PIONEERS, PROBATE, POLYGAMY, AND YOU

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I. THE LANDSCAPE

Families terrify me, and not simply because I came from one. Nor is it simply the case that the family terrorizes queers like me because it and its “family values” are a dominant institution of sexual and political regulation in North America.1 There is something much more complicated in these relationships of terror. So on hand are two documents—one religious, one legal (although we can almost effortlessly argue that these categories are enduringly tangled). I quote them at length:

Exhibit A:
Selections from Section 132 of the Doctrine and Covenants, sacred text of the Church of Jesus Christ of Latter-Day Saints:

1 VERILY, thus saith the Lord unto you my servant Joseph, that inasmuch as you have inquired of my hand to know and understand wherein I, the Lord, justified my servants Abraham, Isaac, and Jacob, as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines—

. . . .

4 For behold, I reveal unto you a new and an everlasting covenant; and if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.

. . . .

19 And again, verily I say unto you, if a man marry a wife by my word, which is my law, and by the new and everlasting covenant, and it is sealed unto them by the Holy Spirit of promise, by him who is

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1 See, e.g., MICHAEL COBB, GOD HATES FAGS: THE RHETORICS OF RELIGIOUS VIOLENCE 28–30 (2006) (referencing “substantial clout with the GOP” held by the Christian Family Research Council).
anointed, unto whom I have appointed this power and the keys of this priesthood; and it shall be said unto them—Ye shall come forth in the first resurrection; and if it be after the first resurrection, in the next resurrection; and shall inherit thrones, kingdoms, principalities, and powers, dominions, all heights and depths—then shall it be written in the Lamb’s Book of Life, that he shall commit no murder whereby to shed innocent blood, and if ye abide in my covenant, and commit no murder whereby to shed innocent blood, it shall be done unto them in all things whatsoever my servant hath put upon them, in time, and through all eternity; and shall be of full force when they are out of the world; and they shall pass by the angels, and the gods, which are set there, to their exaltation and glory in all things, as hath been sealed upon their heads, which glory shall be a fulness [sic] and a continuation of the seeds forever and ever.

20 Then shall they be gods, because they have no end; therefore shall they be from everlasting to everlasting, because they continue; then shall they be above all, because all things are subject unto them. Then shall they be gods, because they have all power, and the angels are subject unto them.

... 

30 Abraham received promises concerning his seed, and of the fruit of his loins—from whose loins ye are, namely, my servant Joseph—which were to continue so long as they were in the world; and as touching Abraham and his seed, out of the world they should continue; both in the world and out of the world should they continue as innumerable as the stars; or, if ye were to count the sand upon the seashore ye could not number them.

31 This promise is yours also, because ye are of Abraham, and the promise was made unto Abraham; and by this law is the continuation of the works of my Father, wherein he glorifieth himself.

32 Go ye, therefore, and do the works of Abraham; enter ye into my law and ye shall be saved.

33 But if ye enter not into my law ye cannot receive the promise of my Father, which he made unto Abraham.

34 God commanded Abraham, and Sarah gave Hagar to Abraham to wife. And why did she do it? Because this was the law; and from Hagar sprang many people. This, therefore, was fulfilling, among other things, the promises.

35 Was Abraham, therefore, under condemnation? Verily I say unto you, Nay; for I, the Lord, commanded it.

36 Abraham was commanded to offer his son Isaac; nevertheless, it was written: Thou shalt not kill. Abraham, however, did not refuse, and it was accounted unto him for righteousness.
Abraham received concubines, and they bore him children; and it was accounted unto him for righteousness, because they were given unto him, and he abode in my law; as Isaac also and Jacob did none other things than that which they were commanded; and because they did none other things than that which they were commanded, they have entered into their exaltation, according to the promises, and sit upon thrones, and are not angels but are gods.

David also received many wives and concubines, and also Solomon and Moses my servants, as also many others of my servants, from the beginning of creation until this time; and in nothing did they sin save in those things which they received not of me.

David's wives and concubines were given unto him of me, by the hand of Nathan, my servant, and others of the prophets who had the keys of this power; and in none of these things did he sin against me save in the case of Uriah and his wife; and, therefore he hath fallen from his exaltation, and received his portion; and he shall not inherit them out of the world, for I gave them unto another, saith the Lord.  

Exhibit B:

A Last Will and Testament of Nicole K. Baker, reproduced in Norman Mailer’s The Executioner’s Song:

TO WHOMEVER IT MAY CONCERN:

I, Nicole Kathryne Baker—have a number of personal requests I would desire to have carried out—in the event that I am at any time—found dead.

I am considering myself of a strong, logical, and totally sane mind—so that which I am writing should be taken serious in every respect.

At the time of this writing I am going through a divorce from a man named Steve Hudson.

By my own standards—the event of death should dissolve all ties with that man and the divorce be carried through and finalized AT ALL COSTS.

I wish to legally be returned to my maiden name which is Baker. And have none ever acknowledge [sic] me by any other name.

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My daughters [sic] birth certificate states her name as Sunny Marie Baker, even though [sic], at the time of her birth, I was then legally married to her father—James Paul Barrett.

My son’s birth certificate states his name as Jeremy Kip Barrett. Because I was at that time still married to James Paul Barrett, who is not Jeremy’s [sic] father.

Jeremy’s [sic] father is the late Alfred Kip Eberhardt.

So Jeremy does have legal grandparents by the last name of Eberhardt who may wish to be notified of his whereabouts. They are residing in Paoli, Pennsylvania, I think.

As to the care custody and welfare of my children—I am not only desiring [sic] but demanding that the responsibility of them and any decisions concerning them—be placed directly and immediately [sic] into the hands of Thomas Giles Barrett and/or Marie Barrett of Springville, Utah.

If the Barretts so wish to adopt my children—they have my willing consent.

If they wish to place the responsibility of one or both children into the hands of another responsible party of their choice—they again have my willing consent.

That is of course—until the children are of legal age to make their own choices.

I have a pearl ring in hock in the bowling alley in Springville. I would really like for someone to get it out and give it to my little Sister—April L. Baker.

Also I have made arrangements for a sum of money to go for April’s mental health problem. My mother should not spend that money for anything other than to pay a good Mental Hospital for helping April back to her sanity.

