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

Oyinlola O. Oguntebi

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

Oguntebi

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.

**TIME SCARCITY AND
“THE PROBLEM OF SOCIAL
REPLICANTS:”
CLONES AND THE COASE
THEOREM**

F.E. Guerra-Pujol;
Orlando I. Martinez-Garcia

With the 30th anniversary of the classic sci-fi/film-noir movie *Blade Runner* approaching, as well as the recent news that the filmmaker Ridley Scott may soon direct a sequel (or possibly, a prequel) to the original film, we thought it fitting as well as timely to revisit the remarkable “battle of the replicants” presented in the original version of the film, namely, the life-and-death struggle between Roy Batty, an advanced and self-aware “social replicant” or humanoid clone, and his human creator, Dr. Eldon Tyrell, the reclusive genius and mad-scientist who invented the advanced Nexus-6 replicants, programming them with a limited four-year lifespan.

Guerra-Pujol, Martinez-Garcia

But first, however, we begin by explaining why the title of our paper refers to the title of a landmark paper in the history of economic thought, Ronald Coase's "The Problem of Social Costs." After all, what could clones and the eponymous "Coase theorem" possibly have in common? Although the film, and the dystopian science fiction novel on which the film is based, pose a wide variety of deep ethical, scientific, and philosophical questions, such as the legal and moral rights of human androids and the ethics of cloning, in this paper we will focus on the life-and-death struggle between Roy Batty and Dr. Tyrell, the central conflict presented in *Blade Runner*, using a "Coasian" lens. We shall also address the following subsidiary puzzles posed by the film and the novel: what is the optimal lifespan of a human clone, such as the fictional Nexus-6 replicants depicted in *Blade Runner*? In addition, who decides what the optimal lifespan of a clone is? These queries from the world of science fiction may appear to be fanciful or esoteric, but they shall help us see Coase's famous

theorem, and the problem of conflict generally, in a new light.

The remainder of this paper is organized as follows: following this brief introduction, in Part II we define the conflict between the rebel replicants and their reclusive creator in terms of “time-scarcity.” After discussing some preliminary matters in Part III regarding justice, behavior, and the problem of perspective, in Part IV we then apply the Coase theorem, including Professor Coase’s counter-intuitive idea of reciprocal harms, to the central conflict in *Blade Runner*. Lastly, we conclude by explaining why one of the sources of this life-and-death conflict is the lack of competitive markets in replicant technology.

**THE INVISIBLE MAN:
HOW THE SEX OFFENDER
REGISTRY RESULTS IN
SOCIAL DEATH**

Elizabeth Megale

Frank Rodriguez is socially dead. He died when he was nineteen years old and had sex with his fifteen-year-old girlfriend (consensual sex with a minor is against the law in Texas). Frank Rodriguez died the day he entered a guilty plea to sleeping with his girlfriend and was forced to move from his parents' home because the law did not permit him to live under the same roof as his twelve-year-old sister. From the time of his plea, he has not been allowed to visit pools, parks, or any locations where children are likely to congregate. He is currently married to this same teenage girl, now a woman, and they have four daughters together, but Frank Rodriguez and his family all live on the margins of society. He is still not allowed anywhere children are likely to congregate. This means he cannot

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coach his daughters' soccer team or even pick them up from school. He is socially dead, and his family is, too.

Frank Rodriguez's story is not unique; the irony of the United States' justice system is that crime rates continue to rise in the face of increasingly harsher criminal laws. In fact, the United States stands out from other nations in its level of incarceration and its rates of routine violence. Yet despite decades of a "tough on crime" approach, the U.S. criminal justice system remains incapable of lowering the crime rate, much less preventing crime at all. Overcriminalization is not only resulting in more crime, but it is also contributing to the deterioration of society making it likely that crime rates will increase even more.

Beginning in the 1970s, a conservative movement emerged at the forefront of criminal justice promoting overcriminalization. The push in favor of overcriminalization in the United States has emerged as an enormous experiment in social engineering. The crisis of penalty is evidenced by

sweeping legislative acts intended to prevent crimes from occurring; anti-crime legislative acts, however, tend to be overly-repressive and function to increase crime rates rather than lower them. Repressive criminal laws, then, are evidence of overcriminalization.

Law exists because society agrees it exists; thus, laws change as societies change. “Society” is an abstract term referring to a collective decision-making body, which excludes some people from the makes the decision. Those who exist on the fringes of society do not enjoy the power to make decisions, and for all intents and purposes they are socially dead. The marginalized, however, can sometimes transition into the normative mainstream and gain a foothold in society to become a part of the decision-making collective. For this to occur, however, requires a fundamental shift in the relationship between those in power and the marginalized of society. The power base must change to make room for the emerging voice of the marginalized group to claim its place in society.

The term “crime” is difficult to define because the concept of what constitutes deviance (i.e. a criminal act) changes as society changes. The more repressive or conservative the societal system, the more likely it is that the deviance is designated by officials. Definitions of deviance may be strongly tied to deviant behaviors, or they may be largely invented. The higher the level of invention in the definition of deviance, the more likely normal standards of procedure and restraint will be taxed.

