

POLYGAMY IS NOT PROSTITUTION: PROBLEMS WITH THE ANTI-POLYGAMY IMMIGRATION EXCLUSION

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Congress explicitly codified polygamy as an exclusion ground from legal immigration in its first comprehensive federal immigration statute, passed in 1891. However, glib statutory language hides both its far-reaching impact, and the convoluted history that led to the codification of the statute. Furthermore, the dearth of case law specifically addressing the polygamy exclusion in immigration law necessitates an inquiry into other sources to understand how this exclusion came to be codified in its current form.

Despite an extant explicit exclusion of practicing polygamists from legal immigration from the very outset of Congress' comprehensive codification of federal immigration law, the development of the law contravening perceived

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sexual immorality better informs a discussion of why practicing polygamists may be excluded in the immigration context. While very little case law specifically references the federal polygamy exclusion—despite the longevity of this explicit ban in federal law—a rich history of case law condemning perceived sexually immoral practices has developed in both the interstate commerce and immigration contexts.

The legislature has repeatedly and deliberately categorized many of the forbidden sexual practices in this jurisprudence along with polygamy. Congress began with the policy starting point that sexual immorality must be suppressed, starting with its most uncontroversially immoral manifestation: prostitution. Commitment to preserving traditional American marriage lies at the heart of the attacks on polygamy and prostitution, both undesirable channels for sexuality. Thus, to understand the problematic nature of the polygamy exclusion ground from legal immigration, one must first examine the development of the criminalization

of polygamy as an outgrowth of the criminalization of prostitution and human trafficking. This case law reveals a great deal about the values reflected in the polygamy exclusion.

The historical development of polygamy as a crime of sexual immorality, related to prostitution and human trafficking, suggests that the current anti-polygamy codification in federal immigration law is likely misguided. Admittedly, suppressing sexual immorality in defense of the traditional family structure is a goal many Americans expect the federal government to pursue. However, the statutory language and case law behind this goal in the polygamy context demonstrate a fundamental misunderstanding of the actual practice of polygamy. Although even Supreme Court Justices have vehemently opposed the likening of polygamy to prostitution, the majority opinion in those cases has always ultimately condemned the practice, frequently by insistently linking it to prostitution. Likewise, the federal immigration code continues to ban polygamy as a crime of sexual immorality, with

no significant challenges to such characterization throughout the duration of the polygamy exclusion from immigration law. Unfettered, the vilification of polygamy as merely another form of sexual deviance has resulted in both internally- and externally-focused efforts to suppress the practice. In the immigration context, these efforts take on the added weight of universalism, seeming to implicitly condemn as barbaric what is common practice in many cultures. Perhaps most problematic, this fundamental misunderstanding seriously calls into question the legitimacy of continuing to criminalize the practice of polygamy and keep polygamists out of the country. The likely victims of the anti-polygamy policy underscore the problem of continuing this misguided criminalization.

Part II of this article begins with a discussion of prostitution, the first crime of sexual immorality to be recognized, though circuitously, in the United States. Part II then delves into the development of statutory law to curb human trafficking as against interstate commerce; and the

later use of the same statutory language to criminalize all sorts of sexual immorality, regardless of pecuniary gain. Part III describes the current manifestation of polygamy in immigration law and discusses who is affected by the anti-polygamy stance of immigration law. Part IV then offers possible solutions to the current problems in the anti-polygamy stance of modern immigration law, in light of vast misunderstandings of the practice of polygamy.