁷

Next, Waddoups identified another passage that Waite wrote and which he thought was Orientalist: “as a practice of such people, ‘polygamy leads to the patriarchal principle,’ which, ‘when applied to large

⁵¹ *Brown v. Herbert*, 43 F.Supp.3d 1299 (D. Utah 2014)

⁵² *Id.* at 1301.

⁵³ *Id.*

⁵⁴ *Id.* (quoting EDWARD SAID, *ORIENTALISM* 40–41 (1978)). I find Said’s own definition of Orientalism to be imprecise, and almost fluid, but among his better definitions is that Orientalism . . . [is] a manner of regularized (or Orientalized) writing, vision, and study, dominated by imperatives, perspectives, and ideological biases ostensibly suited to the Orient” (*Id.* at 202). It always assumes Occidental hegemony.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

communities, fetters the people in stationary despotism’—another racist or Orientalist observation about this Mormon practice based in the ‘scientific’ perspective of the day. *Reynolds*, 98 U.S. at 166 (citing Professor Francis Lieber, “‘a prominent intellectual and founder of American political science)...”⁵⁸ A decade later (in 1890), a Supreme Court decision involving the Mormons reinforced the conclusions in the Waite decision.⁵⁹ In response to these supposedly Orientalist passages, Waddoups concluded, “[s]uch an assessment arising from derisive societal views about race and ethnic origins in the United States at that time has no place in discourse about religious freedom, due process, equal protection or any other constitutional guarantee or right in the genuinely and intentionally racially and religiously pluralistic society that has been strengthened by the Supreme Court’s twentieth-century rights jurisprudence.”⁶⁰ The Utah Attorney General’s Office has launched an appeal to the 10th Circuit court of Appeals in Denver.⁶¹

VI. IS A LITTLE KNOWLEDGE DANGEROUS?

Judge Waddoups built his entire argument on the Orientalist nature of Waite’s ruling by relying on one author and one book—Edward Said’s 1978 publication, *Orientalism*. In doing so, Waddoups may have demonstrated the wisdom behind the widely misattributed statement, “a little knowledge is a dangerous thing.”⁶² In this instance, while a little

⁵⁸ *Id.* In an 1869 publication, Lieber had written “that the Mormons ‘deny the very first principles . . . of our whole western civilization, as distinguished from oriental life” (quoted in JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOME: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 296 (2001).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Brady McCombs, *Utah Appeals Ruling Striking Down Polygamy Ban in Case Involving ‘Sister Wives’ Family*. U.S. NEWS AND WORLD REPORT (October 9, 2014), <http://www.usnews.com/news/entertainment/articles/2014/10/09/utah-appeals-ruling-in-sister-wives-case>

⁶² Almost all of the Internet sources that I read stated that the phrase as I worded it is a deviation of Alexander Pope’s (1688-1744)’s 1709 composition, *An Essay on Criticism*:

A little learning is a dangerous thing;
 drink deep, or taste not the Pierian spring:
 there shallow draughts intoxicate the brain,
 and drinking largely sobers us again.

knowledge about Orientalism may have provided some insight, often that insight may have been wrapped in pretense. Said's *Orientalism* book entered the debate about the topic some fifteen years after Anwar Abdel-Malek, a Western-educated Egyptian professor of philosophy and sociology in Paris, called for a reappraisal of misguided Western conceptions of the East, thus paving the path on which all future discourses on Western Orientalism would proceed.⁶³ "[I]t is urgent to undertake," Abdel-Malek proclaimed, "a revision, a critical reevaluation of the general conception, the methods and implements for the understanding of the Orient that have been used by the West, notably from the beginning of the last century, on all levels and in all fields."⁶⁴