Now, as to the decision as to what should be done with my dead body—I ask that it be cremated. And with the consent of Mrs. Bessie Gilmore I would have my ashes mixed with those of her son—Gary Mark Gilmore. To be then—at any future convenient date scattered upon a green hillside in the State of Oregon and also in the State of Washington.3

Both documents are documents about love, death, and families. Both documents are also about Utah. And Utah is marked by its devotion to families (and most likely love and death), a devotion that seems peculiar, even in a nation enthralled by its almost unquestionable devotion to making families. Wallace Stegner described families in Utah:

The Mormons who fled to the sanctuary of the mountains, and the converts who joined them later, were the kind of people who naturally have large families, and they lived in a time and a part of the world where large families were normal. But add to their normal fecundity the ambition of Brigham Young to people his whole empire with industrious Saints, the pressure he put on his people to be fruitful and multiply.4

Whether or not we can agree that large families are “natural,” Mormons certainly have a unique take on families. The Utah family, “Utah’s Best Crop”—as signposts throughout Mormon country were reported to have advertised under “pictures of chubby rosy children”5—generates much national anxiety. But it wasn’t merely the largeness of Mormon families that made them seem so noteworthy; it was the sexual and marital practices of this frontier, Brigham Young’s “ambition,” that has inspired the most tried, tired, and salacious commentary. That is, it was polygamy—with large numbers of unconventionally reared folk—that got people talking, almost as soon as the Church gained notoriety in the mid-nineteenth-century early days. Mark Twain mocks this fascination in his travel narrative about going West during the Civil War:

And the next most interesting thing is to sit and listen to these Gentiles [that Twain is hanging out with in Salt Lake City] talk about polygamy; and how some portly old frog of an elder, or a bishop, marries a girl—likes her, marries her sister—likes her, marries another sister—likes her, takes another—likes her, marries her mother—likes her, marries her father, grandfather, great grandfather, and then comes back hungry and asks for more. And how the pert young thing of eleven will chance to be the favorite wife and her own venerable grandmother have to rank away down . . . in their mutual husband’s esteem, and have to sleep in the kitchen, as like as not. And how this dreadful sort of thing, this hiving together in one foul nest of mother and daughters, and the making of a young daughter superior to her own mother in rank and authority, are the things which Mormon women submit to because their religion teaches them that the more wives a man has on earth, and the more children he rears, the higher the place they will all have in the world to come—and the warmer, maybe, though they do not seem to say anything about that.6

4 WALLACE STEGNER, MORMON COUNTRY 171 (2nd ed. 2003).
5 Id. at 173.
I don’t want to diminish or mock the history of sexual violence and abuse that adheres to the practices of polygamy (as well as monogamy) in the Beehive State. I cite Twain’s comedic critique to show off how part of polygamy’s difficulty is the extraordinary, often hyperbolic and lurid attention repetitively paid to this marriage practice—for there is long history of this demonization of polygamy. Famously, the Republican Party platform of 1856 declared,

That the constitution confers upon Congress sovereign powers over the territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the territories those twin relics of barbarism—polygamy, and slavery.7

There were numerous sister-wife narratives, which were generically similar to slave narratives. Harriet Beecher Stowe, for example, wrote a preface for Fanny Stenhouse’s *Tell It All: A Woman’s Life in Polygamy*, describing polygamy as “a slavery which debases and degrades womanhood.”8 And the prohibitionist Frances E. Willard goes further and writes, in an introduction to *The Women of Mormonism: Or the Story of Polygamy as Told by the Victims Themselves*, “Turkey is in our midst. Modern Mohammedanism has its Mecca at Salt Lake, where Prophet Heber C. Kimball speaks of his wives as ‘cows.'”9 There was even H.B. Parkinson’s big silent film hit in 1922, *Trapped by the Mormons*, which features the savage capture of women to satisfy the Mormons’ insatiable appetite for wives.10 It would not be a difficult leap to link these various discussions of “Mohammedanism” to the current fret and fear stirred by Islam in the American imaginary today.

One essay by Judge C.C. Goodwin, in 1881, published in *The North American Review*, is drenched in the rhetoric that polygamy stirred (and still stirs) as non-Mormons made sense of the Mormon difference. Polygamous behavior was akin to some internal terror that was “hiving” away at the American way of life—a terror inextricably linked with lascivious caricatures of polygamous practices from Islamic traditions. Goodwin describes Joseph Smith’s story this way:

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8 FANNY STENHOUSE & HARRIET BEECHER STOWE, TELL IT ALL: A WOMAN’S LIFE IN POLYGAMY vi (1875).
10 TRAPPED BY THE MORMONS (Master Films 1922).
Smith was born in Rutland, Vermont, about the time that Wingate, the combined forger and religious charlatan made such a sensation there. He removed, when a youth, to Palmyra, New York . . . . Smith was full of magnetism, full of warm blood, a hearty, generous fellow . . . . After proper training, Smith became the prophet . . . . For one of his sensual nature, it was but natural to conclude that if celestial plural marriages were good, it was a grievous waste of time to wait for death to sanctify them; that real women were greatly to be preferred to doubtful and unsubstantial ghosts, and that the right thing was to be sealed to those still in the flesh. So he had a revelation; polygamy became part of the Mormon religion, and Joe Smith a little Mohammed. Followers began to flock rapidly around Smith. Probably without being conscious of the fact, he made animalism the key-stone in the arch of his creed, and given to his church all the adhesiveness which cements Christian creeds, and in addition all the fascination which, to sensual natures, clings to Mohammedism.11

Certainly, Goodwin makes a point that people still make about the religions of Joseph Smith and Mohammed: there are striking resemblances between the two faiths. Such connections, especially in the American context, have long troubled many. From Goodwin’s angle, polygamy was considered an Eastern practice in the middle of the American West, an Islamic practice that was a sensual form of “animalism” that ran contrary to American values. Well over a century later, in his article for Salon.com, Andrew O’Hehir makes the connections resolutely clear:

To their respective followers, Mohammed and Joseph Smith are not the inventors of new denominations but restorers of the original, uncorrupted monotheistic tradition of Abraham, Moses and Jesus. Even the language of the two faiths’ central tenets is strikingly similar. In reciting the Shahadah, or principal declaration of faith, Muslims may say: “There is no god but Allah and Mohammed is His Messenger,” or “I testify that Mohammed is the Messenger of God.” One of the most frequent forms of “testimony” in a Mormon meetinghouse comes when a worshiper rises to declare: “I know that Joseph Smith was a prophet of God.” Both religions make claims to absolute and universal truth, and those declarations are meant to reflect knowledge rather than belief in the ordinary theological sense, which may be tinged with doubt. In answering the oft-asked question, “Are Mormons Christian?” one might ask, only half facetiously, whether Muslims are Christian too.12

11 Judge C. C. Goodwin, The Political Attitude of the Mormons, 131 N. AM. REV. 276, 270 (1881).
But instead of charting such a genealogy, I want to leave aside this form of critique, which is indebted to the explicit and salacious worry about the sexual practices of polygamists, and argue something from another angle, which Goodwin’s mockery slightly hints at when he talks of the sanctity of death and the “unsubstantial ghosts” of marriage. I want to suggest that perhaps what makes Utah families so troubling and so terrorizing for so many is not always the polygamous difference (always the politics of traditional versus nontraditional marriage contests), but also what Utah families highlight about most families: as we’ll see, there is a strenuous devotion to conceptualizing family as a death-making enterprise in the Latter-Day Saints’ (LDS) imaginary, one with a major elegiac problem that haunts and casts a shadow on sacred and nonsacred forms of family law. This problem is not merely Mormon; it belongs to most families. And this problem hinges on a human right that marks ghostliness: the right of inheritance. But I’m getting ahead of myself.

