



UNIVERSITY OF MARYLAND LAW SCHOOL

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Dear Editors:

I am submitting "*They Ain't White, They're Mormons: An Illustrated History of Polygamy as Race Treason*" for your consideration. While the legal regulation of polygamy and same-sex marriage attract scholarly and media attention, few people realize that legal doctrines banning polygamy grew out of 19th century Americans' view that Mormons betrayed the nation by engaging in conduct associated with, in the Supreme Court's phrase, "Asiatic and African peoples." *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879). This article reveals the racial underpinnings of polygamy law by examining 19th century cartoons and other antipolygamy rhetoric to demonstrate Sir Henry Maine's famous observation that the move in progressive societies is "from status to contract." It frames antipolygamists' contentions as a visceral defense of racial and sexual status in the face of encroaching contractual thinking, building on work I have published about contractual thinking in family relationships in journals such as the *Harvard Civil Rights & Civil Liberties Law Review*, *Texas Law Review*, *North Carolina Law Review*, and *Stanford Law Review*.



The Carrion Crow in The Eagle's Nest, Puck, Jan. 25, 1882

One of the cartoons reprinted in the article illustrates the article's substance and methodology. "The Carrion Crow in the Eagle's Nest" appeared in *Puck* on Jan. 25, 1882, the same year Congress enacted its third anti-polygamy statute. The cartoon depicts a fierce eagle, stars and stripes on its wings representing the U.S., protecting a nest labeled "union." Inside the nest are eaglets, all white, each labeled for a state. A "carrion crow" labeled "Utah" rises up in their midst, clutching a bone labeled "Mormonism." Cartoons like this one, alongside political, legal, and medical discourses, show how antipolygamy doctrine grew out of fears of Mormon political and race treason. The single black crow references Mormons' willful separation from the rest of the Union, its blackness reflects 19th century associations between Mormon polygamy and "African and Asiatic peoples" (although Mormons were overwhelmingly white), as well as miscegenation by depicting one black child among white ones. The "carrion crow," a different species from its eaglet siblings, reflects antipolygamists' claim that polygamy produced a new species. Polygamy, they reasoned, was "natural" for people of color but so "unnatural" for whites as to produce a new, degenerate race, licentious and submissive to despotism. The article suggests that status and anthropologist Edward Said's concept of Orientalism bridge the seemingly separate issues of Mormon polygamy and racial inferiority. In particular, Orientalism explains how the nation deprived overwhelmingly white Mormons of citizenship rights such as voting on grounds of racial inferiority.

It matters that antipolygamy cases like *Reynolds v. U.S.* were products of white supremacist reasoning. Polygamy disputes again occupy headlines and court dockets, and opponents of same-sex marriage cite *Reynolds* to support their status-based arguments that so closely resemble 19th century antipolygamist rhetoric. I accordingly conclude my historical analysis with a presentist claim that status-based arguments against both polygamy and same-sex marriage also share a resistance to what Maine called a progressive society, one whose regulations reflect contractual thinking by respecting choice and producing greater pluralism and equality in place of status-based hierarchies.

The paper was well received when I presented it at law schools including George Washington University and the University of Utah, and to family law practitioners in New York and Utah. Once published, it could provide a framework for a new conversation about two of the most hotly contested issues in family law.

Because of the reprinted cartoons, the article prints out at 80 manuscript pages. However, it contains only 16,700 words, and could be printed as an essay. Please don't hesitate to contact me with any questions at (410) 706-3923, (801) 232-1169, or mertman@law.umaryland.edu. Thank you for your consideration.

Sincerely yours,

Martha M. Ertman
Professor of Law