The ensuing debate covered a wide range of scholarship, including Orientalism's alleged attack on the divinity of Islam and its attempt to destroy Islamic civilization; its relationship with colonialism and some post-colonial Western governments; and the ability of secularists or practitioners of other faiths to study Islam.⁶⁵ Said's 1978 contribution, *Orientalism*, and his subsequent defenses of it, revealed that he "viewed the West with the greatest contempt, and alleged that *all* Western Orientalists are racist in their attitudes toward the East and are politically motivated to do harm in the Middle East by virtue of their being Westerners."⁶⁶ This sweeping argument tainted the work—much of it solid and impressive work—of numerous scholars, including his nemesis, the formidable Bernard Lewis (b.1916), of Princeton University. Lewis took on Said. While Lewis did not reject all of Said's arguments (indeed, as Said implicated, some Orientalists had been pawns of governments), Lewis demonstrated a long tradition of insightful scholarship by Western Orientalists, including some of his own contributions. Furthermore, Lewis "refused to accept the insidious half-truths and unsubstantiated arguments Said disseminated purposely twisted to fit his neatly defined model."⁶⁷

Specifically, Lewis questioned Said's omission of German scholars from his critique; his implication that Westerners who learned Arabic "were

The very similar phrase that I used may have first appeared in 1774, when a writer in *The monthly miscellany; or Gentleman and Lady's Complete Magazine, Vol II*, 1774, misquoted Pope by stating that he had written, "A little knowledge is a dangerous thing." See: "The Phrase Finder" online.

⁶³ Christopher Berg and Melanie Shaw, *Debating Controversial History: A Twenty-First century reappraisal of the Orientalist debate, its key actors, and its future*, 3 INT'L J. OF LEARNING 12 (2013);

⁶⁴ Anouar Abdel-Malek, *Orientalism in Crisis* 11 DIOGENES 103, (1963).

⁶⁵ Berg and Shaw, *supra* note 63, at 3–8.

⁶⁶ *Id.* at 8.

⁶⁷ *Id.* at 12.

committing some kind of offense;”⁶⁸ his sexualized, violent language in describing how Western scholars acquire knowledge about the Orient; and his omission of major scholarly contributions by Western Orientalist scholars. Moreover, Lewis accused Said of showing “a disquieting lack of knowledge of what scholars do and what scholarship is all about,”⁶⁹ and further accused Said of making “reckless allegations.”⁷⁰ Next, Said was guilty of showing “surprising gaps” in his knowledge of Arabic and Islam.⁷¹

Waite’s borrowing of the contrast between the Orient’s practice of polygamy and the West’s practice of monogamy⁷² came from Francis Lieber (whom he cited), and we now know that other specific examples of Oriental religious practice that Waite identified as additional examples of religious practices that were unacceptable in the West—human sacrifice and *suttee*—came from Belcher. (Apparently, Supreme Court justices felt that they were able to build their decisions upon evidence that neither side had admitted in court.) Remarkably, these examples of unacceptable religious behavior in the Orient are not the strongest examples that Waite could have used. (In retrospect, it seems remarkable that he did not discuss directly the practice of polygamy in various Oriental countries.) Despite these dramatic shortcomings, “Said attracted a throng of like-minded ‘Saidists’ who rallied to his cause and looked to add more contrived charges to an already lengthy rap sheet.”⁷³ Apparently, one of those Saidists was Judge Waddoups, despite the fact that “Lewis is still celebrated while Said’s legacy is questionable.”⁷⁴

⁶⁸ Bernard Lewis, *The Question of Orientalism*, 9–10, NEW YORK REVIEW OF BOOKS (June 24, 1982).

⁶⁹ *Id.* at 9.

⁷⁰ *Id.*

⁷¹ *Id.* at 11.

⁷² Waite almost certainly could not have known about the complexity of marriage arrangements in Western Canada during his era. In that part of North America:

There existed diverse forms of marriage among Aboriginal people, including monogamy, polygamy, and same-sex marriage, and no marriage needed to be for life as divorce was easily obtained and remarriage was accepted and expected. There were varied types of marriages to be found in the interracial ‘fur trade’ society, and many Métis marriages drew on Aboriginal precedent and reflected the same flexibility, but some also drew on the informal means of gaining community sanction for divorce and remarriage that persisted in Europe to the mid-nineteenth century.