Both documents at the beginning of this essay (the revelation of Joseph Smith and last will and testament of Nicole Baker, girlfriend of notorious killer Gary Gilmore) are really about the future of families, or how families cope with a future that necessarily contains death. Smith’s revelation outlines a very religiously legal sense of how one can, through the proper and moral kind of family, achieve a permanent place in the highest heavenly existence in the celestial order of the Mormon afterlife: one gets to the choicest afterlife by the best kind of marriage practices—plural marriage (ideally), but, perhaps more importantly, the right kind of conduct that does not violate the sacred laws and example Smith has been appointed to administer and represent. Baker’s will (which she later has to amend once she realizes that she hasn’t properly distributed her property, just her family) is about how she sees her family enduring after her desperate and unsuccessful suicide attempt (which was her attempt to be with her convicted killer boyfriend for eternity since they couldn’t be together on this earth anymore—he was slated to be killed). Most striking, after she has “arranged” the custody of her children (tangled in all sorts of marriage, ex-marriage, and ad hoc familial arrangements), urged that someone get her ring out of hock, and asked her heirs to provide a small sum of money for the cost of her sister’s mental health care, Nicole directs the disposal of her and Gary’s remains. She wants her ashes mixed with Gary’s; she wants to be with him in death since they can’t be with each other in life; and she wants those ashes scattered in two states on the edge of the North American

13 See Goodwin, supra note 11, at 280.
14 See Letter from Nicole K. Baker to Family and Neighbor (Nov. 15, 1976), in MAILER, supra note 3, at 570–71 [hereinafter Letter from Nicole K. Baker].
15 See supra text accompanying note 3; Letter from Nicole K. Baker, supra note 14.
This is Nicole’s vision of what her future might be: an everlasting blended and scattered connection to her unmarried partner. Dead. But together.

Let’s put aside the obvious judgments. Let’s put aside any frustration we might have with a young mother who abandons her children and family for a deadly love with an abusive serial killer (who has helped devise this botched suicide pact, in part because he’d rather see Nicole dead than with another lover). Let’s also put aside whether or not we agree with Smith’s revelations about the “new and everlasting covenant” of marriage. Instead, I want to think of these two “exhibits” as examples of why questions of inheritance prey upon our imaginations about what constitutes a family.

Although Smith’s revelation is not necessarily a will, there is logic in the revelation that mimics the legal instrument that Nicole was trying to write. Mailer includes a letter Nicole wrote right after will, underscoring the connections between a suicide note and a last will and testament:

Well, all will ultimately be clear and right just know that i love you all today and i will love you always.

Please try also not to grieve for me—or resent Gary.

i Love him

i made my own choice.

i’ll not regret it.

Please Love my kids always, as they are part of the family.

Never hid [sic] truths from them.

When any of you need me, i will be there to listen for i and Gary—and yourselves—are all part of a wondrous good understandin [sic] God.

May this parting bring us closer in Loveing [sic], understanding and expeting [sic] of one another.

i Love you All

SISSY

Although written in a less formal manner, Nicole’s letter essentially emphasizes the main points of her will: take care of my kids; I love you all; and Gary and I will be together. By ending her suicide letter with theological insights into the nature of love and family, Nicole, not really religious, seems to parrot the ambient understanding of family togetherness that permeates the Utah she inhabits. As we think about her letter, listen to the forty-sixth verse of Smith’s revelation: “And verily, verily, I say unto you, that whatever you seal on earth shall be sealed in heaven; and whatever you bind on earth, in my name and by my word, saith the

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16 See supra text accompanying note 3; Letter from Nicole K. Baker, supra note 14.

Lord, it shall be eternally bound in the heavens.” 18 In rapid succession, Nicole is sealing her fate, sealing her will, and sealing her bond with Gary in a manner that she hopes will bring her difficult, fractious, and unruly family into stronger relation. Love, for Nicole as for many others, will be for always. It is her will. It’s God’s will. Death gives us this inheritance.

II. THE HAUNTING

The odd optimism in Smith and Baker brings us to the heart of a major frontier of the families we insist on making: is there a way to endure in our relation’s past death? How can we have, or at least distribute, “forever”? And why are families supposed to be the place where we can seemingly negotiate these hopeful wishes? An area of law that helps me think about these questions is, of course, the realm of probate. Wills, trusts, and estates are jurisdictionally specific, so it’s hard to theorize about them. But I’m going to try because it seems to me that the question of who gets your property after you die is, as Nicole’s will illustrates, not simply about giving real or personal property to people you want. It’s the right to transfer property that reveals the particular role that the devisee or legatee occupies in the life of the testator. And not just the role (lover, brother, sister, mother, father, friend, dog, etc.), but also the quality, if not quantity, of the emotion or concern one can express as a parting wish, as a way of continuing to influence the lives one has left behind. And the posthumous transfer of property is not only about the acquisition of certain monetary or chattel windfalls that could ameliorate (or provide for) some of life’s expensive circumstances: my own grandfather gave me a silver ring, made out of a 1942 dime, that he had made during the second world war on a boat in the South Pacific. It might literally be worth a dime, and certainly cannot pay for something substantial. But its sentimental value is forged into its silver in a way I can’t forget. It’s also the only “thing” of his that he once wore that I now own. He loved me enough to make it a piece of his legacy, and I, as his grandson, am his legatee. I wear the ring, always.

In any case, pieces of property (Nicole’s pearl ring; my grandfather’s dime ring) have characteristics of a relative’s regard, and the transfer of property, moreover, transfers parts of the testator (his or her emotion, his or her wealth, his or her attention, even his or her characteristics) to the inheritor. Oliver Wendell Holmes, Jr. kept circling around this very issue when arguing about succession of property after death in his study of the common law. While detailing various ways other legal histories dealt with the transfer of property after death, and while teasing out the particular and sometimes baffling manner in which an estate’s executors and heirs assume the “persona” of the deceased, Holmes, Jr. makes clear that the law treats them “as if they were one with him [the deceased], for the

18 DOCTRINE AND COVENANTS, supra note 2, at § 132:46.
purpose of settling their rights and obligations.”\textsuperscript{19} He describes this particular function as a “fictional” function, which “shadows” particular facts from a long developmental history of common law jurisprudence, and even affects the law “as to dealings between the living.”\textsuperscript{20} But this fiction of transferring one’s persona along with one’s property to people who remain after one’s death is not inconsequential. On the contrary, these legal fictions are the terms of art that help make possible what Marx famously states that the commodity (which can be property, among other “things”) does in the kind of industrialized nation that Holmes, Jr. is writing about: the “mysterious character of the commodity-form . . . reflects the social characteristics of men’s own labour as objective characteristics of the products of labour themselves, as the socio-natural properties of these things.”\textsuperscript{21} Thus, commodities and property start to resemble and reflect the social relations of people—social relations that become “the fantastic form of a relation between things.”\textsuperscript{22} Perhaps more novel for our argument is that the legal fiction of inheritance, the shadowy transfer of property and the deceased owners’ persona to survivors, extends Marx’s fetish idea beyond the social relations of the living; succession and transfer open up the social relations of the commodity to relations with the dead. In other words, a will can keep us carrying on and on with the dead in our alienated social worlds, never failing to make “things” play out relations between people, and thus, with ghosts.\textsuperscript{23}

So we’re haunted by the property willed to us—by the line of succession’s solidification of social relations by the transfer of property after death. And even if you don’t have a will, or if there is property that is intestate because it’s not covered by a will, the line of succession so closely follows the path of a ghost, if not of a law, of familial affiliation. For example, in the current Utah Code Section 75-2-103, we can read about what happens to intestate estates if there is both no will and, perhaps more grievously, no spouse (the spouse is the easiest and most automatic stop on the line of succession in many probate jurisdictions, often not requiring a testament). What happens is a relentless, nearly common-sensical quest for a blood heir, no matter how distant:

\textbf{75-2-103. Share of heirs other than surviving spouse.}

(1) Any part of the intestate estate not passing to the decedent’s surviving spouse under Section 75-2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

\textsuperscript{20} Id. at 269, 275.
\textsuperscript{22} Id. at 165.
(a) to the decedent’s descendants per capita at each generation as defined in Subsection 75-2-106(2);
(b) if there is no surviving descendant, to the decedent’s parents equally if both survive, or to the surviving parent;
(c) if there is no surviving descendant or parent, to the descendants of the decedent’s parents or either of them per capita at each generation as defined in Subsection 75-2-106(3);
(d) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent’s paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent’s paternal grandparents or either of them if both are deceased, the descendants taking per capita at each generation as defined in Subsection 75-2-106(3); and the other half passes to the decedent’s maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent’s relatives on the other side in the same manner as the half.

(2) For purposes of Subsections (a), (b), (c), and (d), any nonprobate transfer, as defined in Section 75-2-205, received by an heir is chargeable against the intestate share of such heir.24

The property of someone dead must haunt the family tree as it hunts for a living person it can be possessed by. We could say that property’s relational itineraries connect and fortify the family’s story, which we could also call a ghost story. And all these heads of a family, all the “by heads” (per capita) who survive the decedent, not so subtly remind us that the family is the default set of social relations that must be remembered and honored by the distribution of property. Sure, the equitable division of wealth between individuals is the explicit point of the law, but those individuals are only found within the realm of familial relation, and specifically relations that are descendants, not decedents. Although this line of inheritance makes sense historically (families and the division of property by a long history of estates, common law, and other models of households throughout the history of law),25 one question that needs to be asked, even now is: why? Are your family members really the ones you want to inherit your wealth, land, rings, lamps, or love? If your spouse is still alive, in Utah, is she or he a legal spouse? We don’t have to be Mormon or in Utah or even religious to be affected by the

25 To assert as much is almost axiomatic. For a fascinating read on the rise of Common Law, and the problems of dividing and representing power and legal force, see BRADIN CORMACK, A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW (2007).
implications of the code. I confess: I’ve not made a will yet (I’ll get to it, someday). By not doing so, my house, pension, life insurance, even beloved dog might end up in the hands of my parents who don’t need or won’t appreciate the money or the love or the sentiment or the pet I’d perhaps prefer to transfer to my boyfriend, or, ideally, my friends. Perhaps I’d like to continue relating to people other than my legal family after my death, in substantial ways. Surely, this predicament is my fault. But why is family the default when there is no will, or if there is property not covered by the will? What kind of insidious priority does this code, and the laws of probate more generally in a myriad of jurisdictions, keep assigning to the family? Is the family really the most important kind of social relation one should always have? And what particular force do these compacts between the living and the dead have in sustaining and protecting the families we make?

III. THE CRIMINAL FAMILY

In 1891, The U.S. Supreme Court decided *Cope v. Cope*, a case about whether or not the Territory of Utah would be promoting and protecting the institution of polygamy by acknowledging the right of inheritance of an illegitimate child, George Cope. The facts of the case were relatively clear: Thomas Cope fathered the child with his second plural wife, Margaret, who did not have the legal status of wife because that status belonged to Janet, his lawful wife. He died without a will. Who, then, was automatically entitled to a share of the estate? Or to be more precise, given the obsessive logic of the family in matters of succession: who belongs to this family? The probate, district, and territorial Supreme Courts eventually concluded that George was not an heir. From this legal vantage point, Thomas, quite simply, did not belong to Cope’s family.

But there were several questions for the Court because an 1852 statute of Utah allowed “illegitimate children and their mothers [to] inherit in like manner . . . from the father.” Normally, probate matters are left to the “state’s cognizance,” but this law, which would not necessarily be so prickly in another jurisdiction, obviously put in place legal mechanisms to provide for all the heirs of polygamous families. But the 1862 statute fashioned some gray areas that were (and are) compelling: “all acts and laws which establish, maintain, protect, or countenance the practice of polygamy” were annulled, but could the 1852 statute definitively be

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26 137 U.S. 682 (1891).
27 See *id.* at 686 (stating that “[t]he question is then presented, [whether] the territorial act of 1852 establish, support, maintain, shield, or countenance polygamy”).
28 *Id.* at 683.
29 *Id.*
30 *Id.*
31 *Id.* at 684 (citation omitted).
32 See *id.* at 684–85.
said to be promoting and protecting polygamy? Certainly, in other jurisdictions, the 1852 statute could be read more innocently. The Court thinks out loud:

But while it is the duty of the courts to put a construction upon statutes which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations.

So it’s hard to determine whether or not the 1862 Act applies to a law when one has to read into the law the way it is responding to the “peculiar state of society,” which was “existing at the time this act was passed, and still existing in the territory of Utah.” In fact, after a variety of lines of thought, the Court concludes that if the 1852 statute “had been passed in any other jurisdiction, it would have been considered as a perfectly harmless, though possibly indiscreet, exercise of legislative power, and would not be seriously claimed as a step towards the establishment of a polygamous system.

Subsequent acts of Congress designed to prohibit and punish polygamous practices (especially the “Edmunds-Tucker Act”), kept returning to a nagging issue that made many of these issues about Congress-versus-state control a bit moot. For example, the Edmunds-Tucker Act included an odd provision stating that the disinherition of illegitimate children (annulling an 1852 Utah territorial act granting inheritance rights to illegitimate children) need not apply to any illegitimate children born within twelve months of the Act. This inconsistency of application was obviously a practical solution to a problem inherent in this inheritance quandary: should the modification of probate law in Utah punish those who had no control over their polygamous circumstance? Should children be stigmatized by an onerous challenge to territorial laws originally put into place to protect them? The opinion decides:

Now if it had been intended by the act of 1862 to annul the territorial act of 1852, fixing the inheritable capacity of illegitimate children, why did congress in 1882 recognize the legitimacy of children born of polygamous or Mormon marriages, prior to January 1, 1883? Or why, in

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33 Id. at 686 (citation omitted).
34 Id. at 685.
35 Id.
36 Id. at 687.
the act of 1887, did it save the rights of such children as well as of all others born within 12 months after the passage of that act? The object of these enhancements is entirely clear. Not only does congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a locus penitentiae, to discontinue their unlawful cohabitation.40

The lack of punishment of children then is considered an “inducement,” in the form of allowing for the parents to withdraw from their illegal marriage contracts, and choose instead the cessation of criminal cohabitation. In short, the Court is politely saying: “Get out now, or your children will suffer.” So the Court reversed the lower court’s decision, making George an heir.41

But it’s not enough to say that Cope was decided as it was because it didn’t want either to further stigmatize children or to use the children’s potential inheritance as a carrot to get people out of plural marriages. Part of what makes Cope a fascinating problem is not necessarily the jurisdictional issues, not the questions about whether or not illegitimate heirs have valid claims on an estate, and not even the persistent moral bias in the court’s consideration of plural families. Instead, what is striking is the manner in which the probate claims of children from unconventional families provoke an intense rhetoric of emotion that enables the Court to contradict its (and the lower courts’) position on the inheritance of polygamy. Polygamy’s outlaw status is apparently not as disturbing as what might happen when even the right of family belonging is denied this “innocent but unfortunate class of children.”42