Repressive control systems tend to incentivize, either economically, politically, or otherwise, the prosecution and punishment of deviance. On the other hand, criminal laws in a restrained system are more effective because they are narrowly tailored and paired with strong protections of individual rights. Additionally, the prosecution and punishment of deviance is not incentivized under a restrained societal system. Therefore, under repressive control systems the number of deviants is greater as is the incidence of punishment; that is, repressive control systems

result in a greater number of criminals and a higher rate of crime.

The sex offender registry is a repressive social control system. Society, through the legislative process, has broadly defined the deviant (i.e. the sex offender) as well as the deviant behavior (i.e. the sex offense). Although some sex crimes may be defined by the deviant behavior itself, many sex crimes encompassed in the Adam Walsh Act and the Sex Offender Registration and Notification Act (SORNA) are only crimes because the legislature has so designated. Specifically, sex offenders under 42 U.S.C. § 16911, SORNA, are any “individual who was convicted of a sex offense,” and a sex offense under SORNA is “a criminal offense that has an element involving a sexual act or sexual contact with another.”

As a result, the number of sex offenders committing sex offenses is growing as is the rate of prosecution and punishment for sex offenders. Rather than working to prevent sex crimes from occurring, SORNA’s repressive nature will function

to increase the incidence of sex-related crimes as well as their punishment.

In this Article, I use Elliott Currie's work to illustrate how repressive control systems overcriminalize behaviors and result in higher rates of crime, prosecution, and incarceration. Section II of this Article establishes that crime is a social construct and explains how, over time, the definition of what constitutes a crime changes. This section also identifies three characteristics that emerge in a repressive control system: (1) imperviousness to restraint by other social institutions; (2) an absence of internal restraints on the powerful, systematic oppression of deviance; and (3) institutional focus on apprehending and processing deviants. In Section III, I examine each of these characteristics in the context of SORNA and propose that each characteristic has emerged in the wake of the implementation of SORNA. Finally, I conclude by predicting crime rates with respect to sex offenses will likely increase as will the rates of

prosecution and punishment in the wake of
SORNA.

**CONSENSUAL INSEMINATION:
AN ANALYSIS OF SOCIAL
DEVIANCE WITHIN GENDER,
FAMILY, OR THE HOME
(ETUDES 6)**

Carmen M. Cusack

Rosie and Eddie are engaged in foreplay. Rosie gives Eddie consent to penetrate her sexually. He does. Their sex builds for some time when suddenly, just before Rosie can climax, Eddie ejaculates inside of her. Rosie immediately exclaims “Did you just cum?” Eddie, thinking that she is alluding to his brevity, apologizes for his performance. Rosie receives his apology, but adds “I didn’t want you to cum inside of me. I can’t believe this!”

What Rosie has just experienced is common. Unless Eddie is the carrier of a sexually transmitted disease (STD), then what he did is not criminal in the U.S. This paper will address some questions, which will be answered by the conclusion that

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American law lacks some protection for female sexual agency. The following questions will be asked and answered: What is the purpose of semen and how does the purpose of semen relate to sexual assault and unprotected sex? If any unwanted sex act is a sexual assault, then when will American society acknowledge that unwanted insemination is a separate crime? Does the law sufficiently distinguish between a woman's right to have sex, a woman's right to have unprotected sex, and a woman's right to consent or withhold consent from being inseminated? How does a global cross-section of data that correlates intimate partner violence, condom use, and sexual agency relate to patriarchal attitudes, and further explain why U.S. law must punish nonconsensual insemination? How can we learn which laws protect women from recent events involving Julian Assange and the country of Sweden?

**MODERN MARRIAGE AND
THEY ARE NOT GODS:
LON L. FULLER, H. L. A. HART, AND A
PROPOSED EXTENSION OF THE LEGAL
SYSTEM EQUATION. FREEDOM OF THE
PEOPLE, EQUALITY FOR THE PEOPLE
& SOVEREIGNTY BY THE PEOPLE**

C.G. Bateman

This paper is a consideration of whether Lon L. Fuller's and H.L.A. Hart's claims about legal systems, and their constituent elements, bear any resemblance to the experience of a herein proposed thought experiment involving fictional castaways and the development of their legal system. As a first step towards understanding this question, the initial part of this paper introduces Hart and Fuller's original debate in its proper post World War Two context. These Harvard essays led to an exchange of writings between the two authors that resulted in agreement on a set of principles which both scholars felt were acceptable requirements for a legal

Bateman

system, but upon which they disagreed as to their nature, moral or purposive. The second part of this paper is the thought experiment itself, which is employed as a heuristic tool that discusses three distinct attempts by a castaway society to fashion a legal system. This thought experiment is then contrasted with what has been prescribed by Fuller and Hart as prerequisites to a functioning legal system. The castaway society's three attempts at government are made to roughly accord with familiar historical incarnations: a monarchy, coregency with senate, and a democratic experiment. In the final democratic stage, the society attempts to ground three democratic principles I argue are necessary additions to Hart's and Fuller's agreed on legal system equation. In part three, I conduct a comparative analysis that examines the legal theories of Hart and Fuller so as to determine how they align or diverge with the experience of the proposed society as they struggled to find a workable legal system. I conclude that although Fuller's legal system is basically sound and

functionally workable, it does not necessarily guarantee the prevention of abuses by governing powers operating under its strictures. Constitutional instruments aimed at entrenching the protection of freedom, equality, and sovereignty for citizens are also required. Finally, the possible relationships between aspects of the democratic stage of development and similar ideas from contemporary legal philosophers are discussed.