⁷³ Berg and Shaw, *supra* note 63, at 11.

⁷⁴ *Id.* at 15.

VII. CHIEF JUSTICE WAITE AND ORIENTALISM

Despite the considerable limitations of Said's scholarship on Orientalism, Judge Waddoups used it as the foundation for arguing that Chief Justice Waite was an Orientalist whose statements about the Orient were colonialist and inappropriate as evidence in a U.S. Supreme Court ruling. I take, however, another position on Waite's supposed Orientalism: most surprising is not the few examples that Waite used from Hinduism and probable allusions to Islam but rather the significant examples that he could have used but did not. Perhaps his failure to use more examples from the Orient reflected what almost certainly was a sparsity of cross-cultural information on traditions such as Islam, Hinduism, and Confucianism, and countries whose populations practiced these traditions, such as India, Middle Eastern nations, and China. Such scholarship now is available, and it does not make assumptions about the supposedly "inferior" Orient in comparison to the "superior" West as Said claimed Orientalist research did. Instead, this scholarship meets the Orient on its own terms, and many of the scholars who are producing it either live in the Orient or have Oriental family lineages.

We now know, for example,—and perhaps Waite did not know—that an extensive system of concubines existed in parts of China in various historical periods. Analogies between concubinage and polygamy are easy to make, although "ritual, legal, and social differences" existed between wives and concubines. (For example, a man could have only one wife, yet have as many concubines as he could afford.)⁷⁵ The property-like and inferior social and legal status of concubines in comparison to wives caused them untold suffering and anxiety. Writing about concubinage in the Sung dynasty (960-1279/1280 C.E.), Asian Studies professor and historian, Patricia Ebrey, summarized:

To some modern authorities, the function of concubinage in the Chinese family system was to provide an outlet for romantic impulses, often impossible in marriages arranged by parents [citation omitted]. Even the literature critical of concubinage most often concentrates on the plight of the wife who must somehow live with a young concubine her husband has brought home, suppressing any feelings of jealousy or distaste. Yet the jealousy a wife may have felt toward a concubine was never a jealousy for her status.... [A] concubine had little to fall back on without her master's

⁷⁵ Patricia Ebrey, *Concubines in Sung China*, J. OF FAMILY HIST. 1, 2 (1986).

affection, especially the significant portion who never bore sons, or who were largely taken over by the wife. To be loved may be gratifying, but the total dependence on another's affection has obvious drawbacks.⁷⁶

As many as a third of the rich Sung families may have had concubines at some time.⁷⁷ The practice of concubinage continued throughout Chinese history, yet mere suggestion that one's daughter might be one was an insult. No woman wanted to be a concubine,⁷⁸ and the burdensome, stressful, and degrading status that it imposed upon so many women made it a social practice that the West was wise to avoid.

Just as Waite could have discussed the Oriental (Chinese) practice of concubinage within his decision about the legality of polygamy in the West, so too could he have discussed concubinage and polygamy in India. Similar to Chinese royalty:

Hindu kings and chiefs retained in their palaces numerous prostitutes, who were salaried servants, and who often had other duties to perform, such as attending on the king's person. The status of these women is somewhat obscure, but apparently they were not only at the service of the king, but also of any courtier on whom he might choose temporarily to bestow them, and thus were not on par with the regular inhabitants of his harem. Prostitutes of this type accompanied the king wherever he went, and even awaited him in the rear when he went into battle.⁷⁹

Even if Chief Justice Waite did not have these forms of concubinage in mind when he wrote his Supreme Court decision against polygamy, then surely the kingly practice of organizing hundreds if not thousands of female subjects to be confined sexual slaves would have been a dramatic example of "the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism."⁸⁰ Kingly despots immersed in unbridled sensual gratification were unlikely to risk loss of political power through routine democratic elections.

As a faith, Hinduism is not known as a religion that fostered polygamy, and indeed, throughout Indian history, monogamy seems to have

⁷⁶ *Id.*, at 2–3.

⁷⁷ *Id.* at 2.