Moreover, children are not the only ones at risk. All families are at risk when there is a death. Death makes the Cope family’s endurance seem so fragile (even the Cope v. Cope title of the case demonstrates the division of the family) so upsetting, that reasonable jurists let a disturbing familial emotion get the best of them:

[B]ut it may be said in defense of this [1852] act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents’ sins. To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than

40 Cope, 137 U.S. at 689.
41 Id.
42 Id.
upon the child; while to hold it to be invalid is to treat the child as, in some sense, an outlaw and a *particeps criminis*.43

In this “state of things,” we’re immersed in Marx’s relation between things, which is a relation between various family members, a relation that becomes adversarial when we have to think about the validity of a law that was intended to preserve the family across generational lines and, in the Mormon worldview, the line between life and death. In the Court’s reading of the legal quandary of a polygamous probate, we have either parents or children punished, and the legal distribution of things is also preserving the “sinful” qualities of polygamous actions. There is a sinful crime here, and no matter which way one divides it (or the estate), someone, if not everyone, in the family is going to have blood on their hands.

But why is it “unjust” to “visit upon” the children “the consequences of their parents’ sins”? These consequences are only really there when the question of inheritance must be settled by a hostile court that doesn’t believe that this family should exist in the first place—a court that has a moral position that adds “odium” to this family (and its class of children). So another way to think about this family’s sinfulness is to implicate the Court in making the family so fragile. The Court is making this generational issue an issue of sinful consequences by pulling apart the family when it revisits the question of whether or not probate statutes can protect the polygamous family. In this way, the Court is functionally similar to the plural parents, who can choose to be polygamous or not: it has a choice to make about how to connect the children to not only inheritance laws, but also the long vitality of the family structure those laws about death enable. The rhetorical leaps of logic that eventually let the children (and the Cope family) off the hook in the decision reveal something curious: the court authorizes, if not protects, George Cope’s relation to his father by giving George part of his father’s estate; in a way, it condones polygamy (at least for a while). The sins of the father or Court be damned! It’s much worse to tear the children away from their deceased parents—from something everlasting and eternal, but construed to be terribly fragile: the families we want to make forever, especially on the occasion of death. This family crime is the crime in which even the Supreme Court can participate.

IV. THE SEALING

The reason why we can put up with all sorts of familial criminality is that we’re worried about the family’s stability, even if we’re not part of a Latter-Day religious schism. We’re worried about how the family unit can so inevitably die as we age, change, and move in the world; an everlasting eternity might not really be in the offing. I’m convinced that Mormons and their polygamous legacies put into sharp relief a concern with the afterlife, and it does not have to be 1891 to ignite

43 *Id.* at 685.
our national worries about polygamy. Indeed, every so often (some people say every ten years), the nation remembers its polygamists, and inevitably controversies erupt over their place in American society. We are currently living in one of those moments. Why? We have here a number of culprits: same-sex marriage; the war on terror (with whiffs of Islamophobia that resonate with early condemnations of polygamy); the failed presidential candidacy of Mormon ex-Massachusetts governor Mitt Romney; and HBO’s *Big Love*. I want to focus on the last culprit for the remainder of this essay. If I had more time, I could carefully explain just how *Big Love*’s appearance during a moment of increased political attention to same-sex marriage and national questions about the details of Mormonism has produced a successful show that mines the theology, history, and culture of polygamists in order to allegorize the struggles of queers who are interested in family, in marriage rights, and in the dynamic clash between religious belief and homosexual practice. The show’s creators, Mark V. Olsen and Will Scheffer, have produced a remarkably sensitive portrayal of polygamy, often drawing parallels between queers’ struggles for rights, respectability, and prominence within the United States, and polygamists’ struggles for rights, respectability, and prominence within the larger Mormon culture. Of course, there are differences between queers and the Fundamentalist Latter-Day Saints (FLDS) (and *Big Love*’s concern for polygamists is not an endorsement of a patriarchal, often abusive culture that pushes the limits of what many would consider acceptable instances of sexual and marital consent), but allegories are not identities, and what HBO has done by green-lighting this show has been to enable people once again to look at a queer region of the United States (remote Utah; specifically what was once known as Short Creek, but is now known as the border towns of Colorado City, Arizona and Hildale, Utah) that tells a story of nontraditional family values (but a story that has quite a long, transhistorical history), which is also the tale of America’s inability to either ignore or embrace sexuality in all of what Gayle Rubin would call the “benign sexual variation” of sexual practice. These comparisons might seem dangerous or misguided, but they shouldn’t be sidestepped: feminist philosopher Cheshire Calhoun, in a provocative law article, suggests that we need to keep our glare on polygamy (beyond our simple dismissals of its patriarchal, abusive cultural practices), in order to understand how “reflection on the similarities between the polygamy and same-sex marriage debates helps to illuminate the larger social issues of how to satisfy

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individuals’ multiple relational needs and whether the state should endorse a single form of marriage.\textsuperscript{46}

Soon after \textit{Big Love}, Warren Jeffs, the leader and prophet of the FLDS, was put on the FBI’s 10-Most-Wanted List, captured, tried, and has now been convicted of assisting in the forced marriage and rape of a teenage girl;\textsuperscript{47} CNN’s Anderson Cooper has spent weeks in Southern Utah reporting on this private underbelly of the Utah desert;\textsuperscript{48} and marriage traditionalists are putting even more emphasis on the fact that marriage is between one man and one woman.\textsuperscript{49} On April 3, 2008, the FLDS’s Yearning For Zion compound in Eldorado, Texas was raided, approximately 450 women and children were removed, and for the next few months, an unprecedented amount of international media coverage followed the court cases and appeals, resulting in a Texas Supreme Court ruling that decided that there was not enough evidence for such a sweeping invasion, forcing District Court Judge Barbara Walter to sign an order that returned the children to their parents that June.\textsuperscript{50} Further court actions will be lengthy and no doubt stir much more publicity.

But the traditional versus the nontraditional sexuality or familial arrangement can’t be the entire source of the American imaginary’s anxiety about Mormonism. In the terribly important \textit{Reynolds v. U.S.},\textsuperscript{51} the opinion delineating whether or not polygamy can be a religious belief worth protecting, a long historical overview about polygamous practice reveals something the majority opinion felt the need to cite in its condemnation of how the Mormon Church had brought the “odious” practice of non-European people to the West. A curious fact: the “ecclesiastical


\textsuperscript{48} On his show, \textit{AC360}, Cooper had covered the FLDS church so much from 2005–2008 that all the polygamy coverage warranted a bold-font category on the list of categories of frequently reported stories on the show’s homepage.

\textsuperscript{49} The mission statement on the conservative (and primarily evangelical) Family Research Council has become emphatic about making sure that we are understanding the “true” meaning of family: “Properly Understood, ‘families’ are formed only by ties of blood, marriage, or adoption, and ‘marriage’ is a union of one man and one woman.” Family Research Council, Marriage & Family, http://www.frc.org/marriage-family (last visited June June 25, 2009).