⁷⁸ *Id.* at 19.

⁷⁹ Basham, *supra* note 17, at 186.

⁸⁰ *Reynolds v. United States*, 98 U.S. 145 (1879) at 166.

been the widely practiced marriage arrangement.⁸¹ Mentions of polygamous arrangements, however, occur throughout ancient Vedic religious scriptures, and when practiced it was not simply limited to kings and nobles.⁸² One study of Hindu polygamy that was available during Waite's era was Arthur Steele's 1826 publication, *Law and Custom of Hindoo Castes*, in which (in the 1868 edition) Steele concluded, "a man may marry as many wives as his inclination or circumstances allow. Marriages in succession, in consequence of the death of a former wife, are very common; but polygamy is not usual except on account of the barrenness of the first wife."⁸³ Whatever reasons allowed or compelled a man to take on a polygamous wife, the wife's reaction was timeless. As a poem in the classical Hindu epic, the Mahābhārata, recounted:

‘Grief of the man who loses all his wealth,
and of him whose son is slain;
grief of a wife who has lost her lord,
and of him whom the king has made captive;
grief of a childless woman,
and of him who feels the breath of a tiger at his back;
grief of the wife whose husband has married another woman,
and of one convicted by witnesses in court--
these griefs are all alike.’⁸⁴

The evidence from Hinduism that Waite brought to bear in the *Reynolds* decision involved *sati* and (less clearly) human sacrifice, whereas a discussion of polygamy among various castes would have been more appropriate.

From our perspective (more than a hundred and thirty years after the *Reynolds* decision), the most glaring Oriental(ist) omission in it involves Islamic polygamy and its most extreme manifestation, harems. Very likely Chief Justice Waite knew little about Islamic polygamy, and the sourcebook that we know he used to gain background on Mormonism, Joseph Belcher's *The Religious Denominations in the United States*, contained only a paragraph about Muhammad's practice of it.⁸⁵ Muhammad (ca 570-632 C. E.) consummated marriage with eleven women,⁸⁶ while the *Koran* (ch. IV)

⁸¹ Basham, *supra* note 17, at 174

⁸² Kane, II Part 1, *supra* note 17, at 550–551.

⁸³ *Id.*, 553.

⁸⁴ Basham, *supra* note 17, at 175.

⁸⁵ Belcher, *supra* note 28, 91–92.

⁸⁶ TABARĪ, THE HISTORY OF AL-TABARĪ, 9 THE LAST YEARS OF THE PROPHET 135 n. 902 (1990) (translated and annotated by Ismail K. Poonawala).

granted ordinary Muslim men up to four marriages if they could economically afford them. The early historical record about Islam provides glimpses into the existence of jealousy and competition even within Mohammad's household—emotions that seem to plague many polygamous marriages throughout time and across cultures. For example, Mohammad's favorite wife, Aisha, got jealous when Mohammad stayed with another wife longer than usual.⁸⁷ Another polygamous wife, Zaynab, boasted to the other wives that she was the most honoured among them.⁸⁸ A friend of Aisha's gossiped that her daughter had "a fat, well-built body" that aroused the jealousy of her son-in-law's other wife.⁸⁹ Similar to the *Quran* granting Muhammad special permission to have so many wives,⁹⁰ Mormonism's

⁸⁷ SAHIH BUKHARI, VOLUME 7, BOOK 63, NUMBER 193; *available at* sahih.bukhari.com.

⁸⁸ Tabarī, *supra* note 86, at 134

⁸⁹ SAHIH BUKHARI, VOLUME 7, BOOK 62, NUMBER 117.