\textsuperscript{51} \textit{Reynolds v. United States}, 98 U.S. 145 (1878).
courts” of England, in charge of punishing polygamous offenses up until the time of James I, were deemed the most “appropriate trial[s] of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlements of the estates of deceased persons.”\(^{52}\) Certainly the relationship between marriage and probate law in ecclesiastical courts is important in the history of Western jurisprudence; but in the quick histories the Court often trots out in its opinions, nuanced historical evidence is not usually in great abundance. So this rhetorical addition of the probate detail is striking because the questions at hand in *Reynolds* are not, at face value, necessarily probate questions. Instead, the Court was concerned with (among other things) the proper constitution of grand juries; the proper way of empanelling jurors; the proper admissibility of testimony; and whether or not polygamy was a practice deserving of religious freedom. But by referencing the ties between the history of marriage regulation and the history of probate regulation, the Court seems here to respond, however unaware, to the questions of death and celestial marriage that preoccupy not only the Mormon faith (as we’ve seen), but also all marriages that must negotiate the difficulty of making sense out of a hope for an eternity together with the dreadful pragmatics of death. Something about Mormonism reminds the Court that marriage law and death law might also be in their own, anxious eternal marriage. And our fears about this link can even make the Supreme Court, as we just saw, participate in and support the continuance of family at the expense of laws that might threaten the “traditional” family. More generally, something about religion is important here; why else, at least historically, would an ecclesiastical court be the place where matters of marriage and death would be adjudicated?

When Marx was introducing his “mysterious” concept of commodity fetishism, his analysis was decidedly religious.\(^{53}\) In the section entitled, “The Fetishism of the Commodity and Its Secret,” Marx writes, “A commodity appears at first sight an extremely obvious, trivial thing.”\(^{54}\) Of course, it’s not so obvious, and Marx attempts to work against simply thinking about the utility of a commodity. He wants us to be less obvious about our relationships with the commodities, things, and property that are circumscribing this odd world.\(^{55}\) He assures us, “[b]ut its [the commodity’s] analysis brings out that it is a very strange thing, abounding in metaphysical subtleties and theological niceties.”\(^{56}\) To begin to make his point, Marx introduces what becomes his famous table, an object made of dead wood, which almost begins to dance:

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\text{It is absolutely clear that, by his activity, man changes the forms of materials of nature in such a way as to make them useful to him. The}
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\(^{52}\) *Id.* at 164–65.

\(^{53}\) See *Marx*, *supra* note 21, at 163–65.

\(^{54}\) *Id.* at 163.

\(^{55}\) *Id.*

\(^{56}\) *Id.*
form of wood, for instance, is altered if a table is made out of it. Nevertheless the table continues to be wood, an ordinary, sensuous thing. But as soon as it emerges as a commodity, it changes into a thing which transcends sensuousness. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than if it were to begin dancing of its own free will.57

In order to illustrate his assertion about all the “theological niceties,” Marx rushes into a fantastical description of something both physical and metaphysical, a table on its head, spinning out “grotesque” and “wonderful” ideas.58 Marx gives us a sense of this table, an idea that is literally turned on its head, haunted by its abilities to be possessed by some kind of life, by using some religious terms and ideas.59 The table transcends its sensuousness by becoming, in a very strange way, religious—Marx takes a “flight into the misty realm of religion.”60 In that realm or religion “the products of the human brain [a “wooden brain”?] appear as autonomous figures endowed with a life of their own, which enter into relations both with each other and with the human race.”61 Dead things, we’re led to imagine, come alive in the religious idea; “the products of the human brain,” become animate, entering into all sorts of social relations.62 And for some reason, Marx calls this process “religious,”63 perhaps because he believes religion to be the realm that not only transcends the limits of sensuousness, but also because it’s a realm where one can imagine more readily dead things interacting as if they’re alive. It is in the afterlife, perhaps many of us hope, where we find the dead alive. So in the realm of probate, which worries about how things and people will relate, we have a curious form of morbid optimism—the will of our loves, and the property we possess, exchange, and transfer, can live on and on. Our inheritances, which always require our families, are hopefully our religious salvations.

Let’s look at some helpful scenes from HBO’s Big Love. After having acclimated viewers to the shocking circumstances of a plural-marriage lifestyle over most of its first two seasons, the show began to delve more into what we might call the various curiosities (to a non-Mormon audience) of Mormon culture and history that obviously extends to a fundamentalist version of the faith that has not abandoned the principle of plural marriage.64 The scenery and setting in Utah

57 Id. at 163–64. For a fascinating take on this table, see BILL BROWN, A SENSE OF THINGS: THE OBJECT MATTER OF AMERICAN LITERATURE 8, 27–30 (2003).
58 MARX, supra note 21, at 163–64.
59 Id.
60 Id.
61 Id. at 165.
62 Id.
63 Id.
64 See Big Love (HBO 2006–2008).
smacks of traditional Americana; indeed, the rise of the Mormon faith and the settlement of Utah have been termed by many as a truly American story.  

Mormons are often considered, as Harold Bloom famously stated, a quintessential American religion, mirroring Western expansion and featuring the “authentic religious genius” that was Joseph Smith. Yet what often fascinate us are the aspects of this milieu that seem mainstream, but aren’t quite. The history, faith, rituals, and theologies of the Church of Jesus Christ of Latter-Day Saints are not well known to a general audience, so the allusions to the particularity of the Mormon worldview—the oddities that seem out of place in the American heartland—become the points of agitating contact that might compel us to wonder: why are these Mormon differences both entertaining and unsettling? The family’s relation to death is one of these almost oddities.

Specifically, the penultimate episode of the second season, “Take Me As I Am” (directed by Jim McKay), is about the complexities of becoming and unbecoming “sealed.” In this installment, the first plural wife, Barb (played by Jeanne Tripplehorn) reaches out to her estranged, LDS mother, Nancy (played by Ellen Burstyn), who ceased to be in contact with her daughter once she became an apostate of the Mormon Church by following the principle of plural marriage. Upon reading that her liberal (for Mormons) mother, a widow, was about to be remarried to Ned (played by Philip Baker Hall), who had recently lost his wife, Barb yearns to be in contact. For Barb, who has become increasingly reluctant in her choice to add wives to her marriage over the run of the show, her mother and sister are part of not only a family she misses and loves, they also are part of her once “normal” LDS lifestyle. So once Barb learns that her eldest son, Ben (played by Douglas Smith) has a “testimony” of the principle himself (and starts to date identical twin daughters whose main ambition is to marry the same man), Barb experiences a crisis, questioning whether or not her choices have doomed her children to the same kind of anxiety and ambivalence she feels in her religion. She seeks out her mother, who agrees to take Ben away for the summer (where he could have monogamous behavior modeled for him so he could have, according to

65 Laurie F. Maffly-Kipp, Religion and the Enduring Legacy of Joseph Smith Jr., in JOSEPH SMITH JR.: REAPPRAISALS AFTER TWO CENTURIES 175, 187 (Reid L. Neilson & Terry L. Givens eds., 2008).
67 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
68 Id.
69 Id.
70 Id.
71 Id.
Barb, a choice in his marital destiny. She convinces her mother to let her children (and eventually, reluctantly, her) attend the wedding reception.

Once she and her children arrive at the wedding, Barb’s sister, Cindy (played by Judith Hoag), quickly explains an interesting marital dynamic circulating around the nuptials of Nancy and Ned. Ned, apparently, has made it a condition of their wedding that they be “sealed in the temple,” a coveted practice of worthy LDS members who have satisfied the requirements of their faith in order to have a temple recommend, gain access to the temple, and follow the ritual of sealing, for time and all eternity, the newlyweds. Being sealed together is a fascinating concept, especially because there are some conceptual difficulties that this episode economically emphasizes. The “heavenly father’s” “new and everlasting covenant” of marriage uses familial sealing as a way to attain a strong spiritual and social foundation that will protect and guide the salvation of all the souls within the Mormon family. But this sealing also is thought of as a way to continue spiritually and physically in the afterlife. The specifically Mormon qualities of this concept have to do with where the idea that this kind of family attachment will lead if all goes well: the celestial (as opposed to terrestrial or telestial) kingdom.

As printed above, Doctrine and Covenants Section 132 states:

and if ye abide in my covenant, and commit no murder whereby to shed innocent blood, it shall be done unto them in all things whatsoever my servant hath put upon them, in time, and through all eternity; and shall be of full force when they are out of the world; and they shall pass by the angels, and the gods, which are set there, to their exaltation and glory in all things, as hath been sealed upon their heads, which glory shall be a fulness and a continuation of the seeds forever and ever.

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\(^{72}\) Id.

\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) Id.


\(^{78}\) These different kingdoms of the afterlife in the LDS’ faith can be most quickly understood by utilizing the Church’s glossary. See The Church of Jesus Christ of Latter-day Saints, Heaven and Eternal Reward, http://www.mormon.org/mormonorg/eng/basic-beliefs/heavenly-father-s-plan-of-happiness/heaven-and-eternal-reward (last visited June 17, 2009).

\(^{79}\) Doctrine and Covenants, supra note 2, § 132:19.
In other words, one can become a god in this heavenly realm, but only if one marries, and marries well. Moreover, in the earlier teachings of the Mormon Church (and the current teachings of the fundamentalists), one should ideally also be married, be sealed, to multiple wives.  

So here’s the problem with Ned and Nancy—and listen to how the people sound in the following descriptions (especially since the things we typically seal are things—letters, jars, safes, doors, etc.): by Ned asking Nancy to be sealed in the temple to him, Nancy is required to be “unsealed” from Barb’s father first. But because the Church of Jesus Christ of Latter-Day Saints is a patriarchal religious tradition, Ned is not required to be unsealed from his first wife, Vera, in order to also be sealed to Nancy. Ned’s children are angry, both because Nancy is “liberal,” but also because, as Cindy puts it, “Ned’s children don’t want Ned to share Vera in the afterlife.” So a polygamist quandary then moves into the nonpolygamist’s ever after—should Ned be sealed to more than one wife forever? The fact that this predicament is even a real possibility speaks not only to a gray area in the Mormon church’s claim that they no longer practice polygamy, but also to the fact that a whole foundational, heavenly cosmos that guides so much of the Mormon worldview, the possibility of “celestial marriage,” is eternally braided in the principle of plural marriage. Doctrine and Covenants Section 132 then cannot be expunged from the sacred texts of the Mormon faith; so not only is polygamy a big part of the Mormon past (and an odd, embarrassing practice of the Church’s founding fathers), but it is also very much a part of the Mormon future—the afterlife, with countless souls, sealed, unsealed, and multiply sealed to various

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80 See Jon Krakauer, Under the Banner of Heaven 6–8 (2003).
81 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
84 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
85 That is, the afterlife is such an important concept for the LDS, and it doesn’t seem to have in place the same kind of restrictions for being “sealed” to multiple wives after death as it has for plural marriage in this life. A 26 June 2008 press release, “Protecting the Church’s Identity,” is just one of a number that have come from the Church lately, iterating the differences between the LDS Church and the FLDS Church, insisting that “The Church of Jesus Christ of Latter-Day Saints reiterates that it has nothing whatsoever to do with any groups practicing polygamy.” Press Release, The Church of Jesus Christ of Latter-day Saints, Protecting the Church’s Identity (Jun. 26, 2008), available at http://newsroom.lds.org/ldsnewsroom/eng/commentary/protecting-the-church-s-identity. True, the Church did officially abandon the practice of polygamy in the 1890s, most prominently in Church President Wilford Woodruff’s 1890 Manifesto. See Irwin Altmann & Joseph Ginat, Polygamous Families in Contemporary Society 36 (1996). But the assertion that it “has nothing whatsoever” to do with the practice of polygamy is not fully accurate since the Church has not disavowed its pioneer heritage, and, more for my essay’s concern, the issue of polygamy in the LDS afterlife.
family members. To put this theological worldview (that mirrors a probate worldview) more succinctly: in order to have a future beyond death, you need a family committed to marriage. Or, put more grimly: with no family, there is no future.86

But the episode’s writer, Eileen Myers, is only quickly critiquing the Church and its possible hypocrisies around the principle of plural marriage. What is more important is the showcase of the potential complications that one finds in the sealed eternities of these families trying to live like gods forever. Eternal salvation has a dizzying array of configurations, much like the present world. So even when one marries into an eternal life after death by way of a faith like Mormonism, there is no guarantee that you will be resurrected in the celestial kingdom as you had hoped. *Big Love* does a remarkable job in pressing upon us that such deathly concerns are not the occasional musings of a religious people that has faith in an afterlife. There is such a bracing distress about one’s salvation that the whole concept of an afterlife saturates the Mormon outlook (and ours the more we watch *Big Love*). The eternal is not just the desire of an isolated soul hoping to get to heaven: it’s a communal desire, or at least a familial desire, where the faithful are eager to have their beloved family members sealed to them forever.87

So when circumstances require that Barb leave her mother’s wedding celebration, we’re treated to a heart-wrenching moment between a daughter who desperately loves her mother, but is ripped apart, literally unsealed, from her because of the divergent theological takes on how one is to live the historical revelations of the Mormon Church. As Barb is on a threshold between her polygamous family and her prepolygamous family, she tearfully pleads for a relationship that could put aside the pressing concern about eternity that is keeping these two family members apart. Barb: “I don’t know if I’ll see you in the afterlife. If you’ll be with Daddy, or Ned, or if I’ll be with you, or Bill [her husband, played by Bill Paxton]. But I know, at the very least, I just want to see you in this life.” The two then hug, almost regretfully, before Nancy refuses to console her.

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daughter. Nancy: “This is your one, big test.” Barb shakes her head; Nancy turns, and returns to the wedding that Barb can no longer attend. Barb stares after her mother, slowly looks back at her large, waiting family, and this scene dissolves into the episode’s last scene, where she returns to her bedroom with Bill. Nancy will not agree to Barb’s proposal to be concerned only with their relationship in the current life. Emotional intensity and sincerity aside, Nancy has been entrusted with a sacred, nearly legal duty. She had reminded Barb of her ultimate obligation a bit earlier, “You’re my daughter! I’m responsible for your eternal salvation!” Her obligation, her love and responsibility for her daughter, must thus keep them separated, for “time and all eternity.”