⁹⁰ *Quran*, S. 50: [33.50] O Prophet! surely We have made lawful to you your wives whom you have given their dowries, and those whom your right hand possesses out of those whom Allah has given to you as prisoners of war, and the daughters of your paternal uncles and the daughters of your paternal aunts, and the daughters of your maternal uncles and the daughters of your maternal aunts who fled with you; and a believing woman if she gave herself to the Prophet, if the Prophet desired to marry her-- specially for you, not for the (rest of) believers; We know what We have ordained for them concerning their wives and those whom their right hands possess in order that no blame may attach to you; and Allah is Forgiving, Merciful. [33.51] You may put off whom you please of them, and you may take to you whom you please, and whom you desire of those whom you had separated provisionally; no blame attaches to you; this is most proper, so that their eyes may be cool and they may not grieve, and that they should be pleased, all of them with what you give them, and Allah knows what is in your hearts; and Allah is Knowing, Forbearing.

[33.52] It is not allowed to you to take women afterwards, nor that you should change them for other wives, though their beauty be pleasing to you, except what your right hand possesses and Allah is Watchful over all things.

[33.53] O you who believe! do not enter the houses of the Prophet unless permission is given to you for a meal, not waiting for its cooking being finished-- but when you are invited, enter, and when you have taken the food, then disperse-- not seeking to listen to talk; surely this gives the Prophet trouble, but he forbears from you, and Allah does not forbear from the truth And when you ask of them any goods, ask of them from behind a curtain; this is purer for your hearts and (for) their hearts; and it does not behove you that you should give trouble to the Apostle of Allah, nor that you should marry his wives after him ever; surely this is grievous in the sight of Allah.

[33.54] If you do a thing openly or do it in secret, then surely Allah is Cognizant of all things. (Internet download).

Joseph Smith claimed a revelation from God that commanded his wife, Emma, to accept his polygamy.⁹¹ Emma, however, remained extremely jealous and angry over her husband's plural marriages, and various accounts from early Mormonism even suggest that she knocked a maidservant down a flight of stairs who she discovered also was one of her husband's polygamous wives.⁹² We shall see later that jealousy and related emotions of anger and diminished self-worth plague polygamous marriages into the present day, at least in the Middle East.

Also potentially relevant to a comparative discussion of Mormon polygamy is analogous material on the public and private living arrangements for women (called harems), including their sexual availability to the household's dominant male. Although Said did not identify discussions by Westerners of harems, he mentioned twice (in passing) comments about Muslim polygamy made by persons he considered to be Western Orientalist writers.⁹³ He seemed dismissive of one of the writer's claims about "intemperance in sensual enjoyments"⁹⁴ but avoided discussing the opportunities of unlimited male sexual gratification provided by some of history's larger harem operations. A contemporary of Chief Justice Waite thought it appropriate to use the Oriental term to describe Brigham Young's marriages—a usage that should have special meaning since this contemporaneous person had been one of Young's brides for several years. In 1876, Ann-Eliza Young wrote about her experiences as

⁹¹ *Doctrine and Covenants* 132: 51 Verily, I say unto you: A commandment I give unto mine handmaid, Emma Smith, your wife, whom I have given unto you, that she stay herself and partake not of that which I commanded you to offer unto her [i.e., the chance to be a polygamist wife]; for I did it, saith the Lord, to prove you all, as I did Abraham, and that I might require an offering at your hand, by covenant and sacrifice.

52 And let mine handmaid, Emma Smith, receive all those that have been given unto my servant Joseph, and who are virtuous and pure before me; and those who are not pure, and have said they were pure, shall be destroyed, saith the Lord God.

53 For I am the Lord thy God, and ye shall obey my voice; and I give unto my servant Joseph that he shall be made ruler over many things; for he hath been faithful over a few things, and from henceforth I will strengthen him.

54 And I command mine handmaid, Emma Smith, to abide and cleave unto my servant Joseph, and to none else. But if she will not abide this commandment she shall be destroyed, saith the Lord; for I am the Lord thy God, and will destroy her if she abide not in my law. (Internet Download).

⁹² TODD COMPTON, IN SACRED LONELIENESS: THE PLURAL WIVES OF JOSEPH SMITH 314–316 (1997).

⁹³ Said, *supra* note 54, at 160, 299.

⁹⁴ *Id.*, at 162.

Brigham Young's nineteenth wife, and she spoke graciously about the leader's women while condemning the polygamous practice:

There are some very fine women among the Prophet's [i.e., Brigham Young's] wives—women that, outside Mormonism, would grace any social circle. Educated, cultivated women, who by some strange circumstance have been drawn, first into the church, then into the Prophet's harem.⁹⁵

Taken out of context, reference to “the Prophet's harem” almost certainly would refer to Muhammad's eleven wives,⁹⁶ but the numbers of plural Mormon wives to its founder and its prophet surpassed them. Joseph Smith had around thirty-three⁹⁷ to thirty-seven wives,⁹⁸ and Brigham Young had fifteen wives.⁹⁹

(For comparison, the recently deceased leader of the Fundamentalist Latter-day Saints, Rulon Jeffs [1909-2002 C.E.], had sixty-five wives,¹⁰⁰ and his son, Warren Steed Jeffs [b. 1955 C. E.] had seventy-eight polygamous marriages.¹⁰¹ Canada's most prominent fundamentalist Mormon polygamist, Winston Blackmore, has twenty-six wives.]¹⁰²

⁹⁵ ANN ELIZA YOUNG, WIFE NO. 19, OR THE STORY OF A LIFE IN BONDAGE, BEING A COMPLETE EXPOSÉ OF MORMONISM, AND REVEALING THE SORROWS, SACRIFICES, AND SUFFERINGS OF WOMEN IN POLYGAMY 464 (1876).

⁹⁶ Tabarī, *supra* note 86, at 135 n. 902.

⁹⁷ Compton, *supra* note 92, at 10.

⁹⁸ GEORGE D. SMITH, NAUVOO POLYGAMY 54 (2008).

⁹⁹ LEONARD J. ARRINGTON, BRIGHAM YOUNG: AMERICAN MOSES 121, 333–34 (1985).

¹⁰⁰ Nina Mandell, *Rebeccas Musser, Former Polygamist Sect Wife, Speaks Out*, N.Y. DAILY NEWS (August 13, 2002), available at <http://www.nydailynews.com/news/national/rebecca-musser-polygamist-sect-wife-speaks-article-1.1061337>.

¹⁰¹ REBECCA MUSSER & BRIDGET COOK, THE WITNESS WORE RED: THE 19TH WIFE WHO BROUGHT POLYGAMOUS CULT LEADERS TO JUSTICE 319 (2013); Another source puts the number of wives at 80 or more: Daphne Bramham, *Ousted Bountiful Bishop Reported on Child Brides to RCMP*, VANCOUVER SUN, (March 18, 2014), available at <http://www.vancouversun.com/life/Daphne+Bramham+Ousted+Bountiful+bishop+reported+child+brides+RCMP/9633143/story.html>

¹⁰² Daphne Bramham, *Polygamist Blackmore Has Hidden Reason for Admitting to Underage Marriages*, VANCOUVER SUN, (March 21, 2014), available at <http://www.vancouversun.com/life/Daphne+Bramham+Polygamist+Blackmore+hidden+reason+admitting+underage+marriages/9642736/story.html>

VIII. ISLAMIC HAREMS

In passages directly challenging anti-Orientalist assumptions, Mughal historian, K. S. Lal, praised European accounts of Mughal harems:

The Indians—men and women, nobles and commoners—all talked or whispered about occurrences inside the harem but about which [native] chroniclers dared not to write; while the Europeans freely could. European travelers did not ‘invent’ scandals; they wrote only what they heard or what they saw. Another accusation against the European writers is that they suffered from a superiority complex and denigrated Mughal social life. This allegation does not stand the test of scrutiny.¹⁰³

In essence, Europeans were able to write things about harems that people in their respective cultures did not dare mention for fear of retaliation from the royal courts.