This episode of Big Love certainly portrays an impasse between a family about competing notions of afterlife and eternity in various strands of the Mormon faith. It also disturbs one into a sense of how marriage and family, polygamous or not, religious or not, are relationships that are inflected by an overwhelming sense of worry about “forever.” Just look at Google’s most popular website for wedding vows, “My Wedding Vows.” I chose the nondenominational examples to illustrate a sense of eternity’s essentialness:

Nondenominational Wedding Vow Sample 1

“I ________, take thee ________, to be my wife/husband.
To have and to hold,
in sickness and in health,
for richer or for poorer,
and I promise my love to you forevermore”

Nondenominational Wedding Vow Sample 2

I ________, take you ________, to be my wife/husband.
To share the good times and hard times side by side.
I humbly give you my hand and my heart
as a sanctuary of warmth and peace,
and pledge my faith and love to you.
Just as this circle is without end, my love for you is eternal.
Just as it is made of incorruptible substance,
my commitment to you will never fail. With this ring, I thee wed

Nondenominational Wedding Vow Sample 3

Before our friends and those so special to us here,
on this wonderful day of gladness and good fortune, I ______ take

88 Big Love: Take Me as I Am (HBO television broadcast Aug. 19, 2007).
you _______ as my wife/husband, in friendship and in love,
in strength and weakness,
to share the good times and misfortune, in
achievement and failure, to celebrate life with you forevermore.

Here we have eternity, and we need to stop and explain why we no longer see marital vows as hinging on “till death do us apart.” Perhaps because we have property to inherit, and wills to write, death in marriage seems to not be so final: instead, there is a trend to want marriage (or family making) to stop time, to conceptualize the relationship as a relationship outside of time, confirming one of literary critic Lauren Berlant’s more provocative formulations about metaphors: that people “aspire to dead identities,” by which she means “dead” as “in the rhetorical sense designated by the phrase ‘dead metaphor.’” A metaphor is dead when, by repetition, the unlikeliness risked in the analogy the metaphor makes becomes so conventionalized as to no longer seem figural, no longer open to history: the leg of the table is the most famous…. Berlant’s part of the table, perhaps her favorite part of Marx’s table, no longer seems be open to time, and all that time can mean. The metaphor of the table having legs has become so common, so conventional, and so required that we fail to see that leggy table as alive. Have marriage and love and family, as they are necessarily cast by probate quandaries, become as dead as a leg of a table?

Hannah Arendt is crucial here because she explains that the experience of the eternal, which to Plato was arrheton (“unspeakable”), and to Aristotle aneu logou (“without word”), and which later was conceptualized in the paradoxical nunc stans (“the standing now”), can occur only outside the plurality of men . . . . Politically speaking, if to die is the same as “to cease to be among men,” experience of the eternal is a kind of death, and the only thing that separates it from real death is that it is not final because no living creature can endure it for any length of time.

Never ending might mean never living—or no longer living. (“The standing now” [and forever] of the table leg?) If we agree with Arendt (and Berlant), then suddenly another version of everlasting love begins to take conceptual shape: the wish for the experience of eternity is a curious form of hoping for a death that

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91 Id.
isolates, one where time and language and experience stop, or at least stop meaning. And if we then stitch this understanding of eternity into the kind of fetishism that preoccupied Marx, we have a version of eternal love as a kind of death that leaves us “outside the plurality of men [and other humans]” with our things.\textsuperscript{93} Perhaps we can then grasp another layer of the secret the commodity keeps: alienation [\textit{Entfremdung}] might also be about separating ourselves from ourselves as we obsess about death, opening ourselves up to an existence only with things rather than people (or, we’re left with people who must be construed as things that will be attached to one another). If we’re not alienated, then we’re thought to have some sort of control over the productions, the fruits of our labor, where those things will go after we die, and also ourselves. But love, families, and the death that circumscribe those significant relationships give us a deadening option for life: the grand choice of a partner/spouse/wife/husband, which is often the precondition of your family, only further alienates you because it leaves you alone, separated, at the precise moment you’ve chosen to believe that you won’t be alone. The family, that set of relationships most often presumed to not be so marred by capitalism, the place that has historically been considered the private household (which Arendt’s work on eternity is trying to show as no longer being private), is stranding us in some “standing now.” It’s helping us feel alienated at the precise moment when we shouldn’t feel such things.

So here’s a great big mystery about the commodity of families (the wedding ring?), which is also a mystery about you (and how well you’ll negotiate your family’s social relations now and “forevermore”): if the family contract is one that is supposed to be sealed for time and all eternity (and if the souls will become things that can be sealed and resurrected in a very physical way in the afterlife), and if this is the logic that supports succession even if there is no legal instrument in place, then we’re stuck in an alienating condition, one wed (and dead) to the kinds of mystical, religious fetishism Marx famously explicates. Part of what the “theological niceties” such as love and marriage are doing, then, is locking people into the kind of familial connections that are as reified and as hard as wood. We learn to stand still with each other, “[i]dentities not live, or in play, but dead, frozen, fixed, or at rest.”\textsuperscript{94} People seal each other with a kiss (“You may now kiss the bride”), as well as with a will, in order to be together through emotions as much as through property (in this life and the next). And then they have eternity, and its obsessive, often religious, demands to endure in face of a terror we cannot survive. From this angle, the transcendence of sensuousness—the transcendence of the material conditions of this world—is a set of relationships we can see, as if in the “social hieroglyphic[s],”\textsuperscript{95} in the wills, the labors, of our love (and the property and things those wills negotiate as we struggle with ways to stay connected after

\textsuperscript{93} \textit{Id.}
\textsuperscript{94} BERLANT, \textit{supra} note 90, at 60.
\textsuperscript{95} MARX, \textit{supra} note 21, at 167.
death). The tragic part of Marx’s mystical table that I always forget: this religious thing only stands on its head, generating some “grotesque ideas,” but it does not dance; it is not that figurative place of something dead once becoming alive: it is the grotesque ideas that become “far more wonderful than if it were to begin dancing of its own free will.” 96 It’s a grotesque version of property’s (and by proxy your) afterlife, one with no free will (and I want all sorts of puns to jump to mind right now).

The point is this: as we start to spin out our own wonderful and grotesque ideas about love, marriage, death, and wills, religion, and Marx, we also need to start thinking of marriage and family commitments as wills in and of themselves, pondering the implications of making the family a supernatural relation of terror, longing, loss, and arrest. The Last Will and Testament that we are always making when we are in families, when we “I do,” is shot through with a deep connection between love and property that keeps us wishing that we could survive our deaths. The will is an explicit instrument of law, and the probate court makes up for wills that might not be there, and this legal realm keeps describing, securing, transforming, and codifying the terms of the family by way of the property of the person that will transcend the limits of her or his body, her or his “sensuousness,” which means her or his body, but also the very tactile relationships she or he has with people, places, and things. The will is like a revelation: even when we will become as dead as a table, we’re hoping there is still a way to make our wills extend indefinitely into some eternal future. The will is helping us think that we can do something religious: something like cheat death.

96 Id. at 163–64.