Based heavily upon the European accounts, we know that “[t]he most important person living in the harem was the king. The seraglio existed for him; queens, concubines, dancers and maids provided him with comfort and pleasure.”¹⁰⁴ Moreover, “[a]ll Mughal Emperors made the best use of daylight and woke up at the break of dawn. On the average they spent half of their time in the harem and the other half in official work.”¹⁰⁵ The size of the harems varied: “the harems of Babur [1483 -1530 C. E.] and Humayun 1508-1566 C.E.] did not comprise more than two hundred members each,”¹⁰⁶ but sultans in Delhi had large retinues, with one boasting of having two thousand women in his harem.¹⁰⁷ A sultan from a slightly earlier period (Ghiyas-ud-din of Malwa [1469-1500 C. E.]):

[F]ound his own chief amusement in the administration of his harem, which it was his fancy to organize as a kingdom in miniature, complete in itself. Its army consisted of two corps of Amazons [i.e., female warriors] of 500 each, one of African and one of Turkish slave girls, who at public audiences were drawn up on either side of the throne. The harem contained,

¹⁰³ K. S. LAL, THE MUGHAL HAREM 9 (1988).

¹⁰⁴ *Id.* at 32.

¹⁰⁵ *Id.* at 33.

¹⁰⁶ *Id.* at 20. This father-and-son were the first two emperors of the Mughal empire, which began in the late 1520s.

¹⁰⁷ *Id.* at 25.

besides these, 1600 women, who were taught various arts and trades and organized in departments.

Besides, there were musicians, singers and dancers.... These women were recruited, at a great trouble and expense, from all parts of India....¹⁰⁸

Other harems from different eras were also dramatically large. An account about the Caliph al-Mutawakkil (r. 847-861 C. E.) indicated that he had a harem of 4,000 women, “with all of whom he enjoyed conjugal relations.”¹⁰⁹ Another account of a harem a few decades later put the number of women at 10,000, although large numbers like these “are better understood as indicators of a ruler’s stature and prestige.”¹¹⁰ In a rare study based upon primary documents, the major harems that existed in two Ottoman palaces from 1552 to 1652 had numbers that totaled from eighteen to 976 women.¹¹¹ At this moment, evidence is building about the immeasurable size of the late Muammar Gaddafi’s (1942-2011 C. E.) harem and slavery system that for forty-two years kidnapped and otherwise trapped countless women (probably numbering in the thousands) within a system of rape, bondage, and degradation.¹¹²

An important evaluation of the impact of harems on Islamic women spoke about their loss of legal rights, their being traded like property, and their status decline, all of which have parallels in the current polygamy debate:

Thanks to successive military victories, upper-class ‘Abbāsid men had gained the ability to procure large numbers of female slaves unencumbered by the legal rights and protection enjoyed by freeborn Arab women. As foreign women thus became traded commodities, harems populated by chattels gradually replaced more equal matrimonial unions, heralding an acute decline in the status of women [citation omitted]. This is one of several ways in which the harem has played a determining role in the construction of gender in the Muslim world.¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ IRVIN CEMIL SCHICK, SPACE: HAREM 545.

¹¹⁰ *Id.*

¹¹¹ LESLIE P. PEIRCE, THE IMPERIAL HAREM: WOMEN AND SOVEREIGNTY IN THE OTTOMAN EMPIRE 122 (1993).

¹¹² ANNICK COJEAN, GADDAFI’S HAREM (2013).

¹¹³ Schick, *supra* note 109, at 545.

Contemporary observers of polygamy will read this passage and think of the current polygamous women living outside the protections afforded them by United Nations human rights declarations¹¹⁴ (not to mention a still-applicable federal law in Canada and a contested one in the U.S.). Observers also will think about the cross-border traffic of Canadian and American women for purposes of polygamy,¹¹⁵ and the manner in which Warren Jeffs reconstituted marriage arrangements according to his evaluations of political loyalty.¹¹⁶ As was the case with Islamic women, the harem in the form of polygamy plays a determining role in the construction of polygamous fundamentalist Mormon women.

Two comments need be made about polygamy in the contemporary Islamic world. First, a substantial body of social scientific literature exists that examines polygamy in various Muslim countries and settings, much of it researched by local academics. Repeatedly, polygamy appears to be harmful on a number of measures. One study reviewed a number of existing articles that dealt with polygamy, with the British author asking, “[a]mong women in polygamous marriages, as compared to women in monogamous marriages in the same population, what is the prevalence of mental health issues?”¹¹⁷ The author narrowed the review to twenty-two relevant articles, and (by my count), at least sixteen of them exemplified polygamous practitioners in Muslim, Arabic, and Bedouin societies or subcultures. It would be difficult if not impossible to dismiss this study as a demeaning Orientalist attack, since the author reached a set of findings through the application of basic research methodology. After identifying the limits to the study, the author concluded, “polygamous women are at-risk of experiencing psychological and emotional distress.”¹¹⁸ Elaborating on this finding, the author continued:

¹¹⁴ The specific condemnation of polygamy appears in the United Nations Commissioner for Human Rights, *Convention on the Elimination of All Forms of Discrimination Against Women*, General Recommendation no. 21 13th Session (1994), Article 16 1b; 2 <http://www.un.org/womenwatch/daw/cedaw/recommendations/>. Since many of the polygamous brides tend to be underage, passages from the Convention on the Rights of the Child” also are relevant.

¹¹⁵ For discussions about trafficking women across the U.S./Canadian border for purposes of polygamy, see Kent, *Matter of Principle*, *supra* note 34 at 15, 18–19; Kent, *Mormonism*, *supra* note 35 at 179.

¹¹⁶ *Id.*

¹¹⁷ L. D. Shepard, *The Impact Of Polygamy On Women’s Mental Health: A Systematic Review*, 22 EPIDEMIOLOGY AND THE PSYCHIATRIC SCI. 47 (2013).

¹¹⁸ *Id.* at 61.

Based on the present evidence, there appears to be a significant relationship between marital status and mental health. Consequently, it is important that practitioners, community leaders and policy-makers working with polygamous populations be aware of their substantive risk for a number of psychological and emotional disturbances. Appropriate care and treatment should accordingly be made available and accessible. Furthermore, special attention may need to be paid to senior wives as some studies distinguish them as particularly vulnerable to psychological distress.¹¹⁹

It becomes a testable question whether these results apply to fundamentalist Mormon polygamous families, but the cross-cultural nature of the studies that led to these findings strongly suggest that they would apply to these families, too.

IX. CONCLUSION

This article began by attempting to solve a small but longstanding mystery surrounding some examples in Chief Justice Waite's 1878/1879 anti-polygamy ruling. The solution that I offered was that Waite, for background on Mormonism, most likely read a book chapter on the group in a popular text on religion at the time—one written by Christian minister Joseph Belcher. In that chapter, Belcher argued that polygamy was as unacceptable as several other foreign religious practices, including human sacrifice and sati. Waite used these examples in his anti-polygamy decision, but did not cite Belcher.

Although Belcher did not indicate why he chose the examples that he did of unacceptable foreign religious practices, the example of sati was from Hinduism, as was the example of human sacrifice (based upon a poor understanding of Hindu cremation practices). The fact, however, that these examples were from what some contemporary scholars came to call an Oriental religion seemingly gave additional support to Utah Judge Waddoups's ruling that Waite's anti-polygamy decision was pejoratively Orientalist. Judge Waddoups had been inspired by Edward Said's critique of scholarship that (he felt) demeaned the Orient, and on the basis of that critique, Waddoups ruled that crucial parts of Waite's anti-polygamy decision was no longer were good law.

I responded to Waddoups's decision in several ways. I argued that Said's Orientalist perspective is highly contentious, partly because of

¹¹⁹ *Id.*

questionable scholarship on his part. Nevertheless, I asserted that Waite did not use too many Orientalist examples in his decision, but actually used too few. Bodies of literature exist about polygamy and related practices such as concubinage and harems, and some of that literature was available in Waite's era. Far more importantly however, is that contemporary research on polygamy and its related practices identify actual harm by the practice, and this finding cannot be dismissed as mere Orientalist bias. Waite, therefore, was correct to outlaw the practice, and any attempt to update the *Reynolds* decision simply will produce numerous examples of polygamy's overall harm.